RAS 10513

September 15, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
EXELON GENERATION COMPANY, LLC and PSEG NUCLEAR, LLC	)	Docket Nos. 50-277 50-278
	)	
(Peach Bottom Atomic Power Station, Units 2 and 3)	)	
	)	

ANSWER OF EXELON GENERATION COMPANY, LLC TO REQUEST FOR HEARING OF ERIC JOSEPH EPSTEIN

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h)(1), Exelon Generation Company, LLC ("Exelon Generation") herein answers the request for hearing and petition to intervene ("Petition") dated August 21, 2005, filed by Mr. Eric Joseph Epstein.[1] Mr. Epstein's Petition relates to the joint request of Exelon Generation and PSEG Nuclear LLC ("PSEG Nuclear") pursuant to 10 C.F.R. § 50.80 for Nuclear Regulatory Commission ("NRC" or "Commission") consent to transfers of the operating licenses for Peach Bottom Atomic Power Station, Units 2 and 3 ("Peach Bottom"), to the extent those licenses are currently held by PSEG Nuclear LLC.

[1] The Petition was dated August 21, 2005 and served by electronic mail that same day. August 21 was a Sunday. Under 10 C.F.R. § 2.305, service is not complete until the original and paper copies are served. Service could not have been effectively accomplished until Monday, August 22 — the next business day. Accordingly, for purposes of computation of a time for a response, the Petition filing date should be considered to be August 22, 2005, and the response date would be September 16, 2005.

In fact, PSEG Nuclear currently owns a 50% non-operating interest in Peach Bottom. Exelon Generation currently owns the other 50% and is the licensed operator. The proposed transfer of PSEG Nuclear's partial ownership interest in Peach Bottom is part of the proposed merger of PSEG Nuclear's indirect parent corporation, Public Service Enterprise Group Incorporated ("PSEG"), with Exelon Corporation ("Exelon"), the indirect parent company of Exelon Generation. The proposed transfers do not change the licensed operator or involve any physical or operational changes at Peach Bottom. Exelon Generation will continue to operate the units.

As discussed below, Mr. Epstein in his Petition has not demonstrated how he could be injured by the proposed license transfers and therefore has not demonstrated the standing required to request a hearing and to intervene. Moreover, his proposed contentions do not raise genuine or material issues related to the proposed license transfers. Rather, the contentions are based on a misguided perception of the "virtual divestiture" associated with the Exelon-PSEG merger; are directed at current operating matters that are neither created nor exacerbated by the merger; raise matters of no consequence to the NRC approval requested; or otherwise fail to demonstrate the existence of a genuine issue. Therefore, no hearing is warranted under the Commission's rules of practice.

II. BACKGROUND

Exelon Generation filed the license transfer application at issue on March 3, 2005.[2] The Application included a request for NRC consent to direct transfers of the licenses for Peach Bottom held by PSEG Nuclear associated with PSEG Nuclear's 50% non-operating

[2] J.A. Benjamin to NRC, Document Control Desk, "Application for Approval of License Transfers" (March 3, 2005) ("Application").

interests in the two units.[3] PSEG will merge into Exelon and Exelon will change its name to Exelon Electric & Gas Corporation ("EEG"). Exelon Generation will be an indirect subsidiary of EEG. Exelon Generation will hold a 100% ownership interest in Peach Bottom and will continue to be the plant operator.[4]

Exelon Generation submitted additional information in support of the Application to the NRC on May 24, 2005. Subsequently, on August 2, 2005, the NRC published a *Federal Register* notice with an opportunity for a hearing, limited to the transfer of PSEG Nuclear's ownership interest in Peach Bottom.[5]

Any proceeding on an application for consent to the direct or indirect transfer of control of a license is to be conducted under the general rules of 10 C.F.R. Part 2, Subpart C, and the specific rules of 10 C.F.R. Part 2, Subpart M. *See* 10 C.F.R. §§ 2.310(g), 2.1300. Recognizing the time-sensitivity involved in license transfer cases and that "license transfers do not involve any technical changes to plant operations," Subpart M was specifically adopted by the Commission to provide streamlined hearing procedures for license transfer matters. *See* Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721-22 (Dec. 3, 1998). To intervene in connection with a license transfer, a petitioner must show the requisite standing in accordance with 10 C.F.R. § 2.309(d). In addition, in accordance with 10 C.F.R. § 2.309(f), the petitioner must set forth contentions, demonstrate that each issue

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3 The Application included other proposed license transfers associated with the merger of Exelon and PSEG, related to other nuclear power plants owned and operated by Exelon Generation. Those transfers are beyond the scope of the Petition.

4 The merger will be accomplished by converting PSEG shares into Exelon shares. It is anticipated that PSEG shareholders will initially hold about 32% of EEG, with current Exelon shareholders holding the balance. Accordingly, there will be no transfer of control of Exelon Generation.

5 70 Fed. Reg. 44389 (Aug. 2, 2005).

raised in the contention is within the scope of the proceeding and material to the findings the NRC must make to support the action requested, and provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. In addressing both a petitioner's standing and the admissibility of contentions, the narrow scope of NRC review of a transfer application establishes a fundamental boundary. The Commission has stated:

> Although other requirements of the Commission's licensing provisions may also be addressed to the extent relevant to the particular transfer action, typical NRC staff review of such applications consists largely of assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC regulations.

63 Fed. Reg. at 66,722. The Commission has further observed in a license transfer case that "a license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant." *Vermont Yankee Nuclear Power Corp., et al.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 169 (2000) (citation omitted). Operational issues that "will remain the same whether or not the license is transferred" are beyond the scope of a transfer proceeding. *Id.*

As discussed below, Mr. Epstein has not established how he could be injured by the transfer of PSEG Nuclear's partial, non-operating interest to Exelon Generation. Likewise, he has identified issues that are beyond the scope of the relevant review and relevant findings; that are unsupported by facts; and that are otherwise inappropriate for litigation in this forum.

III. STANDING

Under 10 C.F.R. § 2.309(d), to establish standing a petition to intervene must set forth the nature of the petitioner's right to be made a party, the nature of the petitioner's interest in the proceeding, and the possible effect on that interest of any decision or order that may be issued in the proceeding. In assessing such a showing, the Commission has long applied judicial

concepts of standing. Specifically, a petitioner must demonstrate (1) that the proposed action will cause an "injury-in-fact" that is within the "zone of interests" protected by the governing statute; (2) that the injury can be fairly traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision in the proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). In particular, the Commission has determined that it is incumbent upon the petitioner to allege some "plausible chain of causation" from the licensing action at issue to the alleged harm that would be redressed. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999).

