UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket Nos.:
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	)	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,
(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)	)	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
	)	July 30, 2021

EXELON'S ANSWER OPPOSING THE PETITION OF THE ENVIRONMENTAL LAW & POLICY CENTER FOR LEAVE TO INTERVENE AND FOR A HEARING

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EXELON'S ANSWER OPPOSING THE PETITION OF THE ENVIRONMENTAL LAW & POLICY CENTER FOR LEAVE TO INTERVENE AND FOR A HEARING

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309, Exelon Generation Company, LLC ("Exelon Generation"), on behalf of itself and Exelon Corporation; Exelon FitzPatrick, LLC; Nine Mile Point Nuclear Station, LLC ("NMP LLC"); R. E. Ginna Nuclear Power Plant, LLC ("Ginna LLC"); and Calvert Cliffs Nuclear Power Plant, LLC ("Calvert LLC") (collectively, "Exelon") submit this Answer opposing the Petition to Intervene and Hearing Request ("Petition") filed by

Environmental Law & Policy Center ("ELPC" or "Petitioner") on June 23, 2021.[1] Petitioner requests a hearing and seeks to intervene in the proceeding associated with Exelon Generation's February 25, 2021, license transfer application ("LTA" or "Application").[2] The Petition contains two contentions with multiple subparts that focus on financial assurance for operations and decommissioning funding. These contentions generally misconstrue the NRC's legal standards for financial and decommissioning funding, argue that information is missing from the LTA despite it being there in plain sight, and raise arguments that are outside the scope of this proceeding. Accordingly, as demonstrated below, both of Petitioner's contentions are inadmissible because they fail to satisfy all of the six admissibility requirements in 10 C.F.R. § 2.309(f)(1). Because Petitioner failed to submit an admissible contention, the Petition must be denied.

Even if Petitioner had submitted an admissible contention—which it has not—the Petition must be rejected because Petitioner also has not demonstrated standing. The Petition claims that ELPC is entitled to representational standing on behalf of its members, and suggests that one member, Robert L. Vogl, has standing to intervene as an individual. However, Petitioner mistakenly relies on the "proximity presumption" as its purported basis for standing. The Commission has squarely held that the proximity presumption is inapplicable to indirect license transfer proceedings like this. Petitioner otherwise fails to demonstrate "traditional" standing. In the alternative, Petitioner requests the Commission to grant it discretionary

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1 Petition to Intervene and Hearing Request of the Environmental Law and Policy Center (June 23, 2021) (ML21174A320) ("Petition").

2 *See* Letter from J. Bradley Fewell, Exelon Generation Company, LLC, to NRC Document Control Desk, "Application for Order Approving License Transfers and Proposed Conforming License Amendments," Encl. 1 (Feb. 25, 2021) (ML21057A272) (Proprietary Version) (ML21057A273) (Non-Proprietary Version) ("LTA" or "Application").

intervention. However, Petitioner fails to provide a colorable justification for discretionary intervention.

In sum, each of the proposed contentions fails to satisfy one or more of the six admissibility criteria in 10 C.F.R. § 2.309(f)(1), and Petitioner has not demonstrated standing to intervene. Accordingly, pursuant to 10 C.F.R. § 2.309(a), the Commission must deny the Petition.

II. BACKGROUND

A. The LTA

Exelon filed the LTA on February 25, 2021, requesting certain written approvals from the NRC to support a proposed transaction in which Exelon Corporation will transfer its 100% ownership of Exelon Generation to a newly created subsidiary that will then be spun-off to Exelon Corporation shareholders, becoming Exelon Generation's new ultimate parent company ("Spin Transaction").[3] As part of the Spin Transaction, Exelon Generation will remain the same Pennsylvania limited liability company, but will be renamed (consistent with its complete separation from Exelon Corporation).[4] The *new name* of Exelon Generation is yet to be determined, and, therefore, is described using the generic name "SpinCo."[5]

Specifically, Exelon Generation requested NRC approval of the following:

- The indirect transfer of Exelon Generation's respective ownership interests in the Facilities[6] to a newly created holding company that will become the parent company of

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3 *See id.* (cover letter at 3).

4 *See id.*

5 *See id.*

6 As of the date of the LTA, Exelon Generation is the licensed operator and a full or partial direct or indirect owner of the following facilities and their corresponding Independent Spent Fuel Storage Installations ("ISFSIs"): Braidwood Station, Units 1 and 2 ("Braidwood"); Byron Station, Units 1 and 2 ("Byron"); Calvert Cliffs Nuclear Power Plant, Units 1 and 2 ("Calvert Cliffs"); Clinton Power Station, Unit 1 ("Clinton"); Dresden Nuclear Power Station, Units 1, 2, and 3 ("Dresden"); James A. Fitzpatrick Nuclear Power Plant ("FitzPatrick"); LaSalle County Station, Units 1 and 2 ("LaSalle"); Limerick Generating Station, Units 1 and 2 ("Limerick"); Nine Mile Point Nuclear Station, Units 1 and 2 ("NMP"); Peach Bottom Atomic Power Station,

Exelon Generation. In the LTA, Exelon Generation stated that the name of the new holding company is yet to be determined and therefore is described using the generic name "HoldCo." Exelon Corporation will then spin-off HoldCo and its subsidiaries (including Exelon Generation/SpinCo) as a publicly-held company. At the time of the spin-off, the shareholders of HoldCo will be the same as the shareholders of Exelon Corporation. After the spin-off, HoldCo and its subsidiaries will no longer be affiliates of Exelon Corporation.

- The indirect transfers of Exelon FitzPatrick, LLC's, NMP LLC's, and Ginna LLC's respective ownership interests in FitzPatrick, NMP, and Ginna (collectively the "New York Facilities"), whereby these entities and, as applicable, parent entities, would become subsidiaries of a newly created, wholly-owned subsidiary of SpinCo. The name of the new subsidiary is yet to be determined and therefore is described in the LTA using the generic name "New York HoldCo."

- Conforming administrative amendments to the licenses and the technical specifications for the Facilities to reflect the new names of Exelon Generation (i.e., SpinCo) and Exelon FitzPatrick, LLC (its new name is yet to be determined and therefore it is described in the LTA using the generic name "New FitzPatrick, LLC") after they are spun-off from Exelon Corporation.

- Approval to replace existing master demand notes and cash pooling arrangements in which Calvert LLC, Ginna LLC, and NMP LLC (collectively, the "Constellation Subsidiary Owner LLCs," and together with Exelon FitzPatrick, LLC, the "Subsidiary Owner LLCs") participate and existing financial support arrangements among the Exelon entities with a new financial arrangement and financial support agreements consistent with the new organizational structure, and conforming administrative amendments to the licenses for FitzPatrick, NMP, Ginna and Calvert Cliffs to reflect the same.

- Approval to delete conditions in the NMP, Ginna, and Calvert Cliffs licenses referencing the Constellation Energy Nuclear Group, LLC ("CENG") Board and its operating agreement, consistent with the internal reorganization described in the LTA.

- Approval to transfer the qualified trust and the non-qualified trust for FitzPatrick from Exelon Generation Consolidation, LLC (a subsidiary of Exelon Generation that will also be renamed as a result of the Spin Transaction) to New FitzPatrick, LLC.

- Approval to replace the existing Nuclear Operating Services Agreements ("NOSA") between Exelon Generation and Exelon FitzPatrick, LLC, NMP LLC, Ginna LLC, and

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Units 1, 2, and 3 ("Peach Bottom"); Quad Cities Nuclear Power Station, Units 1 and 2 ("Quad Cities"); R.E. Ginna Nuclear Power Plant ("Ginna"); and Three Mile Island Nuclear Station, Unit 1 ("TMI"), a shutdown unit. Exelon Generation also is a partial direct owner, but not the licensed operator, of the following facilities and their corresponding ISFSI: Salem Generating Station, Units 1 and 2 ("Salem"). Prior to the closing of the Spin Transaction, Exelon Generation is expected to be the direct owner and licensed operator with possession, maintenance, and decommissioning authority of the generally licensed ISFSI on the site of the former: Zion Nuclear Power Station, Units 1 and 2 ("Zion") (ISFSI only site). Collectively, these are referred to as the "Facilities."

Calvert LLC with NOSAs between SpinCo and the Subsidiary Owner LLCs that contain materially the same terms as the existing NOSAs.[7]

B. Procedural History

The NRC accepted the LTA for review on March 24, 2021.[8] On March 25, 2021, Exelon supplemented the LTA with markups of the licenses for each of the facilities, showing the proposed changes to each license.[9]

The NRC published a notice in the *Federal Register* on May 3, 2021, informing the public that it is considering the LTA for approval, providing an opportunity for the public to submit written comments on the LTA, and offering an opportunity for persons whose interests may be affected by the approval of the LTA to file (within 20 days of the notice—i.e., by May 24, 2021) hearing requests and intervention petitions ("Hearing Opportunity Notice).[10] On May 24, 2021, the NRC Secretary issued an order extending that deadline for three weeks, until June 14, 2021.[11] On June, 14, 2021, the NRC Secretary granted a motion extending the deadline until June 23, 2021.[12] The Petitioner filed its Petition on June 23, 2021. On July 6, 2021, the NRC Secretary issued an order extending the deadline for Exelon Generation to respond to the Petition to July 30, 2021.[13] Exelon Generation timely files this Answer opposing the Petition according to the provisions of 10 C.F.R. § 2.309(i)(1).