Mr. Epstein is petitioning on his own behalf. He bases his interest in the proceeding and his standing on no more than his statement that he "lives and operates a business" 40 miles northeast of Peach Bottom. (From plotting Mr. Epstein's address onto a Peach Bottom emergency preparedness map, it appears that he actually lives about 48 miles from the site.) He seems to assume that residency at that distance alone confers standing. However, although the NRC has applied a presumption of standing in initial reactor operating license proceedings for individuals who live within 50 miles of a plant, it has held that a more stringent standard applies to proceedings involving approvals lacking an "obvious potential for offsite consequences." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); *see also Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985) (residence 43 miles from the plant is inadequate for standing with respect to a spent

fuel pool expansion). Mr. Epstein never attempts to demonstrate — and therefore clearly never establishes — how the proposed transfer of a 50% non-operating ownership interest in Peach Bottom will lead to harm to Mr. Epstein 40 (or more) miles from the site. Contrary to Mr. Epstein's assertions, the proposed license transfers do not involve any changes to the plant, to operating procedures, to design basis accident analyses, or to plant management or other personnel.

In license transfer cases, the Commission has generally found standing only for petitioners "living or active quite close to the site." *Vermont Yankee*, CLI-00-20, 52 NRC 163-64. In *Vermont Yankee*, the petitioner was living 6 to 6 1/2 miles from the site. In *GPU Nuclear, Inc., et al.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193 (2000), the Commission found standing for a petitioner organization representing individuals living within 1 to 2 miles of the plant. *Id.* at 203. Similarly, in *Power Authority of the State of New York, et al.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266 (2000), the Commission found standing for organizations representing individuals living 5 1/2 miles from the plant as well as individuals who worked inside the plant. *Id.* at 293-294. Mr. Epstein lives and conducts business at a far greater difference. Furthermore, these past cases have involved transfers of 100% ownership of the plant and *operating authority* for the plant. The approval requested in the present case is distinctly different and is one with, at most, a very tenuous connection to nuclear accident risk. The petitioner has not made any convincing demonstration that a transfer of a 50% ownership interest, resulting from the merger of the parent company of one present co-owner into the parent company of the other present co-owner (and operator), will lead to an increased risk of off-site injury at a substantial distance (40 or more miles) from the plant.

The Commission and its boards will normally look to the nature of the proposed action to determine the extent to which standing can be based on geographic proximity. In *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 427-29 (2002), concluding that a 50 mile presumption was too much, the Licensing Board set a 17 mile radius as a guide for deciding standing in a proceeding on a license to construct and operate an independent spent fuel storage installation at a reactor site. Similarly, the Licensing Board in *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-3, 57 NRC 45, 60-63 (2003), involving a license amendment related to accident analyses for fuel handling accidents, found standing for one group based on a member's residence 2 miles from the plant, but rejected standing for another group with a member's residence 23 miles from the plant. It would be incongruous to conclude that Mr. Epstein, at 40 (or more) miles from the site, somehow has standing with respect to the present transfer application involving transfer of an ownership share, which has no obvious potential to lead to offsite consequences, but would not have standing in connection with the matters such as those addressed in *Diablo Canyon* and *Millstone*.

In *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993), the Commission found standing for a petitioner in a license transfer case where the petitioner resided 35 miles from the plant. That case, however, is clearly distinguishable from the present situation. *Vogtle* involved a proposed transfer of operating authority for the plant from Georgia Power Company to Southern Nuclear Operating Company ("Southern Nuclear"), and the petitioner alleged that Southern Nuclear management lacked the "character, competence, and integrity" to manage the plant in accordance with regulatory requirements. *Id.* at 33. The Commission held that it could not conclude at the threshold that the

petitioner "would not face increased risk of radiological injury." *Id.* at 37. However, in the present case the current plant operator (Exelon Generation) is not changing.

Finally, Mr. Epstein includes in his Petition (at 12-13) a laundry list of other activities he has been involved with related to either the Three Mile Island station or Peach Bottom. Mostly, these activities involve monitoring of issues related to the stations and participating in economic regulatory proceedings. None of these activities establish the "injury in fact" required for standing in this proceeding. His interest could best be described as academic, rather than "concrete and particularized." *Compare Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Suffice it to say, longstanding precedent establishes that an interest in an issue alone does not establish standing. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972).

At bottom, Mr. Epstein has not demonstrated how he can suffer any radiological injury as a result of the license transfers proposed by Exelon Generation, or how a speculative injury would be redressable in this proceeding. The burden for such a showing is placed on the petitioner, and Mr. Epstein has not met that burden in his filing. Therefore, the Petition should be dismissed for lack of standing.

IV. PROPOSED CONTENTIONS

Under 10 C.F.R. § 2.309(f)(1), for each proposed contention the petitioner must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

The Commission has emphasized on numerous occasions that these standards are to be strictly applied. *See, e.g., Arizona Public Service Company, et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991) ("if any one of these requirements is not met, a contention must be rejected"); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 212-13 (2003). In particular, the Commission will not accept vague, unparticularized issues, unsupported by alleged fact or expert opinion and documenting support. *Oyster Creek*, CLI-00-6, 51 NRC at 203, *citing North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). Likewise, issues outside the scope of the required NRC review and hearing notice cannot be admitted. *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n. 6 (1979). Under these standards, Mr. Epstein's proposed contentions are not admissible.

Contention 1

The management committee of Exelon may change as a result of the "virtual divestiture" and "virtual ownership" of portions of Peach Bottom.

Mr. Epstein's first contention is a confused challenge to the proposed license transfers based on Exelon's commitments made to the Federal Energy Regulatory Commission ("FERC") in connection with FERC review and approval of the Exelon-PSEG merger. Mr. Epstein incorrectly argues that the commitments, described as a "virtual divestiture" of nuclear

assets, could lead to foreign ownership and operation of Peach Bottom or foreign domination of the "management committee" of Exelon.[6] Petition, at 16. He demands that the Commission "compel Exelon to identify how much of Peach Bottom 2 and 3, Hope Creek and Salem will be divested, and who will purchase the assets."[7] *Id.* at 18. Mr. Epstein is simply incorrect in his facts and thus has failed to demonstrate a *genuine* dispute with respect to a material issue. The contention should be rejected.

To clarify, FERC regulations require that, to obtain approval for the proposed merger, Exelon satisfy a competitive analysis screen to determine if unacceptable market concentration would result from the merger. FERC's objective is to ensure that the combined entity (in this case, EEG) would not have market power which, if exercised, could potentially harm competition in the relevant wholesale electric market. To reduce the amount of market concentration to a level that would satisfy FERC's standards, Exelon proposed mitigation in the form of sales of some of the energy generated by the nuclear plants (which the company refers to as a "virtual divestiture") and actual sales of fossil generation plants. More specifically, FERC approved the proposal to sell outright 4,000 MW of coal, mid-merit and peaking units, and to "virtually divest" through energy sales 2,600 MW of nuclear energy.[8] The nuclear mitigation strategy is described as a "virtual divestiture" because it is *not* an actual sale of the nuclear assets to a third party and does *not* change the operator of the assets. It is a 24-hour-a-day sale of energy for a fixed price at a delivery point comprised of a collection of nuclear buses in the PJM

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6 It is unclear what Mr. Epstein means by the "management committee of Exelon." No such organization exists. We assume he means the management of Exelon Generation.

7 To the extent the proposed contention addresses Salem and Hope Creek, on its face it raises matters beyond the scope of the hearing notice and this proceeding.

8 *See* "Order Authorizing Merger Under Section 203 of the Federal Power Act," 112 FERC ¶ 61,011 (issued July 1, 2005) ("FERC Order").

East region. This structure removes any financial incentive to economically or physically withhold nuclear-generated energy from the market. At bottom, the "virtual divestiture" is an arms-length arrangement for power delivered without recourse to operation or management of the facility.

From FERC's perspective, the sale of energy associated with Exelon's nuclear mitigation strategy accomplishes the same objective as would an actual sale of a nuclear facility because it financially obligates Exelon to deliver the energy and impedes any ability Exelon might have to artificially withhold energy from the market. As relevant here, however, Exelon Generation will continue to own and operate the nuclear units — including Peach Bottom — exactly as before the "virtual divestiture." The "virtual divestiture" does not involve any transfer of control of Peach Bottom, nor does it involve any change to the management of Exelon Generation. It cannot result in any foreign ownership or control of the nuclear units. The question raised in the Petition regarding how much of Peach Bottom energy will be sold as part of the "virtual divestiture" is completely immaterial and irrelevant to the issues the NRC must review in connection with the proposed transfers. In fact, the question reflects an even deeper misunderstanding of the FERC-approved "virtual divestiture" because, technically, all of the energy sold as part of the auction will come from Exelon Generation's portfolio and none of it will be tied directly to the output of a particular nuclear unit or units.[9]

With respect to proposed contentions and supporting information, the Commission's boards have previously recognized that they are "not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for

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[9] Exelon does have the option of entering into long-term contracts tied to particular nuclear units outside of the auction. Nevertheless, no such sale involving Peach Bottom, if one

a contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998); *see also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996) ("[a] document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show"). Moreover, an imprecise reading of a document "cannot serve to generate an issue suitable for litigation." *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300 (1995). Under the present circumstances, where the proposed contentions merely reflect the petitioner's own confusion, there is no *genuine* dispute and the contention cannot be admitted.[10] *See* 10 C.F.R. § 2.309(f)(1)(vi).

Contention 2

Exelon's auction manager, who was contracted to "virtually divest" the ownership of Peach Bottom, may be owned, controlled or dominated by foreign interests.

This speculative, hypothetical contention raises the prospect that the independent auction manager to be retained by Exelon to coordinate the "virtual divestiture" could have "ties to foreign governments." Petition, at 19-20. In particular, Mr. Epstein cites Market Design, Inc. ("MDI") and the mere fact that Exelon disclosed that MDI has an "international reputation" and is currently "managing similar auctions of base load nuclear energy and peaking capacity in

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were to be concluded, would in any way change the ownership or the operator of the plant.

10 Furthermore, the proposed contention is, by its terms, entirely speculative. Mr. Epstein argues that the management committee "may change" (Petition, at 15) and that "there is a distinct possibility" that portions of Peach Bottom's generating assets will be sold (*Id.*, at 16). The contention should be rejected for this reason alone. If any portion of Peach Bottom is ever, in fact, sold, Exelon Generation will at that time seek the approval necessary under 10 C.F.R. § 50.80.

France and Belgium." *Id.* at 19. This proposed contention fails to raise any genuine issue with respect to any matter material to the proposed license transfers currently at issue.

Quite simply, NRC regulations do not establish any requirements with respect to auction managers for power sales (or, for that matter, actual plant sales). Section 103.d of the Atomic Energy Act establishes restrictions on foreign ownership and control of nuclear plants. Accordingly, 10 C.F.R. § 50.33(d) requires applicants for licenses to disclose certain information germane to foreign ownership and control. Likewise, 10 C.F.R. § 50.38 specifically prohibits foreign entities, and entities owned, controlled, or dominated by a foreign entity, from being an NRC power reactor licensee. However, Exelon and PSEG Nuclear are not, in the transaction under review, selling any actual ownership of Peach Bottom to a foreign concern, nor is any control over the plant or plant operations being conveyed to a foreign concern as part of the "virtual divestiture." The fact that the auction manager may have an international reputation based on experience managing auctions of base load nuclear energy and peaking capacity in Europe is immaterial to NRC requirements and the present NRC transfer review. The issues raised in the Petition also have no conceivable bearing on nuclear safety. Accordingly, the proposed contention should be rejected under 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), and (vi).

Contention 3

Exelon will not continue to own, operate, and market power from Peach Bottom.

This proposed contention is again premised upon a misunderstanding of the proposed "virtual divestiture." Mr. Epstein cites the FERC Order of July 1, 2005, approving the merger and the "virtual divestiture" mitigation plan. Mr. Epstein mischaracterizes that order, and then argues that "Exelon and PSEG have made misleading or material false statements" in the March 3, 2005 license transfer Application in stating that "Exelon Generation will continue to own, operate, and market power from a diverse portfolio of nuclear, fossil, and hydroelectric

generating units." Petition, at 21. Secondarily, Mr. Epstein argues that "[t]he NRC must also examine the veracity of the Applicants' assertion: 'Furthermore, based upon the financial stature of the company, Exelon Generation *expects to have an investment grade bond rating*, which will enable the Company to raise additional funds as necessary.'" *Id.* (emphasis in Petition, not the Application). He argues that the "NRC must order Exelon to justify their unsustained claims regarding investment bond grades [*sic*] ratings. . . ." *Id.* at 23. Neither portion of this contention, however, establishes a legitimate, material dispute.

First, with respect to the statement in the Application that Exelon "will continue to own, operate, and market power from a diverse portfolio" of generating units, the statement is quite clearly accurate. Mr. Epstein questions the statement based only on the FERC Order of July 1, 2005, from which he extracts the following quote:

> Here, the virtual divestiture effectively transfers control of the output of 2,600 MW of nuclear capacity from the merged firm to the purchasers. That is, the merged firm cannot withhold the energy from the market and the buyer of the firm rights, not the seller, determines where and to whom the energy is ultimately sold. In effect, the virtual divestiture is a must-offer provision that removes the ability to withhold output, along with a contractual obligation that reduces the incentive to withhold output in order to affect market outcomes.[11]

Mr. Epstein reads this as establishing that "the FERC Order is contingent upon Exelon *transferring ownership of their nuclear generating assets* in order to ameliorate market power concentrations." Petition, at 20 (emphasis in Petition). However, the FERC Order (and the quoted language) does not say anything about transferring ownership of assets. Rather, the quoted language states that the "virtual divestiture effectively transfers control of the *output* of 2,600 MW of nuclear capacity" (emphasis added). There is no basis for the claim of a false

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[11] FERC Order, slip op. at 46.

statement and no basis for an admissible contention. It should be rejected under 10 C.F.R. § 2.309(f)(1)(vi).