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7 *See* LTA (cover letter at 4-5).

8 *See* Email from B. Purnell, NRC, to B. Fewell, Exelon Generation Company, LLC, "Exelon Generation Company, LLC – Acceptance of License Transfer Application (EPID L-2021-LLM-0000)" (Mar. 24, 2021) (ML21084A253).

9 *See* Letter from D. Helker, Exelon Generation Company, LLC, to NRC Document Control Desk, "Supplemental Information Regarding Application for Order Approving Transfers and Proposed Conforming License Amendments," Encl. 1-15 (Mar. 25, 2021) (ML21084A165).

10 Consideration of Approval of Transfer of Licenses and Conforming Amendments, 86 Fed. Reg. 23,437 (May 3, 2021) ("Hearing Opportunity Notice").

11 NRC Secretary Order at 2 (May 24, 2021) (unpublished) (ML21144A125).

12 NRC Secretary Order at 2 (June 14, 2021) (unpublished) (ML21165A124).

13 NRC Secretary Order at 2 (July 6, 2021) (unpublished) (ML21187A285).

The Hearing Opportunity Notice also contemplated that potential parties may need access to the Sensitive Unclassified Non-Safeguards Information ("SUNSI")[14] in the LTA for contention drafting purposes. Thus, it directed those potential parties to request access from the Exelon or file a motion with the Commission.[15] Exelon and ELPC jointly moved that Petitioner's representatives, Margrethe Kearney, Caroline Cox, and Peter Bradford be authorized to access SUNSI, and the NRC Secretary issued a Protective Order granting that request on June 9, 2021.[16] Consistent with the Protective Order, Exelon provided ELPC with unredacted versions of Enclosure 6A, "Projected Financial Statements for SpinCo Consolidated (Proprietary Version)"; Enclosure 10A, "Alternate Decommissioning Funding Analysis (Proprietary Version)"; and pages 1-2, 11-12, and 21 of Enclosure 8A, "Projected Financial Statements for Nuclear Fleet and Subsidiary Owner LLCs (Proprietary Version)" to the LTA.

Petitioner did not include any SUNSI in its Petition.

C. Regulatory Framework for NRC License Transfers

Under Section 184 of the Atomic Energy Act of 1954, as amended ("AEA"),[17] an NRC reactor license, or any right under it, may not be "transferred, assigned[,] or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of [the] license to any person," unless the NRC first gives its written approval.[18] This statutory requirement is codified in 10 C.F.R. § 50.80 and applies to both direct and indirect license

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14 SUNSI, in this context, includes any proprietary commercial information that an applicant requests to be withheld from public disclosure.

15 *See* Hearing Opportunity Notice at 23,440.

16 NRC Secretary Order (June 9, 2021) (unpublished) (ML21160A231).

17 Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011, *et seq*.).

18 *Id.* § 184 (codified as amended at 42 U.S.C. § 2234).

transfers.[19] Transferring control may involve either the licensed operator or any individual licensed owner of the facility.[20] The NRC review focuses on the "potential impact on the licensee's ability both to maintain adequate technical qualifications and organizational control and authority over the facility[,] and to provide adequate funds for safe operation and decommissioning."[21]

To grant a license transfer application, the NRC must find a "reasonable assurance" of financial qualifications.[22] License transfer applicants for reactors that will be permanently shut down at the time of the transfer may rely *solely* on the adequacy of the nuclear decommissioning trusts to demonstrate reasonable assurance.[23] Longstanding Commission precedent makes clear that the reasonable assurance standard does not require "absolute assurance"; rather the Commission requires an applicant to demonstrate by a preponderance of the evidence that it will possess the financial qualifications to own and operate nuclear facilities.[24] The NRC interprets

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19 *See* NRC Backgrounder, Reactor License Transfers at 1-2 (Jan. 2020) (ML040160803). A direct license transfer occurs when an entity seeks to transfer a license it holds to a different entity (*e.g.*, when a plant is to be sold or transferred to a new licensee in whole or part). *See id*. On the other hand, "[a]n indirect transfer could result from forming a new parent holding company or subsidiary having an ownership interest in a licensee, while the nuclear power plant licensee owner and/or operator remains unchanged . . . as a result of a merger or acquisition at high levels within or among corporations." *Id.* at 2.

20 *See id.* at 2.

21 Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071, 44,077 (Aug. 19, 1997); 10 C.F.R. § 50.80(b)(1)(i), (c)(1); *see also* NUREG-1577, Rev. 1, Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance (Feb. 1999) (ML013330264) ("NUREG-1577").

22 10 C.F.R. § 50.33(f)(2).

23 *See, e.g.*, Oyster Creek License Transfer Safety Evaluation Report at 7-10 (June 20, 2019) (ML19095A457); Pilgrim License Transfer Safety Evaluation Report at 7-15 (Aug. 23, 2019) (ML19235A300).

24 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 262 n.142 (2009); *Commonwealth Edison Co.* (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 421 (1980); *N. Anna Envtl. Coal. v. NRC*, 533 F.2d 655, 667-68 (D.C. Cir. 1976) (rejecting the argument that reasonable assurance requires proof beyond a reasonable doubt and noting that the licensing board equated "reasonable assurance" with the preponderance standard).

"reasonable assurance" with the understanding that "some risks may be tolerated and something less than absolute protection is required."[25]

As particularly relevant here, the NRC recognizes that forward-looking financial projections, such as the five-year cost and revenue projections required by 10 C.F.R. § 50.33(f)(2), are precisely that—estimates—and do not require licensees to be clairvoyant about future economic conditions.[26] Furthermore, the Commission has codified the level of detail required to be included in such estimates.[27] More specifically, Part 50 explains that "annual financial reports" and "summary data" are generally "sufficient for the Commission's needs."[28] Here, the financial projections in the LTA go well beyond those codified requirements and provide additional information, such as "stress case" sensitivity analyses, which provide further support demonstrating Exelon Generation's ongoing financial qualifications to assist NRC Staff in its review of the Application.[29]

The Commission accepts and finds reasonable "financial assurances based on *plausible* assumptions and forecasts, even though the possibility is not insignificant that things will turnout less favorably than expected."[30] Thus, for a contention to satisfy the requirement in 10 C.F.R. § 2.309(f)(1)(vi) to show that it raises a *material* dispute with an applicant's financial projections, it must do more than merely "cast[] doubt on some aspects of proposed funding plans."[31] Rather,

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25 Memorandum from F. Brown, Director, Office of New Reactors to New Reactor Business Line, Expectations for New Reactor Reviews at 4 (Aug. 29, 2018) (ML18240A410).

26 *See N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999).

27 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 9 (1978).

28 10 C.F.R. Part 50, app. C; *see also Seabrook*, CLI-78-1, 7 NRC at 9 (noting that the financial qualifications requirements in 10 C.F.R. § 50.33(f) are "amplified" by Appendix C).

29 *See, e.g.*, LTA, Encl. 6/6A.

30 *Seabrook*, CLI-99-6, 49 NRC at 222.

31 *Id.* at 221-22.

it must provide a colorable argument that an applicant's projections are "*implausible*"—and those arguments must be supported by alleged facts and expert opinions, as required by 10 C.F.R. § 2.309(f)(1)(v).[32]

The AEA requires that the NRC offer an opportunity for hearing on a license transfer.[33] But Subpart M of 10 C.F.R. Part 2 (10 C.F.R. §§ 2.1300 to 2.1331) authorizes the NRC to use a streamlined license transfer process with informal legislative-type hearings, rather than formal adjudicatory hearings.[34] Subpart M covers direct or indirect license transfers for which NRC approval is required, including those transfers that require license amendments and those that do not.[35] Section 2.1315 codifies the Commission's generic determination that any conforming amendment to an operating license that only reflects the license transfer action involves a "no significant hazards consideration."[36] That same regulation provides that "[a]ny challenge to the administrative license amendment is limited to the question of whether the license amendment accurately reflects the approved transfer."[37]

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[32] *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-20-12, 92 NRC __, __ (Nov. 12, 2020) (slip op. at 20) ("we will admit for hearing [] only those contentions based upon 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.").

[33] AEA § 189.a(1)(A) (codified as amended at 42 U.S.C. § 2239 (a)(1)(A)) ("In any proceeding under this chapter, for . . . [any] application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.").

[34] *See* Streamlined Hearing Process for NRC Approval of License Transfers; Final Rule, 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998) ("Subpart M Rule"); *see also* Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182, 2,214 (Jan. 14, 2004) (retaining streamlined process under Subpart M for license transfers without substantive changes).

[35] *See* Subpart M Rule, 63 Fed. Reg. at 66,727.

[36] 10 C.F.R. § 2.1315(a).

[37] *Id*. § 2.1315(b). 10 C.F.R. § 51.22(c)(21) also categorically excludes from environmental review "[a]pprovals of direct or indirect transfers of any license issued by [the] NRC and any associated amendments of license required to reflect the approval of a direct or indirect transfer of an NRC license." This regulation reflects the NRC's finding that license transfers do not "individually or cumulatively have a significant effect on the human environment." *See* Subpart M Rule, 63 Fed. Reg. at 66,728.