Second, with respect to the statement in the Application that Exelon Generation "expects to have an investment grade bond rating," it is not clear what issue Mr. Epstein would litigate. The statement in the Application is one of Exelon Generation's expectation. Mr. Epstein has not shown that any other expectation exists that would support his assertion that this was a "material false statement." But, in any event, a bond rating from Standard and Poors of BBB- ("triple B minus") or better is "investment grade." Mr. Epstein's Petition cites a BBB bond rating for Exelon from June 2004, which would be investment grade. In fact, Exelon's senior unsecured rating was and remains BBB+. The bond rating for Exelon Generation (the licensee) for senior unsecured debt is A-. Therefore, quite simply, there is no admissible issue.

Furthermore, there is in any event no requirement in Part 50 that a licensee have or maintain an investment grade bond rating. In accordance with 10 C.F.R. § 50.33(f)(2), non-utility NRC licensees must demonstrate that they are financially qualified by providing 5-year projections showing revenue from the sale of electricity from the nuclear units sufficient to cover nuclear operating costs. With respect to Peach Bottom, both Exelon Generation and PSEG Nuclear are presently licensees, with the appropriate financial qualifications. As a result of the merger, their ownership interests, revenues, and costs will be combined. Notwithstanding that no new party is being introduced, the license transfer Application incorporated by reference detailed financial projections for the combined company for the first five years after the merger.[12] The financial projections are consistent with and fully satisfy NRC guidance on

[12] Application, at 4. Additional information on the financial projections was included in the May 24, 2005 supplement to the Application.

financial qualifications in NUREG-1577 (Rev. 1), "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance" (March 1999). No further showing with respect to bond ratings is required.[13] Therefore, Mr. Epstein's contention regarding the "reputations" of Exelon and PSEG are immaterial and his demand for further justification seeks a remedy that exceeds NRC requirements. The proposed contention should be rejected under 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).

Contention 4

The technical qualifications of Exelon will be affected by the proposed license transfers.

In this proposed contention, Mr. Epstein — as reflected from the first sentence of the basis statement — appears to recognize that the proposed license transfers do not change the licensed operator. He challenges the "status quo" regarding the technical qualifications of Exelon Generation as the operating licensee. Petition, at 24. Mr. Epstein believes that the status quo with regard to technical qualification is inadequate, based on: (1) problems with the training program at Three Mile Island; (2) staffing reductions at Peach Bottom since Exelon Generation became the operator; (3) "a disproportionate number of unscheduled shutdowns" experienced by Peach Bottom, Unit 2; and (4) an Office of Investigations report and NRC enforcement action in 2001 involving emergency preparedness personnel. *Id.* at 24-27. However, all of these matters are beyond the scope of the present proposed license transfers and this proceeding.

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[13] For operating license reviews, NUREG-1577, Section III.1.b, does allow a reviewer to consider investment grade bond ratings from widely-accepted ratings organizations, in order to find applicants financially qualified. However, this is by no means a requirement. Nor does it mean that a bond rating less than investment grade would mean that the applicant is unqualified. Indeed, the guidance further concludes that if an applicant cannot meet the criterion the reviewer would consider other financial information. *See* NUREG-1577, at 5. Accordingly, Mr. Epstein's speculation regarding bond ratings could not lead to any meaningful remedy in this proceeding.

The proposed license transfers do not change the licensed operator at Peach Bottom. They do not involve or implicate the training program at Three Mile Island,[14] or the staffing level,[15] number of unscheduled shutdowns, or emergency preparedness at Peach Bottom.[16] The matters raised in the Petition are all past and current operational issues at the stations involved, and they are matters that remain subject to normal NRC oversight. As such, they are beyond the scope of a license transfer review — particularly where the license transfer does not involve a new operator. *See Oyster Creek*, CLI-00-6, 51 NRC at 212-13 ("A license transfer proceeding is not a forum for a full review of all aspects of current plant operation"); *see also Consolidated Edison Co. of New York, et al.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 146-47 (2001) (rejecting a proposed contention regarding the plant's emergency response plan because it is an issue relating to daily plant operations, not license transfer).

In sum, the issues raised in this proposed contention are not material to the findings the NRC must make in connection with the license transfers. Nor are they within the

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14 With respect to training at Three Mile Island, it should be noted that the Institute for Nuclear Power Operations ("INPO") recently renewed the accreditation of the programs that were on probation.

15 With respect to staffing at Peach Bottom, Exelon Generation is responsible as the licensee for the performance at the station. However, as discussed further below in connection with proposed Contention 5, apart from a few specific staffing and qualifications requirements, no particular NRC approval is required in connection with past or future staffing changes. Exelon Generation retains the discretion to determine appropriate staffing levels for safe and efficient nuclear operations.

16 With respect to emergency preparedness at Peach Bottom, the Petition (at 27) deceptively alludes to the 2001 enforcement action for Limerick and Peach Bottom related to siren maintenance and testing records. The enforcement action (EA-01-188/EA-01-189) was issued in a Notice of Violation ("NOV") dated October 23, 2001. The NOV was for a Severity Level III violation. However, although a $55,000 base civil penalty was "considered" (as it would be for any Severity Level III violation), no civil penalty was actually proposed because credit was given for (a) Exelon Generation's identification and reporting of the matter to the NRC and (b) the licensee's "prompt and comprehensive" corrective actions.

scope of the proceeding. The proposed contention, therefore, must be rejected. *See* 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).

Contention 5

The new Management Model: the Exelon Way, may result in the "downsizing" of Exelon personnel or reassignment to nuclear stations involved in the proposed merger.

This proposed contention challenges the Exelon Management Model, arguing that "[c]ut and slash personnel programming is the heart and soul of the new Management Model referred to as the 'Exelon Way.'" Petition, at 30. Mr. Epstein cites various statistics related to workforce reductions throughout the company's business units (*i.e.*, not limited to Peach Bottom), and seeks NRC review, prior to approving the requested license transfers, of the Management Model submitted to the Pennsylvania Public Utilities Commission and to FERC. *Id.* at 29-30. The Petition also again vaguely implicates the "virtual divestiture" in the concerns regarding staffing and organization. *Id.* at 31. However, like Contention 4, this proposed contention is a challenge to the status quo and is outside the scope of this proceeding.