III. THE PETITION MUST BE DENIED BECAUSE PETITIONER HAS NOT PROPOSED AN ADMISSIBLE CONTENTION

To grant the Petition, the Commission must find that Petitioner has submitted at least one proposed contention that satisfies all six admissibility criteria in 10 C.F.R. § 2.309(f)(1). Petitioner proposes two contention. However, as detailed below, none satisfies all six contention admissibility criteria. Accordingly, both must be rejected as inadmissible, and the Petition must be denied.

A. Contention Admissibility Standards

Petitions to intervene must "set forth with particularity" the contentions a petitioner seeks to have litigated in a hearing.[38] The requirements for an admissible contention are set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi) and also described in the Hearing Opportunity Notice.[39] The Commission's contention admissibility requirements are "strict by design."[40] They seek "to ensure that NRC hearings 'serve the purpose for which they are intended: to adjudicate *genuine, substantive safety . . . issues* placed in contention by qualified intervenors.'"[41] 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.'"[42] To warrant an adjudicatory hearing, the NRC requires proposed

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38 *PPL Susquehanna, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-15-8, 81 NRC 500, 503-04 (2015) (quoting 10 C.F.R. § 2.309(f)(1)); *Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-17-4, 85 NRC 59, 74 (2017).

39 *See* Hearing Opportunity Notice at 23,439.

40 *Dominion Nuclear Conn., Inc*. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

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

42 *Susquehanna*, CLI-15-8, 81 NRC at 504 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

contentions to have "some reasonably specific factual or legal basis."[43] The petitioner alone bears the burden to meet the standards of contention admissibility.[44]

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 which the petitioner intends to rely in litigating the contention at the hearing.[45] 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.[46] Contentions that challenge NRC regulations,[47] seek to impose requirements stricter than those imposed by the agency,[48] or opine on how Staff should conduct its review[49] 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.[50] 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

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43 *Id.* (quoting *Millstone*, CLI-03-14, 58 NRC at 213).

44 *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 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).

45 10 C.F.R. § 2.309(f)(1)(ii), (v).

46 *Id*. § 2.309(f)(1)(iii)-(iv); *Susquehanna*, CLI-17-4, 85 NRC at 74.

47 10 C.F.R. § 2.335(a).

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

49 *See, e.g.*, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 25 (2001) (quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 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.'").

50 10 C.F.R. § 2.309(f)(1)(vi); *Susquehanna*, CLI-17-4, 85 NRC at 74.

required by law, the petitioner must identify each failure, and provide supporting reasons for the petitioner's belief."[51]

Petitioners may not incorporate by reference voluminous documents or affidavits with conclusory assertions to support a contention. As the Commission explained:

> Commission practice is clear that a petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions. . . . Such a wholesale incorporation by reference does not serve the purposes of a pleading. . . . 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.[52]

In short, the Commission has refused to "sift through the parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves."[53]

B. Contention 1 (Financial Qualifications) Is Inadmissible

In Contention 1, ELPC claims that the Application "does not provide sufficient information to meet the NRC's financial qualification requirements under 10 C.F.R. § 50.33."[54] According to ELPC, the Application makes "no showing that the opaque new SpinCo will be able to meet the NRC's financial qualifications standards."[55] More specifically, ELPC claims that "Applicants . . . fail[ed] to demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operating costs for the period of the license[s],"

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51 *Susquehanna*, CLI-17-4, 85 NRC at 74 (citing 10 C.F.R. § 2.309(f)(1)(vi)).

52 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989) (citations omitted).

53 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 337 (2002) (quoting *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 194 (1999)).

54 Petition at 12.

55 *Id.*

as required by 10 C.F.R. § 50.33(f)(2).[56] However, as detailed below, Petitioner's meritless claims fail to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1) for multiple reasons.

As a preliminary matter, it should be noted that ELPC fundamentally misunderstands the various corporate entities discussed in the LTA. ELPC repeatedly refers to SpinCo—throughout the Petition—as an "opaque new [entity]" or a "new corporate entity."[57] But that is incorrect. As explained in the LTA, the generic placeholder term "SpinCo" merely refers to Exelon Generation, which will be given a new name after the Spin Transaction. For more than two decades, Exelon Generation has been—and after the Spin Transaction, will continue to be—an NRC-licensed owner and/or operator. Exelon Generation will remain the *same* Pennsylvania limited liability company as it has been for more than two decades, but will be renamed (consistent with its complete separation from Exelon Corporation). The *new name* of Exelon Generation is yet to be determined; thus, it is described in the LTA using the generic name "SpinCo."[58] To be clear, SpinCo is Exelon Generation.

Petitioner appears to conflate SpinCo with "HoldCo," which is a separate entity referenced in the LTA. HoldCo is a newly created holding company. As part of an intra-corporate reorganization and following the Spin Transaction, HoldCo will sit above Exelon Generation in the corporate structure to address corporate and tax considerations. This is a common legal structure in which a C-corporation holding company is the publicly traded company and sits above an operating company that has the financial responsibility for its business operations. Exelon Generation has long independently maintained its own investment

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56 *Id.* at 13.

57 *See, e.g.*, *id.* at 2, 12.

58 *See id.*

grade rating. Following the Spin Transaction, SpinCo (the renamed Exelon Generation), not the holding company, anticipates having an investment grade rating and will continue to underwrite business operations going forward. In addition, following the Spin Transaction, SpinCo will continue to be the NRC licensed operator of the Facilities. Notably, unlike SpinCo, HoldCo *will not* be an NRC licensee because it will neither operate nor directly own any of the Facilities. As explained in the LTA, this is an *indirect* transfer proceeding—no direct transfers of any NRC licenses are requested or contemplated in the LTA; neither the NRC-licensed owners nor the NRC-licensed operator of the Facilities will change. At bottom, Petitioner's misunderstanding of the various entities undermines its purported analyses of NRC requirements, which apply differently to NRC-licensed entities versus mere indirect owners. Petitioner's arguments fail to acknowledge this distinction and therefore fail at a fundamental level, as further explained below.

Furthermore, the regulation cited by Petitioner as the basis for the contention—Section 50.33(f)(2)—requires transfer applications to include "estimates for total annual operating costs for each of the first five years of operation" and "indicate the source of funds to cover these costs." Exelon fully complied with this requirement by submitting five-year *pro forma* consolidated financial statements as enclosures to the LTA.[59] Even though ELPC was given proprietary versions of these financial statements, the Petition neither acknowledges, discusses, nor engages with *any* of that information. Thus, the contention fails to demonstrate a genuine dispute with the LTA on the question of whether it complies with Section 50.33(f)(2).

Setting aside these fundamental defects that render Contention 1 inadmissible, ELPC's other assertions, including its discussion of allegedly unaccounted-for "future liabilities," also

[59] LTA, Encls. 8, 8A, 10, and 10A.

fail to raise a litigable claim. As detailed below, they are variously unsupported, immaterial, out-of-scope, or fail to raise a genuine dispute with the Application. For these reasons, the contention must be rejected as inadmissible.

1. ELPC's Generalized Financial Arguments Fail to Identify Any Inadequacy in the LTA

Subsection 1 of Contention 1 alleges that the LTA fails to address "key potential liabilities."[60] This claim is accompanied by a series of vague assertions[61] and unsupported criticisms regarding the credit ratings of HoldCo and SpinCo, nuclear support services, and alleged utility subsidies. However, as detailed in the subsections below, Petitioner's arguments are riddled with factual and legal inaccuracies. In sum, ELPC fails to identify or explain why any specific financial assumption or forecast in the LTA purportedly is *im*plausible, as would be needed to defeat a finding of reasonable assurance.

a. Entity Credit Ratings

ELPC claims the Application provides "insufficient support for its assumption that HoldCo or SpinCo will achieve and maintain an investment grade credit rating."[62] First, the LTA clearly indicates that HoldCo will not be an NRC licensee, so the LTA does not include any assumptions about HoldCo's credit ratings.[63] Indeed, because the LTA does not rely on HoldCo to demonstrate the financial qualifications of any licensee entity, there is no NRC requirement

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60 Petition at 13.

61 *E.g.*, *id*. at 15 (criticizing the LTA as being based "exclusively" on Exelon's own projections about "the financial condition of the generating assets," but failing to engage with or dispute any of the LTA's detailed financial projections, failing to offer any competing projections of its own, and failing to explain why or how those non-existent alternative projections expose some unidentified defect in Exelon's robust *pro forma* financial statements); *id*. (arguing that Exelon's projections "ring hollow" because some nuclear plants in Illinois may close prematurely, but ignoring the plain text of the LTA, which explicitly *assumes* that those shutdowns will occur, and provides financial information *based* on that assumption, *see infra* Section III.B.2.).

62 Petition at 13.

63 And ELPC points to no requirement to discuss such information in the LTA for an indirect, non-licensee owner entity such as HoldCo.

that applies to HoldCo's credit rating. ELPC's argument about HoldCo's credit rating, therefore, does not raise a genuine dispute of a material fact.

Second, the Application says that "Exelon Generation (as SpinCo), anticipates investment grade credit ratings."[64] ELPC cites a news article noting that, after the Spin Transaction was announced, S&P downgraded Exelon Generation's credit rating; and ELPC claims that Exelon's assumption of an investment-grade rating after the Spin Transaction closes "does not address the risks raised by the rating agencies."[65] A downgrade in its credit rating does not mean that Exelon Generation is no longer investment grade. In addition, ELPC's statement ignores the fact that S&P continues to rate Exelon Generation *after the spin announcement* as investment grade, and that is consistent with the statements in the LTA.[66] In other words, there is no inconsistency in the LTA. ELPC fails to explain why some further demonstration is required here.

ELPC then points to the (unsurprising) results of a recent PJM capacity auction for three of Exelon Generation's plants in Illinois.[67] But the ability (or not) of some of Exelon Generation's reactors in Illinois to clear the PJM auction is already accounted for in the LTA through conservative scenarios about early plant closures. More specifically, Exelon Generation fully acknowledges the "economic distress caused by energy markets that do not compensate these units for their unique environmental attributes and contributions to grid resiliency."[68] As Exelon further explains in the LTA, without "market reform or legislative action," these plants

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64 LTA, Encl. 1 at 5 (emphasis added).

65 Petition at 14.

66 *Id.* at 14-15 (acknowledging that S&P rated Exelon Generation BBB-, which is an investment grade rating, after the spin announcement).

67 *Id.* at 15 (citations omitted).

68 LTA, Encl. 1 at 9 n.11.

"remain at risk of premature retirement," and thus the financial projections conservatively *assume* those units retire early.[69] ELPC fails to explain why anything more is required.

Because ELPC provides no support for a suggestion that the financial projections in the LTA are "implausible," this part of Contention 1 fails to raise an adequately-supported dispute with the Application on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

b. *Nuclear Support Services*

ELPC also criticizes the LTA for not "explain[ing] how support services provided under [the] existing Nuclear Operating Services Agreements [NOSAs] will impact SpinCo's financials."[70] However, Petitioner again disregards the relevant portions of the LTA. In particular, the NOSAs clearly specify that SpinCo will "provide corporate and administrative services necessary for the operation of the Facilit[ies] as the NRC licensed operator,"[71] and the notes to the *pro formas* make clear that the financial statements *include* corresponding costs (i.e., costs for corporate overhead, governance, and oversight).[72] Petitioner neither engages with the detailed financial statements nor the NOSAs, nor disputes any information therein, nor demonstrates (with adequate support or citation to any NRC requirement) that anything more is required. Accordingly, this unfounded criticism is unsupported and fails to raise a genuine dispute on a material issue of fact or law, as required by 10 C.F.R. § 2.309(f)(1)(ii) and (iv)-(vi).

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69 *See, e.g.*, *id*. at 9-10.

70 Petition at 15.

71 LTA, Encl. 2 at 5.

72 As explained in the Notes to the *pro formas*, "'Operating and Maintenance Expenses' in the Projected Income Statement include direct and allocated overhead, corporate governance, and oversight expenses for the nuclear fleet" (LTA, Encl. 6 at 3 ¶ 5) and "'O&M Nuclear Direct Overhead,' 'O&M Nuclear Allocated,' and 'ExGen Overhead' includes direct site costs that are managed by Exelon Generation's corporate functions (e.g. insurance) and corporate governance and oversight expenses" (*Id*., Encl. 8 at 21 ¶ 9).

c. Alleged Utility Subsidies

Finally, ELPC claims that "[c]urrently, Exelon [Corporation]'s regulated utility divisions provide reliable financial support to the nuclear fleet," and argues the LTA is inadequate because it fails to explain how SpinCo will replace this alleged "support" after the Spin Transaction occurs.[73] ELPC provides no citation or basis for its claim that Exelon Corporation's utility subsidiaries subsidize Exelon Generation. More importantly, this claim is demonstrably incorrect.

First, Exelon Corporation's rate-regulated utility subsidiaries are separate legal entities, and not "divisions" within Exelon Corporation (as ELPC incorrectly claims).[74] Each individual utility is rate regulated based on its unique cost of providing transmission and distribution services, and in some cases natural gas services (collectively, utility services), to its customers.[75] The costs included in the regulated rates of the utility operating companies do not include costs related to operating nuclear generating assets. Therefore, Exelon Corporation's utility subsidiaries do not provide financial support to Exelon Generation's nuclear fleet. In fact, both the Federal Energy Regulatory Commission ("FERC")[76] and the various state regulatory bodies[77]

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73 Petition at 15-16.

74 *See* Exelon Corporation, Annual Report (Form 10-K) (Dec. 31, 2020) ("Annual Report") (the cover pages list the separate legal entities), *available at* https://investors.exeloncorp.com/static-files/aec53069-4e5f-424b-92dd-e5ead7de7668.

75 *See id*. at 9.

76 *See Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 (2008). This order imposes restrictions on transactions between franchised public utilities that have captive customers or that own or provide transmission service over FERC-jurisdictional transmission facilities, and their market-regulated power sales affiliates and other non-utility affiliates. FERC policy regarding restrictions on affiliate transactions between franchised public utilities and their non-utility affiliates is codified "to ensure that customers of franchised public utilities do not inappropriately cross-subsidize the activities of 'non-regulated' affiliates, and are not financially harmed as a result of affiliate transactions and activities." *Id.* at 2, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008) (codified at 18 C.F.R. § 35.44).

77 *See, e.g.*, 83 Ill. Admin. Code 452.125(b) ("No electric utility shall use delivery services to subsidize generation services.").

with authority over Exelon Corporation's utility operating companies' electric and gas distribution services *prohibit* utilities from subsidizing their affiliates (e.g., Exelon Generation). Petitioner's groundless claim in this regard is simply untrue.

Furthermore, Petitioner alleges that SpinCo's ability to replace "this reliable financial support is unknown and poorly described in the Application[.]"[78] As noted above, no such subsidy exists, and thus there is nothing to replace. Moreover, the LTA contains ample documentation of SpinCo's financial "ability," in full satisfaction of 10 C.F.R. § 50.33(f)(2). This information is not "unknown"—ELPC simply fails to acknowledge or engage with it. And ELPC certainly does not demonstrate that any particular aspect of that unacknowledged information is "implausible."[79]

What is true is that Exelon Generation owns and will continue to own a diverse mix of generation sources and not just nuclear facilities as ELPC's Petition seems to assume.[80] This mix of generation contributed to Exelon Generation's past earnings,[81] but also provides Exelon Generation, and thus SpinCo, with the projected revenue over the next five years to provide "reasonable assurance." As discussed above, a petitioner must do more than cast doubt on an

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78 Petition at 16.

79 ELPC also claims its arguments regarding alleged utility subsidies are "similar" to comments submitted by EDF, Inc. in a state regulatory proceeding. Petition at 16. However, Exelon already has explained the multiple reasons why EDF, Inc.'s essentially-identical claims in this NRC proceeding are meritless and inadmissible. *See generally* Exelon's Answer Opposing Petition of EDF, Inc. for Leave to Intervene and Request for a Hearing (July 12, 2019) (ML21193A365). Exelon incorporates that Answer by reference here. *See also* Letter from D. Saia, Counsel for Exelon Generation and Exelon Corporation, to Hon. M. Phillips, Secretary to the N.Y. Pub. Serv. Comm., Case 21-E-0130 (July 23, 2021), *available at* https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={28B3F0CC-EE7C-4BFB-B973-71BBC6A5C28C}; Responsive Comments of Joint Petitioners to Clarify and Correct Record, Case 21-E-0130 (July 26, 2021), *available at* https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={98CBAF6D-97A5-4041-9AE9-A16B7CBA864E}.

80 LTA, Encl. 1 at 5; *see also* Annual Report at 341.

81 Annual Report at 60.

applicant's financial projections; it must show why an applicant's projections are *implausible*.[82] ELPC has not done so here.

2. ELPC's Arguments Regarding Cumulative Impacts of Early Retirements Fail to Identify Any Inadequacy in the LTA

Subsection 2 of Contention 1 claims that "the Application *does not address* how the early decommissioning of significant portions of Exelon Generation's nuclear fleet will impact SpinCo's financial stability."[83] However, Petitioner seems unaware that the LTA's detailed financial statements squarely "address" this issue. More specifically, the financial projections conservatively *assume* the early retirement of eight units.[84] Petitioner entirely disregards this on-point discussion. Once a unit shuts down for decommissioning, the costs associated with that unit are no longer operating and maintenance costs to be paid from operating revenues; following shutdown, the costs become decommissioning costs payable from the decommissioning trust funds and other decommissioning funding assurance mechanisms.

To the extent ELPC simply missed this information in the Application, its "misreading" or "misinterpret[ation]" fails to supply the requisite "factual support" for an admissible contention.[85] And to the extent Petitioner speculates that Exelon's financial projections are inadequate because they do not account for other units that will close at some unspecified point

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82 *See supra* Section II.C.; *Seabrook*, CLI-99-6, 49 NRC at 222; *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 31 (2000) (citation omitted).

83 Petition at 17 (emphasis added).

84 LTA, Encl. 6 (Non-Proprietary) at 3 n.7 ("Projections account for the announced early retirement of Byron Units 1 and 2 in September 2021 and Dresden Units 1 and 2 in November 2021 and the conservative scenario that includes the potential that Braidwood Units 1 and 2 and LaSalle Units 1 and 2 retire early in [[ ]] and [[ ]], respectively."); *see also id*., at Encl. 6A (proprietary version of same).