As discussed above, the proposed license transfers do not introduce a new operator at Peach Bottom. Exelon Generation is already the licensed operator. Moreover, as a matter of simple fact, Mr. Epstein is again confused. The Exelon Way is not the same as the Exelon Management Model. The latter is an organizational approach to managing the company's nuclear fleet, which is not new to Peach Bottom and is not changing. The former is an approach to maximize business efficiency which, with respect to staffing levels, has already been applied to the nuclear stations (including Peach Bottom). Past reductions cannot necessarily be extrapolated into the future. Certainly, no staffing reductions at Peach Bottom will follow directly from the merger with PSEG Nuclear. Likewise, the "virtual divestiture" has

no relationship to the staffing level at Peach Bottom or to Exelon Generation's nuclear organizational structure.

In total, proposed Contention 5 again raises issues beyond the scope of the proceeding. In *Oyster Creek,* a case actually involving a transfer of the license to a new operator, the Commission rejected an analogous issue alleging "cost-cutting" and layoffs. The Commission observed:

> For key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. *See* 10 C.F.R. § 50.54(m). Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then (as noted above) the agency can and will take the necessary enforcement action to ensure the public health and safety. The Oyster Creek application does not on its face suggest any likelihood of a cost-driven lapse in compliance with NRC safety rules.

CLI-00-6, 51 NRC at 209; *see also FitzPatrick/Indian Point 3*, CLI-00-22, 52 NRC at 313 ("speculation about the likelihood and ramifications of staff reductions is insufficient to trigger a hearing"). Accordingly, this proposed contention should be rejected under 10 C.F.R. §§ 2.390(f)(1)(iii) and (iv).

Contention 6

Exelon's programs, procedures, and conduct of operations will be altered for these facilities as a result of the merger.

This proposed contention alleges that there will be "additional risks such as cost uncertainties associated with major outages" as a result of bringing "PSEG's nuclear plants under one corporate control with Exelon and AmerGen's plants." Petition at 31. In particular, Mr. Epstein states that the capacity factors at Hope Creek and Salem "have historically been far below the national and Exelon averages." *Id.* at 32. The argument seems to be that these factors call into question the overall financial projections for the combined, post-merger EEG. The

Petition states: "the bottom line is that if these plants fall below these optimistic operating margins, or are forced to undergo extended outages, Exelon-PSEG must buy higher priced energy from the market." *Id.* at 33. The Petition also alleges a "disturbing trend" of "declining performance" at Exelon and asserts that the NRC "must investigate not only staffing levels and organizational infrastructure at Peach Bottom, but the Commission must scrutinize, determine, and insist that programs, procedures, and conduct of operations to address problems and challenges as a result of the merger, will not be altered." *Id.* at 34. The Petition, however, completely fails to demonstrate how any of this is relevant to the issues raised by the license transfers or how there is a genuine dispute regarding the financial qualifications of Exelon Generation.

First, the specific request for relief in the proposed contention demonstrates the inadmissibility of the contention. Mr. Epstein insists that programs, procedures, and conduct of operations not be altered as a result of the merger, and again seeks an investigation of "staffing levels and organizational infrastructure." *Id.* The fact is, however, that nothing in the merger — or more particularly in the proposed transfer of PSEG Nuclear's non-operating ownership interests — involves altering programs, procedures, conduct of operations, or staffing levels at Peach Bottom. The proposed contention certainly does not identify any programs, procedures, or conduct of operations that would be altered. And, as previously discussed, the proposed transfer of ownership does not bear on staffing levels or organizational infrastructure at Peach Bottom. Therefore, the proposed contention should be rejected for lack of specificity, lack of materiality, and for seeking relief that is not available in connection with the license transfer review.[17]

[17] Of course, as discussed previously, the conduct of operations at Peach Bottom will continue to be subject to regulatory oversight. Problems can be addressed by the NRC if

Second, the proposed contention appears to be based upon the premise that the entire merger is now under NRC review. The proposed contention raises questions regarding performance, capacity factors, and outage durations at Salem and Hope Creek, which are not the subjects of the transfer application under review in this proceeding. The contention also vaguely suggests declining performance at other Exelon plants. None of these assertions is convincingly linked to Peach Bottom or the transfer of the PSEG Nuclear ownership interest here at issue. There is no specific challenge, with supporting basis, demonstrating how these factors create financial uncertainly or safety risk with respect to Peach Bottom.

Exelon Generation currently operates Peach Bottom and is currently responsible for its share of operating costs. Likewise, as a 50% owner, PSEG Nuclear is currently responsible for its pro-rata share of Peach Bottom operating costs. Folding PSEG Nuclear, and its nuclear plants, directly into Exelon does not in itself create or increase financial uncertainty related to Salem and Hope Creek performance. In fact, PSEG Nuclear is presently financially qualified, as a non-electric utility, to be the licensee for Salem, Hope Creek, and Peach Bottom.[18] Without more specificity and support, the Petition has not demonstrated a genuine, litigable dispute regarding the future financial qualifications of the combined entity.

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and when they arise. Petitioners can also seek enforcement action under 10 C.F.R. § 2.206.

18 For example, on February 16, 2000, the NRC issued orders approving the transfers of the licenses for Hope Creek and Salem, to the extent held by Public Service Electric and Gas Company, to PSEG Nuclear. PSEG Nuclear was determined to be financially qualified to be the owner and operator of those stations. On that same date, the NRC issued an order approving transfers of the ownership interests in Peach Bottom held by Public Service Electric and Gas Company to PSEG Nuclear. The safety evaluation included positive findings with respect to PSEG Nuclear's financial qualifications and decommissioning funding assurance for its Peach Bottom ownership share.

Finally, as discussed above, in the Application the parties referenced detailed financial projections for the combined EEG. The Petition seems to challenge those projections by arguing that the assumed capacity factors are too optimistic. However, in *Oyster Creek* the Commission rejected a similarly vague contention for lack of documentary or expert opinion supporting the argument that actual capacity factors would be lower than assumed in the projections. CLI-00-6, 51 NRC at 207. In the present case, there is certainly no showing in the Petition of a sensitivity in Exelon Generation's overall financial qualifications to the assumed capacity factors, if performance at one or more stations is lower than projected. Exelon Generation will clearly be a robust generating company, with a substantial fleet of diverse generation assets and with an obvious ability to access credit markets. The Commission has previously recognized that "absolutely certain predictions of future economic conditions" are not required and that "the mere casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance." *North Atlantic Energy Service Corporation* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999). When viewed in light of the magnitude of the financial projections for the combined companies, as well as this Commission's standard for a financial qualifications showing, proposed Contention 6 certainly lacks a basis sufficient to demonstrate a genuine dispute.