85 *Interim Storage Partners LLC* (WCS Consol. Interim Storage Facility), CLI-20-14, 92 NRC __, __ (Dec. 17, 2020) (slip op. at 18-19); *see also Seabrook*, CLI-12-5, 75 NRC at 312 (2012) (noting a petitioner's "ironclad obligation" to review application materials thoroughly) (citation omitted); *Ga. Inst. of Tech.* (Ga. Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (holding that a petitioner's "imprecise reading" of a document "cannot serve to generate an issue suitable for litigation").

in the next five years (the period covered by the financial projections), it fails to provide the requisite support. 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. As the Commission has long held, this type of gross speculation is not sufficient to support an admissible contention.[86]

Petitioner also makes the vague challenge to the LTA claiming that it does not address "higher than anticipated costs of decommissioning" that may materialize at some point the future because decommissioning costs allegedly are "increasing by a higher margin than the growth rate allowed for in NRC regulations."[87] However, the instant adjudicatory proceeding is not the appropriate forum for Petitioner's challenge to the adequacy of a generally-applicable NRC regulation.[88] Indeed, this line of argument (which seems to acknowledge that the LTA fully complies with NRC regulations, as written) is immaterial, beyond the scope of this proceeding, and fails to demonstrate a genuine dispute with the Application on a material issue of law or fact. Even if NRC regulations could be challenged in this proceeding, this claim still would be inadmissible because Petitioner has not identified, with the requisite specificity, which decommissioning cost estimates, and for which plants, it alleges are materially inadequate based

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86 *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010) (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 194 (1999)).

87 Petition at 18.

88 10 C.F.R. § 2.335(a). A contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected. *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). Furthermore, "a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue." *PPL Susquehanna, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 23 (2007).

on this speculation about future decommissioning costs. Ultimately, this claim is inadmissible on multiple grounds.

Finally, ELPC criticizes the LTA because it purportedly does not provide "concrete evidentiary support" that SpinCo will have the "necessary access to credit" to address speculative shortfalls, caused by speculative early retirements, coupled with speculative decommissioning cost increases.[89] Once again, Petitioner conflates its preferred standard of "concrete evidentiary support" with the NRC's *actual* standard for reasonable assurance, which requires a demonstration that financial projections are "plausible." Moreover, Petitioner has not demonstrated that SpinCo's assumption of an investment grade credit rating and access to ample liquidity (based on Exelon Generations' current rating and ongoing discussions with credit ratings agencies) is implausible. At bottom, Petitioner's multi-layered speculation and misunderstanding of NRC requirements provide an insufficient basis for an admissible contention.

3. ELPC's Arguments Regarding the Nuclear Waste Policy Act of 1982 ("NWPA") One-Time Fee Fail to Identify Any Inadequacy in the LTA

Under the NWPA, the U.S. Department of Energy ("DOE") is responsible for disposal of spent nuclear fuel ("SNF") and high-level radioactive waste.[90] As required by the NWPA, Exelon Generation is a party to contracts with the DOE to provide for disposal of SNF from the Facilities ("Standard Contracts").[91] The Standard Contracts require Exelon Generation to pay DOE a one-time fee to cover the costs of SNF disposal, applicable to nuclear generation through April 6, 1983.[92] As noted in Exelon's most recent Annual Report filed with the U.S. Securities

89 Petition at 18.

90 Annual Report at 341.

91 *Id*.

92 *Id*. at 342.

and Exchange Commission ("SEC"), Exelon Generation's liability in this regard is $1.208 billion[93] as of December 31, 2020.[94] In Subsection 3 of Contention 1, ELPC cites this information from the Annual Report and asserts that the LTA "does not address these obligations or what may happen if they are not met."[95] ELPC ignores the fact that the same Annual Report to which it cites reflects this one-time fee liability on Exelon Generation's balance sheet. Similarly, Exelon Generation's proprietary projected financial statements, submitted at Enclosure 6A to the Application, account for the one-time fee obligations as "Other Non-Current Liabilities" on the Projected Balance Sheet.[96]

Furthermore, to the extent ELPC speculates that SpinCo may be unable to pay DOE when the liability comes due far into the future, it offers no corresponding explanation or support. This claim ignores, yet again, the detailed financial projections provided with the LTA, which demonstrate substantial assets and revenues and a strong overall balance sheet and financial position across the projection period. Petitioner neither engages with this information nor offers the slightest analysis of it. As a result, Petitioner's bare speculation provides insufficient support for an admissible contention.

Additionally, Petitioner suggests that it is unclear which entity will remain responsible for these liabilities after the Spin Transaction.[97] Specifically, ELPC claims that a full-blown

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93 Exelon Generation maintains an offsetting asset of $126 million to account for its contractual right of reimbursement from a prior owner of the one-time fee for FitzPatrick. *Id*. at 342, n.(b).

94 *Id*.

95 Petition at 19.

96 As noted in the Exelon Generation Consolidated Balance Sheet in the Annual Report, which refers to the one-time fee as the "Spent nuclear fuel obligation," this liability is categorized under "other liabilities," *id*. at 187, and is non-current, *id*. at 123 (*i.e.*, due "2026 and beyond"). To the extent the Petitioner asserts that the one-time fee should have been listed as a separate line item in the financial projections, it cites no corresponding requirement. Nor is there one, because the financial projections need only supply "summary data." 10 C.F.R. Part 50, app. C.

97 *Id*.

evidentiary hearing is necessary "to determine whether" the Applicants intend for these liabilities to be "transferred to SpinCo and/or HoldCo."[98] But a hearing is not necessary to find the answer to ELPC's question—it is provided in the plain text of the Application, which ELPC disregards. The LTA explains that there will be *no change* to the current parties to the Standard Contracts (and thus, no change to the liabilities associated therewith); the only changes to those contracts will be to reflect the new *names* of those entities following the Spin Transaction.[99] Ultimately, ELPC's unsupported claims regarding the NWPA one-time fee fail to raise a material issue or dispute the sufficiency of the Application.

4. ELPC's Arguments Regarding Retrospective Insurance Premiums Fail to Identify Any Inadequacy in the LTA

In 1957, Congress passed the Price-Anderson Act as a means of providing a mechanism to cover personal injury and property damage claims from members of the public in the unlikely event of a commercial nuclear power plant accident. This law requires owners of nuclear power plants to pay an annual premium for offsite liability coverage. This is known as the "first tier" of coverage. In the event a nuclear accident causes damages in excess of the "first tier" coverage, the Price-Anderson Act provides for a "second tier" of coverage through which each licensee in the insurance pool would be assessed a *pro rata* share of the excess damages, up to a specified maximum amount.

This assessment is referred to as a "deferred" or "retrospective" premium. Since its formation in 1973, the insurance company that administers this coverage, Nuclear Electric Insurance Limited ("NEIL"), has never assessed a retrospective premium. Suffice it to say, it is not possible to predict, with any accuracy, when, whether, and in what amount any retrospective

98 *Id*.

99 LTA, Encl. 1 at 14.

premium may ever be assessed, if any. But, as noted in Exelon's recent Annual Report, the current *maximum* aggregate annual retrospective premium obligation for Exelon Generation would be approximately $252 million.[100]

In Subsection 4 of Contention 1, ELPC highlights this information and demands a hearing "to determine *whether* SpinCo or HoldCo will be assuming this premium obligation." But, again, a hearing is not necessary for this purpose. The LTA explains that there will be no changes to the existing arrangements other than to amend the relevant documents to reflect the new names of the respective entities.[101] Indeed, NRC regulations specify that the licensee is responsible for these premiums.[102] This is an indirect license transfer proceeding—the LTA proposes no change in the licensees in this regard. At bottom, there simply is no genuine dispute on this issue.

Moreover, NRC regulations require each licensee to "provide evidence to the Commission," on an annual basis, that it will be able to cover the retrospective premium; specifically, the regulations require a "guarantee of payment" through a number of methods as specified in the regulation, including, a surety bond, letter of credit, or annual certified financial statement.[103] Since the existing licensees (who are not changing) already maintain the required guarantees of payment, and will have to show compliance every year, Petitioner fails to explain why anything further is required here. Indeed, Petitioner's demand appears to conflict with the Commission's codified generic determination that annual certification of the guarantee of payment is fully sufficient to demonstrate reasonable assurance of financial qualifications to

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100 Annual Report at 340.

101 LTA, Encl. 1 at 15.

102 10 C.F.R. § 140.11.

103 10 C.F.R. § 140.21.

meet potential retrospective premium obligations. At bottom, this is an issue of ongoing regulatory compliance and therefore outside the scope of this proceeding.[104]

5. ELPC's Arguments Regarding Non-Radiological Decommissioning Costs Fail to Identify Any Inadequacy in the LTA

Subsection 5 of Contention 1 claims that the LTA does not address "non-radiological costs of decommissioning."[105] But in the very next sentence, ELPC correctly notes that non-radiological decommissioning is "out of the NRC's purview."[106] ELPC thus admits that it identifies no unmet NRC requirement. Simply put, the financial ability 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.

Undaunted, ELPC makes a vague claim that such costs "go directly to . . . financial qualifications."[107] But it makes no attempt to explain a purported connection between non-radiological decommissioning costs and the LTA's satisfaction of 10 C.F.R. § 50.33(f)(2), which Petitioner cites as the basis for Contention 1. That regulation requires a demonstration of "reasonable assurance of obtaining the funds necessary to cover estimated *operation costs* for the period of the license."[108] In contrast, site restoration activities occur after a reactor has *ceased to operate*. Thus, Petitioner's suggestion that non-radiological site restoration costs incurred at some stage of the decommissioning process somehow could impact a licensee's ability to cover operational costs during its operational phase is not only baseless—it is counterintuitive.

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104 *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 434-36 (2011) (holding that issues of ongoing regulatory compliance are outside the scope of adjudicatory proceedings).

105 Petition at 21.

106 *Id.*

107 *Id.*

108 10 C.F.R. § 50.33(f)(2) (emphasis added).

Even assuming *arguendo* there could be some nexus to the NRC's financial review, ELPC does not demonstrate that such costs would be material to that review. More specifically, ELPC neither explains whether and how the alleged level of such costs would raise financial wherewithal issues nor engages with the LTA's detailed financials to support its speculation that SpinCo would be unable to cover those unspecified costs. Instead, Petitioner relies on conjectural statements by its expert, Mr. Bradford, who acknowledges that these are *potential* costs that the "states and localities *may* impose" at some unspecified time in the future.[109] Indeed, Mr. Bradford acknowledges these costs will "[d]epend[] on the standards imposed."[110]

Nevertheless, ELPC notes that the licensee for the Vermont Yankee plant maintains (pursuant to a voluntary settlement agreement between the licensee and the State of Vermont) "a $60 million site restoration fund in addition to its decommissioning trust fund."[111] Even using this value as a benchmark, it is unclear—and ELPC certainly offers no explanation—why this amount would be material in the context of the multi-decade operating lifespan of a plant and potentially multi-decade decommissioning process. In essence, ELPC offers no basis to conclude that multi-layered speculation about potential non-radiological site restoration costs incurred after the reactor ceases to operate would, in any way, be meaningful—much less

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[109] Petition at 21 (citing Bradford Decl. at 28). ELPC also criticizes the decommissioning cost estimates cited in the LTA because they are based on the calculation formula specified in 10 C.F.R. § 50.75(c), rather than "site-specific" estimates." *Id*. at 21-22. But Petitioner identifies no obligation to rely on site-specific estimates. Indeed, it's criticism of the estimation method expressly authorized by the regulation represents a direct challenge to the NRC's codified finding that the method is fully sufficient to demonstrate decommissioning funding assurance, and therefore is an impermissible attack and beyond the scope of this proceeding. 10 C.F.R. § 2.335. *See also Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-22, 82 NRC 310, 317 (2015) (affirming a licensing board's conclusion that "[w]hen the Commission has determined that compliance with a regulation is sufficient to provide for reasonable assurance of public health and safety," a contention claiming otherwise is not admissible) (quoting and agreeing with *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), LBP-15-17, 81 NRC 753, 789 (2015)).

[110] Petition at 21 (citing Bradford Decl. at 28).

[111] *Id.* (citing Bradford Decl. at 31).

material—to the NRC's review of the licensees' ability to cover operating costs during its operational phase. At bottom, no part of this criticism raises an admissible contention.

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Taken together, the issues identified by ELPC do not identify a genuine dispute with the LTA and are unsupported, immaterial to the NRC's review, and outside the scope of this proceeding. And they certainly fall short of showing that the LTA's financial projections are based on "implausible" assumptions and forecasts that prevent the Commission from finding reasonable assurance of financial qualifications. Accordingly, Proposed Contention 1 should be rejected for failure to satisfy all six admissibility criteria in 10 C.F.R. §§ 2.309(f)(1).

C. Contention 2 (Decommissioning Funding Assurance) Is Inadmissible

In Contention 2, ELPC claims that the LTA "does not show that the Applicants have the requisite reasonable assurance of sufficient funds for decommissioning" as required by 10 C.F.R. § 50.33(k)(1).[112] In particular, ELPC claims that the LTA does not provide reasonable assurance of decommissioning funding because of "significant projected early retirements," as to "decommissioning funds generally," and "Byron Units 1 & 2," specifically.[113] Notably, Contention 2 does not contain a *single reference* to the decommissioning-related portions of the LTA—the document that is the subject of this proceeding, and the plain text of which rebuts each of ELPC's baseless claims. Instead, ELPC purports to challenge statements from a recent

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112 *Id*. at 22.

113 *Id*. at 23. Petitioner also claims that Exelon has not met its "burden of proof" under 10 C.F.R. § 2.325. *Id*. at 23, 28. But, Petitioner clearly misunderstands and misrepresents this regulatory provision. Section 2.325 is an *adjudicatory* rule; it applies to adjudicatory filings, not licensing applications. Here, ELPC is the "proponent" of an order granting their petition, admitting their contentions, and convening a hearing. The burden (*i.e.*, to satisfy 10 C.F.R. § 2.309(f)(1)) is on them, not Exelon Generation. *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).

Quarterly Report[114] Exelon filed with the SEC (which Petitioner largely misinterprets), claiming they do not fulfill NRC requirements. But that is insufficient for an admissible contention. The Commission has explained that, to be admissible, a contention must challenge "the pertinent portions of the *license application* . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[115] ELPC plainly fails to do this in Contention 2, and it should be summarily rejected on this ground alone. The discussion below explains the additional reasons the contention must be rejected for failing to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).

1. ELPC's Arguments Regarding Decommissioning Funds, Generally, Fail to Identify Any Inadequacy in the LTA

In subsection 1 of Contention 2, ELPC first claims that the LTA "does not address" and "fails to show in any manner" how the applicants will provide adequate decommissioning funding for "the full Exelon nuclear power plant fleet."[116] This claim is patently incorrect. The LTA does "address" decommissioning funding for each of the Facilities. The Application contains an entire section titled "Decommissioning Funding Assurance." That discussion also incorporates by reference the Decommissioning Funding Report that Exelon Generation recently submitted to the NRC as well as an enclosure to the LTA that provides "alternate" decommissioning assumptions. Petitioner does not appear to have reviewed any of this relevant information, because it does not cite to any of it. Quite simply, ELPC's claim that the LTA omits a discussion of decommissioning funding is baseless and does not create a genuine dispute.

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114 Exelon Corporation, Quarterly Report (Form 10-Q) (Mar. 31, 2021) ("Quarterly Report"), *available at* https://investors.exeloncorp.com/static-files/505a305b-0042-4260-908f-029eb6a90a52.

115 Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Millstone*, CLI-01-24, 54 NRC at 358.

116 Petition at 23.

ELPC also cites a statement in Exelon Corporation's Quarterly Report acknowledging Exelon Generation's plans for early retirement of Dresden and "increased signs of economic distress" for Braidwood.[117] ELPC then claims that the LTA "fails to address the significant likelihood" that that these plants "will face early retirement,"[118] and further claims that the LTA fails to confront any impact this may have on decommissioning funding.[119] ELPC's claims, however, again ignore the relevant LTA content that *squarely addresses* the anticipated early shutdown of Dresden and potential early shutdown of Braidwood (along with LaSalle, which ELPC does not mention).[120]

More specifically, the LTA specifies that "Dresden Units 2 and 3 are scheduled for shutdown later this year" and notes that the corresponding trust fund balances, alone, "are sufficient to provide decommissioning funding assurance for Dresden Units 1 (already shutdown), 2, and 3."[121] As to Braidwood, the LTA notes that "Applicants anticipate that ongoing economic stressors may result in [those units] shutting down before the end of their licensed terms, resulting in potential assumed decommissioning funding shortfalls."[122] The LTA includes specific enclosures providing an alternate decommissioning funding analysis addressing this possibility,[123] and explaining that, "[i]f that [alternate] scenario comes to fruition, SpinCo

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117 *Id.* at 23-24 (citing Quarterly Report at 76).

118 *Id*. at 23.

119 *Id.* at 23-24.

120 *See* LTA, Encl. 6 at 3 and Encl. 8 at 21 (Non-Proprietary) ("Projections account for the announced early retirement of Byron Units 1 and 2 in September 2021 and Dresden Units 1 and 2 in November 2021 and the *conservative scenario* that includes the potential that Braidwood Units 1 and 2 and LaSalle Units 1 and 2 retire [prematurely].").

121 LTA, Encl. 1 at 12. *See also* Decommissioning Funding Report, Attachs. 10 at 1 (note (d)) and 11 at 1 (note (d)) (stating, as to Dresden, Units 2 and 3, that "permanent termination of operations (shutdown) is expected on November 30, 2021.").

122 LTA, Encl. 1 at 13-14.

123 LTA, Encls. 10 (non-proprietary) and 10A (proprietary) at 4-5.

would address any shortfall(s)" through an NRC-approved funding mechanism."[124] Once again, ELPC's claim of omission (i.e., that the LTA "fails to address" the possible early retirement of Dresden and Braidwood)[125] is meritless because the allegedly-missing information is plainly provided in the LTA.

ELPC also cites an internet article as alleged support for its speculation that "Exelon's fleet in New York, Maryland, and Pennsylvania also face potential early closure."[126] However, that article provides no specific analysis of "Exelon's fleet in New York, Maryland, and Pennsylvania." Rather, the article generically observes that the early retirement risk for nuclear plants "fluctuates" depending on power prices and policy initiatives, such as carbon pricing and zero-emissions credits. This unremarkable observation is woefully insufficient support for any claim that continued operation of Exelon's non-Illinois Facilities is entirely "implausible." And ELPC otherwise fails to engage with the detailed revenue projections in the *pro formas*, much less demonstrate some defect therein that would result in an early retirement of some unspecified unit.