In sum, the proposed contention should be rejected because it is based on a faulty premise that programs, procedures, and conduct of operations will change at Peach Bottom as a result of the proposed license transfers. In addition, the proposed contention raises matters more directly applicable to other PSEG Nuclear or Exelon Generation units that are not the subject of this proceeding. Finally, to the extent the contention is somehow deemed to raise a financial qualifications issue related to Exelon Generation, there is no showing — with a supporting

basis — as to how uncertainties would be created or increased, or how any such uncertainties would appreciably affect the ability of Exelon Generation to cover 100% of the operating costs of Peach Bottom. The vague concerns regarding financial uncertainties articulated in the contention are unsupported and inadequate to demonstrate a genuine issue. The proposed contention should be rejected under 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

Contention 7

Exelon's training programs, procedures, and conduct of operations for Emergency Planning are in violation of federal regulations.

Contention 7 alleges that Exelon Generation is "in violation of Federal Laws put into place due to Presidential Executive Order 12148," because Peach Bottom has "failed to include child care facilities in their Radiological Emergency Plans for the past 18 years." Petition, at 35. Mr. Epstein claims a violation of a number of regulations, including 10 C.F.R. § 50.47 and Part 50, Appendix E. The proposed contention raises matters that are not relevant to the findings required in connection with a license transfer and that are beyond the scope of the proceeding.

As discussed previously, the proposed transfer of PSEG Nuclear's ownership interests does not change the licensed operator. Moreover, it does not involve any change in the emergency plan or emergency preparedness procedures. Similar proposed emergency preparedness contentions were rejected in *FitzPatrick/Indian Point 3*, CLI-00-22, 52 NRC at 317, and *Indian Point 2*, CLI-01-19, 54 NRC at 146-47 ("emergency response claims relate to the everyday running of the plant, not to license transfer"). To the extent Mr. Epstein claims that a violation of NRC regulations exists at Peach Bottom, the appropriate procedure to follow is 10 C.F.R. § 2.206. No hearing is justified in this forum. The contention should be rejected under 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).

Contention 8

The proposed license transfers will adversely impact Exelon's off-site emergency preparedness program.

Like proposed Contention 7, this proposed contention relates to off-site emergency preparedness. Rather than alleging a current violation of regulations at Peach Bottom, Contention 8 speculates regarding the possibility of *future changes* that might result due to the merger of Exelon and PSEG. The contention vaguely refers to the "negative fallout of the previous [Emergency Operations Facility ("EOF")] consolidation" for Peach Bottom and Three Mile Island, and argues that the NRC should "fully flush out the impact of further [unspecified] emergency plan consolidations with PSEG nuclear reactors." Petition, at 36. These speculations regarding possible — but unspecified — future EOF consolidations and emergency plan changes are beyond the scope of issues to be addressed in connection with the presently proposed license transfers.

The March 3, 2005, license transfer Application for Peach Bottom did not address emergency planning issues. There was good reason for this omission. As discussed above, there will be no change to the emergency plans required as a result of the transfer of PSEG Nuclear's ownership interests to Exelon Generation. In the Petition, at 38, Mr. Epstein cites the license transfer application filed in connection with the merger for the Salem and Hope Creek stations operated by PSEG Nuclear. In those cases, the operating responsibility (including emergency preparedness) is transferring to Exelon Generation. However, the citation is inapposite for Peach Bottom because the ownership change does not, in and of itself, implicate the emergency plan. Furthermore, any future "consolidations" or emergency planning changes affecting Peach Bottom will be addressed when they materialize, in accordance with appropriate regulatory

procedures. *See, e.g.*, 10 C.F.R. § 50.54(q). The proposed contention should be rejected under 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).

In the proposed contention, Mr. Epstein also claims that "[t]he proposed License Transfers exacerbates [*sic*] problems caused by the consolidation of the TMI and Peach Bottom EOF's into one central location in Coatesville, Pennsylvania." Petition, at 38. The "problems" are not clearly specified. But, in any event, these problems — if they existed — would relate to the "everyday running" of the plants, and therefore would not be issues for a license transfer proceeding. *Indian Point 2*, CLI-01-19, 54 NRC at 146-47. One problem cited relates to the October 23, 2001, enforcement action related to siren maintenance and testing records.[19] Corrective actions for that violation were taken in due course. To the extent this assertion is a challenge to the character and competence of Exelon Generation, the challenge is in the wrong forum because the proposed license transfers do not involve any change in operator. In any event, vague allegations regarding character are insufficient to support admissibility of a contention. *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 345 (2002), *citing Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-67 (2001). These aspects of the proposed contention should be rejected under 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), and (vi).

Contention 9

The proposed merger and proposed transfers will affect the financial qualifications of Exelon as the licensed owner and operator.

This proposed contention reprises several of the themes of proposed Contention 6. Mr. Epstein argues that the merger of Exelon and PSEG "presents additional risks such as cost

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19 *See* n.16 above.

uncertainties associated with major outages, the potential for significant liabilities that could result from increased safety requirements, and the significant costs of future capital additions." Petition, at 40. He also argues — somewhat incongruously — that the applicants in the public utilities commission forum have not considered the "impact of increased capacity factors on wholesale or retail [electricity] prices." *Id.* He vaguely argues that "[t]he Company did not attempt to examine the impact of license renewals or power uprates on the proposed 'virtual divestiture' scheme." *Id.* And, he suggests that "[t]he era of cheap and inexhaustible supplies of subsidized fuel is over and most experts anticipate price increases in the next 24-36 months." *Id.* at 41. All of this potpourri leads Mr. Epstein to conclude that "[t]he assumptions contained in the five year proprietary financial projections are unrealistic, are not supported by historic trends." *Id.* at 42. Nowhere in the rambling basis statement, however, is credible support sufficient to demonstrate a genuine dispute on a material issue.

As discussed in connection with Contention 6, in *Seabrook*, CLI-99-6, 49 NRC at 221-22, the Commission observed that absolute certainty in financial projections is not required. "The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected." *Id.* at 222. To be admissible, a contention would need to demonstrate the existence of a genuine dispute on the issue of whether the applicants' financial projections meet this standard. The Commission in *Oyster Creek* rejected a proposed financial qualifications contention where the petitioner failed to proffer "plausible and fact-based claims that a new reactor owner or operator lacks sufficient financing to run the reactor safely." The Commission found that the petitioner — just like Mr. Epstein in this case — "has offered no tangible information, no experts, no substantive affidavits. Instead, [the petitioner] has provided bare

assertions and speculation. This is not enough to trigger an adversary hearing on [the licensee's] financial qualifications." CLI-00-6, 51 NRC at 208. The same conclusion applies here.