Ultimately, ELPC's demand for an evidentiary hearing to determine "which and how many of Exelon's nuclear plants are slated for early retirement" is unnecessary because the LTA already contains conservative projections for such information. ELPC disregards that information, and its bare speculation provides insufficient support to demonstrate a genuine dispute with the Application. Accordingly, these arguments do not give rise to an admissible contention.

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124 LTA, Encl. 1 at 14.

125 Petition at 23.

126 *Id*. at 26.

2. ELPC's Arguments Regarding Decommissioning Funding for Byron Units 1 and 2, Specifically, Fail to Identify Any Inadequacy in the LTA

ELPC's second claim highlights information in the Decommissioning Funding Report noting that Byron, Units 1 and 2 are expected to shut down by September 30, 2021, whereas their trust fund balances are insufficient, standing alone, to satisfy the expected costs of decommissioning for those units.[127] ELPC points out that Exelon Corporation's Quarterly Report states that it will provide an update on "how" it will cover the funding shortfall.[128] ELPC then asks for permission to amend its contention once that update is provided, and claims that the Commission must "hold a hearing to evaluate Applicant's proposed remedy for this shortfall."[129] In particular, ELPC speculates that Exelon Generation may seek to address the shortfall through "parent company guarantees" (i.e., from HoldCo to SpinCo).[130] But, the LTA, which it seems ELPC did not review in full, already explains *exactly* how Exelon Generation plans to address the potential shortfall. The Application states, "SpinCo plans to provide surety bonds in the full amount(s) of the remaining shortfall(s) that, when combined with the decommissioning trust funds, will provide the required decommissioning funding assurance for Byron Units 1 and 2."[131] ELPC does not acknowledge this statement or otherwise explain why anything more is required. Thus, there is no basis for Petitioner's unsupported and factually incorrect claim of omission, which fails to raise a genuine dispute with the Application.

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127 *Id*. at 26-27.

128 *Id*. at 27 (citing Quarterly Report at 78).

129 *Id*. at 27.

130 *Id*.

131 LTA, Encl. 1 at 12 (emphasis added).

Accordingly, Proposed Contention 2 should be rejected for failure to satisfy each requirement in 10 C.F.R. §§ 2.309(f)(1) (i), (ii), and (vi).

IV. THE PETITION MUST BE DENIED BECAUSE PETITIONER HAS NOT DEMONSTRATED STANDING

The Commission need not evaluate standing because each of Petitioner's contentions is inadmissible.[132] But even if the Commission examines Petitioner's standing arguments, it can conclude that Petitioner lacks standing. Petitioner asserts representational standing through its member, Robert L. Vogl, whom Petitioner implies has standing to intervene as an individual.[133] Petitioner also suggests that, in the alternative, it should be granted discretionary intervention under 10 C.F.R. § 2.309(e).[134] As demonstrated below, Petitioner has not established standing to intervene in this proceeding as a matter of right under 10 C.F.R. § 2.309(d). Nor has it satisfied the strict requirements for discretionary intervention under 10 C.F.R. § 2.309(e). Because Petitioner failed to demonstrate standing in this proceeding, the Petition must be denied.[135].

A. Legal Standards For Standing

To determine whether a petitioner presents a cognizable interest to intervene in a proceeding, the Commission applies contemporaneous judicial concepts of standing.[136] The

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132 *See Susquehanna*, CLI-15-8, 81 NRC at 503 n.19 ("Because [the petitioner's] contentions all fall far short of our contention admissibility standards, we need not address his standing to intervene.").

133 Petition at 10.

134 *Id*. at 11 (claiming that its participation would "assist in developing a sound record" because "ELPC has experience in nuclear decommissioning regulatory proceedings and cases related to the financial issues surrounding site restoration and reclamation at nuclear power plants").

135 10 C.F.R. § 2.309(a).

136 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015) (citation omitted).

petitioner bears the burden to provide facts sufficient to establish standing.[137] As relevant here, a petitioner may satisfy that burden in one of three ways.

1. Traditional Standing

First, a petitioner may demonstrate traditional standing. This requires a showing that a person or organization has suffered or might suffer a concrete and particularized injury that is: (1) fairly traceable to the challenged action; (2) likely redressable by a favorable decision; and (3) arguably within the zone of interests protected by the governing statutes—here, the AEA.[138] These criteria are known as injury-in-fact, causality, and redressability. Although a petitioner need not show that the injury flows directly from the challenged action, it must still show that the "chain of causation is plausible."[139] Finally, a petitioner must show that "its actual or threatened injuries can be cured by some action of the tribunal."[140]

An organization seeking to intervene in its own right must satisfy the same standing requirements as an individual.[141] To address the injury requirement, an organization such as ELPC must show that the license transfer "would constitute 'a threat to its organizational interests.'"[142]

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137 *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 & 2), CLI-00-5, 51 NRC 90, 98 (2000)).

138 *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

139 *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994); *see also Crow Butte Res., Inc.* (In-Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 345 (2009).

140 *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-01-2, 53 NRC 9, 14 (2001).

141 *FirstEnergy Nuclear Operating Co.* (Beaver Valley Power Station, Units 1 & 2; Davis-Besse Nuclear Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-20-5, 91 NRC 214, 219 (2020) (citing *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 411 (2007)).

142 *Id.* (slip op at 5-6) (quoting *Crow Butte Res., Inc*. (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 18 (2014); *Ga. Inst. of Tech.* (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); *see also Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

2. Representational Standing

An organization may seek to establish representational standing based on the standing of one or more individual members. To establish representational standing, an organization must: (1) show that the interests it seeks to protect are germane to its own purpose; (2) identify at least one member who qualifies for standing in his or her own right; (3) show that it is authorized by that member to request a hearing on his or her behalf; and (4) show that neither the claim asserted nor the relief requested require an individual member's participation in the organization's legal action.[143] If the affidavit of the member lacks a statement that the member wants and has authorized the organization to represent his or her interests, the presiding officer should not infer that authorization.[144]

3. Proximity-Based Standing

Proximity-based standing is not available in this indirect license transfer proceeding. In some proceedings, a petitioner may rely on a Commission-created standing shortcut known as the "proximity presumption." For example, in proceedings that involve construction or operation of a nuclear power plant, the Commission has found standing based solely on a petitioner's residence within a 50-mile radius of the site.[145] But in other cases, including license transfers, the Commission determines, "on a case-by-case basis whether the proximity presumption should apply, considering the 'obvious potential for offsite [radiological] consequences,' or lack thereof, from the application at issue."[146]

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143 *Palisades*, CLI-07-18, 65 NRC at 409 (citation omitted).

144 *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

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

146 *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007); *see Exelon Generation Co., LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-81 (2005).

However, the Commission has "consistently held that indirect license transfers involving 'no change in the operator, no change in the direct owner, and no change in the physical plant . . . create[] no obvious source of actual or potential harm.'"[147] Accordingly, because the LTA does not propose to change the licensed operator, any of the direct owners, or any of the physical plants, proximity-based standing is not available in this proceeding.

4. Discretionary Intervention

Pursuant to 10 C.F.R. § 2.309(e), the Commission may consider a request for discretionary intervention where a party lacks standing to intervene as a matter of right under 10 C.F.R. § 2.309(d)(1). However, discretionary intervention may be granted only when at least one petitioner has established standing and at least one contention has been admitted for hearing.[148] In addition to addressing the factors in 10 C.F.R. § 2.309(d)(1), a petitioner who seeks intervention as a matter of discretion (if it is determined that standing as a matter of right is not demonstrated) must specifically address in his or her initial petition the six factors set forth in 10 C.F.R. § 2.309(e), which the Commission will consider and balance.[149] Of the six factors, primary consideration is given to the first factor—assistance in developing a sound record.[150]

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147 *El Paso Elec. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-20-07, 92 NRC __, __ (Sept. 15, 2020) (slip op. at 8-9) (quoting *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260 (2008).

148 10 C.F.R. § 2.309(e). *See also PPL Susquehanna LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 21 n.14 (2007) ("[D]iscretionary standing [is] only appropriate when one petitioner has been shown to have standing as of right and [there is an] admissible contention so that a hearing will be conducted.").

149 Factors weighing in *favor* of allowing intervention include: (i) the extent to which the petitioner's participation would assist in developing a sound record; (ii) the nature of petitioner's property, financial or other interests in the proceeding; and (iii) the possible effect of any decision or order that may be issued in the proceeding. *See* 10 C.F.R. § 2.309(e)(1)(i)-(iii). Conversely, factors weighing *against* allowing intervention include: (i) the availability of other means whereby the petitioner's interest might be protected; (ii) the extent to which petitioner's interest will be represented by existing parties; and (iii) the extent to which petitioner's participation will inappropriately broaden the issues or delay the proceeding. *See id*. § 2.309(e)(2)(i)-(iii).

150 *See Gen. Pub. Utils. Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996).

The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention.[151]

B. ELPC Has Not Demonstrated Organizational or Representational Standing

ELPC appears to claim both organizational and representational standing. For ELPC to demonstrate organizational standing, it must show that the license transfer would constitute a threat to its organizational interests. And for representational standing, it must identify at least one member who qualifies for standing in his or her own right.[152] ELPC identified its member, Robert L. Vogl, and suggests that Mr. Vogl has individual standing to intervene because he lives near the Byron Nuclear Generating Station.[153] ELPC also alleges that itself, as an organization, and Mr. Vogl, as in individual, will suffer "injury" and therefore are entitled to traditional standing.[154] As explained below, both assertions are meritless.