Looking at the issues alluded to in Contention 9, it is clear that there is no substantive issue. First, as discussed above, PSEG Nuclear is presently an owner of Peach Bottom. Its share of Peach Bottom costs and revenues will simply be absorbed into Exelon. It is not at all clear how this would negatively impact the overall financial qualifications of Exelon Generation. Certainly, nothing in the Petition logically supports the argument.[20]

The vague references in the Petition to cost uncertainties associated with outages, capacity factors, electricity prices, forward projections of fuel costs, and the like, do not demonstrate a litigable dispute. Rather, this is merely a recitation of factors that Mr. Epstein believes should be addressed in financial projections. However, nowhere in the Petition does he ever engage the specifics of the financial projections or the assumptions included in the Application and in the supplement. Those materials include, for example, assumed capacity factors, fuel costs, and projected average market prices for electricity. The contention fails to identify a particular factor and challenge that factor based on tangible information, expert opinions, or substantive affidavits. The Petition, therefore, fails to meet the Commission's demanding rules for admission of contentions. *Compare Millstone*, CLI-01-24, 54 NRC at 358 ("The intervenor must do more than submit 'bald or conclusory allegation[s]' of a dispute . . . . He or she must 'read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view.'") (*citing* 54 Fed. Reg. 33,168, at 33,170-71).

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[20] In fact, as discussed in other forums, the parties expect the merger to lead to cost savings, which would improve the licensee's financial position. There is no basis to assume that Mr. Epstein's scenarios are any more likely.

In total, as discussed in connection with Contention 6, the Petition fails to acknowledge the financial qualifications issue in its appropriate, factual context. The proposed license transfers, at most, raise the issue of Exelon Generation's financial qualifications to absorb an additional 50% of Peach Bottom costs (along with pro rata revenues). Exelon Generation will in fact be a very large generating company with substantial, diverse generating assets. To establish a genuine issue with respect to financial qualifications, a petitioner would need some basis to assert that there is significant, unusual uncertainty associated with a projection (*see Seabrook*, CLI-99-6, discussed above) and that the uncertainty could reasonably impact the overall financial qualifications of the robust combined entity (that is, that there is some sensitivity in the overall result). Mr. Epstein's Petition clearly fails to satisfy either portion of this reasonable test. The contention therefore should be rejected for lack of a basis and a failure to demonstrate a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi).[21]

Contention 10

The proposed indirect and direct license transfers affect the present decommissioning funding assurances provided by Exelon Generation.

This proposed contention challenges the decommissioning funding assurance for Peach Bottom. The Petition asserts that "combining the two shares [PSEG Nuclear an Exelon Generation] can actually reduce financial qualifications based on Exelon's trust performance." Petition, at 44. The basis for the contention appears to be an argument that PSEG Nuclear's decommissioning fund investments have performed better than Exelon's — or, conversely, that

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21 In this contention Mr. Epstein also suggests that the NRC must request "basic credit and bond rating rationales used for financial assurance projections." Petition, at 42. This appears to conflate NRC's requirement for 5-year financial projections with the guidance in NUREG-1577 related to bond ratings as one possible measure of financial ability of an applicant to cover plant costs during a shutdown. However, as discussed above, there is no NRC requirement related to credit or bond ratings.

Exelon's funds "have grossly underperformed." *Id.* at 45. This, however, is not an issue relevant to the findings required in connection with the proposed license transfers. Viewed in the most favorable light possible for Mr. Epstein, it is a compliance issue related to Exelon Generation's decommissioning funding assurance — which is an ongoing matter beyond the scope of this proceeding.

Exelon Generation and PSEG Nuclear addressed decommissioning funding assurance in the Application (at 5) as follows:

> With respect to Peach Bottom, the decommissioning funds currently held by PSEG Nuclear for its ownership interest, or the beneficial interest in those funds, will be transferred to Exelon Generation's existing decommissioning trust funds for the respective unit. Therefore, the transfer of the PSEG ownership interest to Exelon Generation will not reduce the total financial assurance for Peach Bottom, Units 2 and 3.
>
> The status of decommissioning funding for Peach Bottom was shown in the most recent decommissioning funding reports submitted by PSEG Nuclear and Exelon Generation* and will be updated in status reports, as required by 10 C.F.R. 50.75, "Reporting and recordkeeping for decommissioning planning," paragraph (f), to be submitted by March 31, 2005.
>
> For PSEG Nuclear, the amounts accumulated in the funds at the end of 2002 exceeded the amount needed to be collected by that date to be consistent with the formulas in 10 C.F.R. 50.75(c). The PSEG Nuclear fund is presently fully funded with no further collections through the state regulatory process anticipated. For the present Exelon Generation share, the amounts accumulated in the funds at the end of 2002 also exceeded the amount needed to be collected. Exelon Generation is continuing to make collections for its existing share, and those collections are unaffected by the proposed transaction.

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* PSEG Nuclear Letter to NRC, "NRC Decommissioning Funding Status Report," dated March 25, 2003; Exelon Generation letter to NRC, "Report on Status of Decommissioning Funding for Reactors," dated March 31, 2003.

In fact, both licensees have submitted the required, updated decommissioning funding reports — on March 24, 2005, for Exelon Generation[22] and on March 30, 2005, for PSEG Nuclear.[23] The reports show that decommissioning funding for Peach Bottom remains in compliance with the requirements specified in 10 C.F.R. § 50.75(c). Following the license transfers, the existing funds will remain dedicated for decommissioning of Peach Bottom.

Mr. Epstein does not challenge the performance of the PSEG Nuclear trust. Rather, his focus seems to be on the investment performance of the Exelon Generation fund. Exelon Generation no longer collects funds through the state regulatory process for the decommissioning of Peach Bottom. As is the case with the PSEG Nuclear trust funds, the Exelon Generation funds are *now fully funded for decommissioning without additional contributions,* as reflected in the March 2005 report. The merger, and related license transfers, therefore cannot *reduce* decommissioning funding assurance as argued in the contention. At most, the status quo is preserved.

Moreover, the investment performance of the Exelon Generation fund is an "everyday operating issue" that exists today independent of the merger and will continue to be addressed after the merger. In this regard, Mr. Epstein challenges the use of a 2% assumed real rate of return, when recent fund performance has been below that amount. In fact, Exelon does not assume a 2% real rate of return in order to demonstrate financial assurance; a 3% rate of return is assumed in the Exelon Generation calculations. The assumption of a 3% rate of return is specifically authorized in accordance with 10 C.F.R. § 50.75, and is used as a projected, long-

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22 J.A. Benjamin to NRC, Document Control Desk, "Report on Status of Decommissioning Funding for Reactors" (March 24, 2004).

23 C.L. Perino to NRC, Document Control Desk, "NRC Decommissioning Funding Status Report" (March 30, 2005).

term average. If a 2% real rate of return were used, Exelon Generation *would still be able to demonstrate financial assurance* as required by the NRC. This aspect of the proposed contention is inadmissible as a challenge to the Commission's regulations.

Mr. Epstein also freights this proposed contention with a discussion of a site-specific decommissioning study for Peach Bottom submitted by PECO Energy (the licensee at the time) in the Pennsylvania Public Utilities Commission in 1997. Petition, at 46. In particular, he challenges the "decommissioning funding targets" calculated by the company's contractor. *Id.* at 47. However, this issue is misplaced in this forum. The NRC's decommissioning funding assurance regulations establish minimums based on a generic formula. *See* 10 C.F.R. § 50.75(c). The NRC does not require site-specific decommissioning funding estimates for nuclear plants more than 5 years prior to the end of licensed life. A contention challenging the adequacy of decommissioning funding assurance based on a site-specific estimate, or a contention demanding a site-specific study, would be barred as an impermissible challenge to the generic decision made by the Commission in its decommissioning rulemaking. *See Diablo Canyon*, CLI-02-16, 55 NRC at 341-42; *Indian Point 2*, CLI-01-19, 54 NRC at 143-44.[24]

In sum, proposed contention 10 should be rejected under 10 C.F.R. § 2.309(f)(1)(vi) because Mr. Epstein has not demonstrated a genuine dispute regarding the impact of the proposed merger and ownership transfer on decommissioning funding assurance for Peach Bottom. He has not shown how the funding assurance associated with the 50% PSEG Nuclear share is changed or reduced. Moreover, to the extent the contention challenges the funding due to the performance of the Exelon Generation portion of the fund, the Petition raises

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[24] The Petition includes (at 49) a passing reference to awaiting a private letter ruling from the Internal Revenue Service on the "tax transfer status" associated with transfer of PSEG

an ongoing operating issue that is addressed through normal regulatory processes. It is beyond the scope of this proceeding. Finally, to the extent the proposed contention ventures into site-specific decommissioning studies, it is an inadmissible challenge to the Commission's generic decommissioning rule.

Contention 11

The transfers require a proposed amendment to accommodate the changes in the design and licensing basis, plant configuration, and operation of Peach Bottom 2 and 3 as a result of Exelon's compliance with the Environmental Protection Agency's 316(b) mandate for power plants.

This proposed contention is based on Section 316(b) of the Clean Water Act, related to the environmental impact of cooling water intake structures for power producing facilities. The Petition states: "Exelon must submit a compliance filing by *September 7, 2005* to the Pennsylvania Department of Environmental Protection designating the Company's preferred alternative [for Peach Bottom] to abate the impingement and entrainment of aquatic species on the Lower Susquehanna River." Petition, at 50 (emphasis in Petition). The contention is, quite simply, in the wrong forum.

As inherently recognized in the contention itself in the language quoted above, this contention relates to a Clean Water Act compliance issue that will be addressed at the Pennsylvania Department of Environmental Protection ("PADEP"). The federal Environmental Protection Agency promulgated a final rule implementing Section 316(b) on July 9, 2004. 69 Fed. Reg. 41,576 (2004). (This was the "Phase II" rule for existing power producing facilities.) The regulation was effective on September 7, 2004, and establishes performance standards projected to reduce impingement mortality and entrainment of aquatic organisms. The rule sets

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Nuclear's decommissioning funds. That ruling was in fact received on August 11, 2005, so no genuine issue exists.

forth a series of compliance steps tied to the plant's next water permit renewal. These steps involve the collection of data about the present environmental impact of the cooling water intake, the submission of a proposed compliance plan for review and approval by the PADEP, implementation of the plan, and monitoring and verification that the plan is meeting the impingement and entrainment reduction requirements, and therefore does not need further modification. A compliance plan must be filed no later than January 2008, and actual implementation of the compliance measures would not be required until several years thereafter. The proposed license transfers do not impact these compliance requirements.

In accordance with the rule, Exelon Generation made an initial filing with the PADEP on June 10, 2005.[25] The filing outlines Exelon Generation's preliminary assessment of the issue of cooling water intake design and provides details on the information to be collected for evaluation in a comprehensive study to assure that Peach Bottom will meet the performance requirements of the rule.

At bottom, the issue raised in proposed Contention 11 is beyond the NRC's jurisdiction and wholly-unrelated to the proposed license transfers. Mr. Epstein argues that the "NRC must examine the financial impact that 316(b) compliance will have on the Direct and Indirect License Transfers, and require a license amendment to accommodate the changes in the design and licensing basis, plant configuration, and operation of Peach Bottom 2 and 3." *Id.* at 52. However, there is no basis offered for this relief. First, the alleged financial impact is neither identified nor supported. *Compare Indian Point 2*, CLI-01-19, 54 NRC at 145-46 (excluding a financial contention based on vague references to the need for future

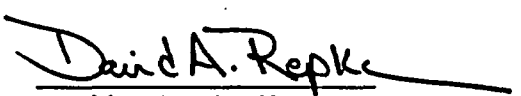
[25] The reference in the Petition to a filing date of September 7, 2005 is incorrect. There is no such filing required.

"environmental remediation"). Moreover, any financial impact due to Section 316(b) compliance will exist independent of the proposed license transfers. As the Commission has noted in other contexts, "[o]perational issues of this kind will remain the same whether or not the license is transferred." *Vermont Yankee*, CLI-00-20, 52 NRC at 169. Therefore, this issue is beyond the scope of a license transfer hearing. Any changes in the plant design or operations ultimately necessary to achieve Section 316(b) compliance can be addressed in due course, as needed. The proposed contention is beyond the scope of the proceeding and inadmissible under 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).

V. CONCLUSION

For the reasons set forth above, Mr. Epstein's request for hearing and petition to intervene should be denied.

Respectfully submitted,



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Dated in Washington, District of Columbia
this 15th day of September 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
EXELON GENERATION COMPANY,	)	
LLC and PSEG NUCLEAR, LLC	)	Docket Nos. 50-277
	)	50-278
(Peach Bottom Atomic Power Station,	)	
Units 2 and 3)	)	
	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Admissions:	District of Columbia Court of Appeals
Name of Party:	Exelon Generation Company, LLC

/David A. Repka/
David A. Repka, Esq.

Dated at Washington, District of Columbia
this 15th day of September, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
EXELON GENERATION COMPANY,	)	
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	)	50-278
(Peach Bottom Atomic Power Station,	)	
Units 2 and 3)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF EXELON GENERATION COMPANY, LLC TO REQUEST FOR HEARING OF ERIC JOSEPH EPSTEIN" and "NOTICE OF APPEARANCE FOR DAVID A. REPKA" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 15th day of September, 2005. Additional e-mail service, designated by *, has been made this same day, as shown below.

Office of the Secretary*
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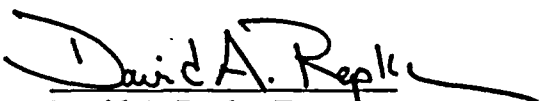

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