1. Proximity-Based Standing Does Not Apply

Petitioner alleges that "Mr. Vogl's proximity to the Byron nuclear plant, alone, creates a presumption of injury-in-fact" and that Mr. Vogl has individual standing because he lives "so close to the Byron Generating Station that there is an alarm posted near the corner of his property line**.**"[155] These claims are legally misplaced because mere proximity to a facility is insufficient to demonstrate standing here; as noted above, proximity-based standing is unavailable in indirect

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151 *See Nuclear Eng'g Co., Inc.* (Sheffield, Ill., Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 744 (1978) (requiring potential discretionary intervenor to show "that it is both willing and able to make a valuable contribution to the full airing of the issues . . . in this proceeding").

152 *Palisades*, CLI-07-18, 65 NRC at 409 (citation omitted).

153 *See* Petition at 10 (inferring that Mr. Vogl should have standing because he "lives within ten miles of the Byron nuclear power plant").

154 *Id.*

155 *Id.* at 8, 10.

license transfer proceedings like this one. In fact, the Commission has "'*never* granted proximity-based standing to a petitioner in an indirect license transfer adjudication.'"[156]

The Commission's recent ruling in the *Palo Verde* proceeding is instructive here.[157] Like this proceeding, *Palo Verde* involved approval of an indirect license transfer, and a petitioner sought to establish standing based on "close proximity" to the facility.[158] As the Commission explained:

> We have consistently held that indirect license transfers involving "no change in the operator, no change in the direct owner, and no change in the physical plant…create[] no obvious source of actual or potential harm." Consequently, we have not extended proximity standing in such cases, and we see no reason to deviate from our practice here.[159]

That is exactly the case here. The LTA does not propose to change the licensed operator, any of the direct owners, or any of the physical plants. Accordingly, proximity-based standing is simply not available.

2. Neither ELPC Nor Mr. Vogl Has Demonstrated Traditional Standing

Because proximity-based standing is unavailable in this proceeding, the standing inquiry reverts to a "'traditional standing' analysis of whether the petitioner has made a specific showing of injury, causation, and redressability."[160] As explained below, neither Mr. Vogl nor ELPC has made the requisite showing to establish traditional standing.

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156 *Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), LBP-16-12, 84 NRC 148, 159 (2016) (citing *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 269 (2008) (emphasis added)).

157 *Palo Verde*, CLI-20-07, 92 NRC __ (slip op.).

158 *Id.* at __ (slip op. at 8).

159 *Id.* at __ (slip op. at 8-9) (citing and quoting *Palisades*, CLI-08-19, 68 NRC at 260).

160 *Peach Bottom*, CLI-05-26, 62 NRC at 581.

Mr. Vogl's and ELPC's alleged harms are not concrete and particularized injuries that would be certainly impending, or that would be likely to occur, as a result of an NRC decision to grant the LTA. Mr. Vogl and ELPC claim their interests somehow could be harmed if the decommissioning trust fund became underfunded.[161] Their best attempt at explaining how this might happen is by anecdotally discussing contamination on a nearby farm as a result of "accept[ing] toxic chemicals from" another site, and expressing "concern[] that the same thing *could* happen with the Byron nuclear power plant *if* the decommissioning [trust fund] is not adequately funded."[162]

But neither ELPC nor Mr. Vogl provide an explanation for how this attenuated speculation satisfies the traditional standing requirements. And, indeed, it does not. Courts have found less-layered speculation insufficient to demonstrate traditional standing.[163] To constitute an adequate showing of injury-in-fact, "pleadings must be something more than an ingenious academic exercise in the conceivable"; rather, a petitioner "must allege that he has or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected."[164] Some courts have recognized that a "substantial risk" of future harms (i.e., something slightly less than a certainly-impending injury) may be sufficient to

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161 *See* Petition at 8 ("Mr. Vogl is now concerned that the proposed license transfer is not accounting for the financial impacts on decommissioning. Mr. Vogl and his community will be adversely impacted *if* there is insufficient funding to carry out safe and timely decommissioning."). *See also id.* ("[T]here *may* not be sufficient funding to fully and safely decommission the nearby Byron nuclear power plant.") (emphasis added).

162 *Id.* (emphasis added).

163 *See, e.g.*, *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (holding that because plaintiff began describing the injury with the word "if", the allegations were too attenuated to establish standing); *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 297-98 (3d Cir. 2003) (holding that an injury does not meet the imminence requirement if "one cannot describe how [they] will be injured without beginning the explanation with the word "'if'").

164 *Nuclear Fuel Services, Inc.* (Erwin, Tenn.), CLI-04-13, 59 NRC 244, 248 (2004) (citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973)) (emphasis added).

demonstrate injury-in-fact in some limited circumstances. However, neither ELPC nor Mr. Vogl provides factual or legal support for the Petition's conclusory assertion that layered-speculation about a hypothetical injury somehow constitutes a "substantial risk" of harm. The Commission has long held that such "conjectural" claims are "too speculative" to demonstrate traditional standing.[165]

In sum, the Petition fails to demonstrate that Mr. Vogl or ELPC have a cognizable interest that may be affected by *this* indirect license transfer proceeding. Accordingly, ELPC has not satisfied the requirements for representational or organizational standing.

C. ELPC Has Not Demonstrated Entitlement to Discretionary Intervention

The Commission must also reject Petitioner's alternative request for discretionary intervention under 10 C.F.R. § 2.309(e).[166] Under Section 2.309(e), the Commission may consider a request for discretionary intervention when a party lacks standing to intervene as a matter of right. But discretionary intervention may be granted only when at least one petitioner has established standing and at least one contention has been admitted for hearing.[167] But that fundamental pre-condition has not been satisfied here; as Exelon Generation has explained in each of its Answers filed in this proceeding, no petitioner has proffered an admissible contention. Accordingly, discretionary intervention is unavailable to ELPC.

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165 *Sequoyah*, CLI-94-12, 40 NRC at 72 ("The alleged injury, which may be either actual or threatened, must be both concrete and particularized, not 'conjectural' or 'hypothetical.' As a result, standing has been denied when the threat of injury is too speculative."). *See also Exelon Gen. Co., LLC* (Three Mile Island Nuclear Station, Units 1 & 2), LBP-20-2, 91 NRC 10, 26-27 (2000) (quoting *Zion*, CLI-99-4, 49 NRC at 188) (rejecting Petitioner's vague "general objections" regarding insufficient decommissioning funds in another recent proceeding).

166 *See* Petition at 11.

167 10 C.F.R. § 2.309(e); *see also Susquehanna*, LBP-07-10, 66 NRC at 21 n.14 ("[D]iscretionary standing [is] only appropriate when one petitioner has been shown to have standing as of right and [there is an] admissible contention so that a hearing will be conducted.").

Even if that pre-condition had been satisfied, ELPC should not be granted discretionary intervention because it failed to address the six factors enumerated in Section 2.309(e),[168] and failed to argue that a balancing of those factors favor the Commission's exceptional granting of discretionary intervention status.[169] Instead, ELPC asserts simply that its participation "will assist in developing a sound record because ELPC has experience in nuclear decommissioning regulatory proceedings and cases related to the financial issues surrounding site restoration and reclamation at nuclear power plants."[170] ELPC does not try to explain why that is the case.

Furthermore, as noted above, ELPC's proposed contentions disregard the detailed financial information in the LTA and misread or disregard key portions thereof,[171] and it seems unlikely they could help develop a "sound" record here. In fact, it could conflict with the Commission's goal of adjudicatory efficiency, and unduly delay the proceeding – which is one of the factors counseling *against* intervention.[172]

Finally, ELPC fails to address, in any meaningful way, the other discretionary intervention factors specified in Section 2.309(e). Rather, ELPC summarily states that "[t]here are no other means by which ELPC and its members' interests will be protected, and no other party in the proceeding will represent ELPC's interests. Further, ELPC's participation will not unduly delay or inappropriately broaden the issues in the proceeding."[173] Such conclusory statements, without more, are not helpful to the Commission. But ELPC fails to provide more.

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168 *See supra* note 69.

169 *See Sheffield*, ALAB-473, 7 NRC at 744 (requiring potential discretionary intervenor to show "that it is both willing and able to make a valuable contribution to the full airing of the issues . . . in this proceeding").

170 Petition at 11.

171 *See supra* Section III.B.

172 10 C.F.R. § 2.309(e)(2)(iii).

173 Petition at 12.

The burden of convincing the Commission that a petitioner can make a valuable contribution to the agency's decision-making process lies with the petitioner.[174] ELPC has not come remotely close to meeting that burden here.

V. CONCLUSION

As established above, each of the proposed contentions fails to satisfy one or more of the six admissibility criteria in 10 C.F.R. § 2.309(f)(1), and ELPC has not demonstrated standing to intervene. Accordingly, 10 C.F.R. § 2.309(a) requires that the Commission deny the Petition for both of these reasons.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated at Washington, D.C.
this 30th day of July, 2021

[174] *See Sheffield*, ALAB-473, 7 NRC at 744.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket Nos.:
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	)	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,
(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)	)	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
	)	July 30, 2021

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Exelon's Answer Opposing the Petition of the Environmental Law & Policy Center for Leave to Intervene and for a Hearing" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

Signed (electronically) by Grant W. Eskelsen

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