

RAS 10675

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 10/26/05

COMMISSIONERS

SERVED 10/26/05

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In the Matter of)

EXELON GENERATION COMPANY, LLC)

&)

PSEG NUCLEAR, LLC)

(Peach Bottom Atomic Power Station,)
Units 2 and 3))
_____)

Docket Nos. 50-277-LT & 50-278-LT

CLI-05-26

MEMORANDUM AND ORDER

This proceeding involves the proposed merger of the corporate parents of the two captioned companies and the consequent transfers of the 50-percent non-operating interests in Units 2 and 3 of the Peach Bottom facility from PSEG Nuclear, L.L.C. (PSEG Nuclear), to Exelon Generation Company, L.L.C. (Exelon Generation). To accomplish these goals, the companies need, and have here requested, a license transfer authorization pursuant to 10 C.F.R. § 50.80. Mr. Eric Joseph Epstein opposes the authorization and has petitioned us both to intervene in this proceeding and for a hearing on the proposed license transfers. Generally, Mr. Epstein argues that the license transfers raise issues involving financial and technical qualifications as well as the possible extent of foreign ownership.

To qualify as an intervenor, Mr. Epstein must proffer at least one admissible contention and demonstrate standing.¹ Exelon Generation asserts that Mr. Epstein lacks standing.² For the reasons set forth below, we agree that Mr. Epstein lacks standing to intervene in this proceeding. We therefore dismiss his petition and terminate this adjudication.³

DISCUSSION

A. Traditional Standing

The Commission does not permit uninterested persons to intervene and play the role of “private attorney general” in NRC adjudications.⁴ Rather, we insist that an intervenor have some direct interest in the outcome of the proceeding.⁵ To this end, we have imposed upon all prospective intervenors (a.k.a. “petitioners” to intervene) the requirement to show they have “standing” to participate. To meet this requirement, a petitioner like Mr. Epstein must demonstrate (among other things) that the proposed transfer would injure his financial, property or other interests.⁶

Mr. Epstein never squarely addresses this “injury” requirement. Rather, he merely points to his involvement -- both personal and through organizations -- in numerous activities related to Peach Bottom. Specifically, Mr. Epstein points to his leadership roles in two citizen

¹ 10 C.F.R. § 2.309(d), (f).

² Answer of Exelon Generation Company, LLC to Request for Hearing of Eric Joseph Epstein, dated Sept. 15, 2005, at 4-8.

³ Because our rulings on standing dispose of the case, we need not address the admissibility of Mr. Epstein’s contentions.

⁴ See, e.g., *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806 n.6 (1976), *aff’d*, CLI-76-27, 4 NRC 610, 614 (1976).

⁵ 10 C.F.R. § 2.309(d)(1)(iii).

⁶ 10 C.F.R. § 2.309(d); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

groups that monitor Peach Bottom and other plants for safety and radiation levels, his participation in negotiations regarding mergers of companies with a financial interest in Peach Bottom, his participation in negotiations involving the decommissioning tariff for Peach Bottom and other nuclear facilities, his roles as publisher and researcher of documents addressing nuclear and electric issues, and finally his status as an intervenor before both this Commission and the Pennsylvania Public Utility Commission on nuclear and electric issues.⁷

Although these kinds of involvement demonstrate both Mr. Epstein's general interest in electric and nuclear issues and his particular interest in the Peach Bottom facility, they do not demonstrate injury. It is well-established that mere intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing.⁸

B. "Proximity Standing"

The only other ground on which Mr. Epstein relies for his claim of standing is that his home and business are 40 miles from the Peach Bottom nuclear power plant. Although Mr. Epstein (who is a *pro se* litigant) cites no legal authority in support of his claim, he presumably is relying on a series of Commission decisions granting "proximity standing" to prospective litigants upon the mere showing that they lived within a certain radius of the regulated facility at issue. In such cases, a petitioner need not expressly "establish the [traditional] standing elements of injury, causation or redressability."⁹ Rather, this particular kind of standing rests on

⁷ See Mr. Epstein's Request for a Public Hearing, dated Aug. 21, 2005, at 12-13.

⁸ See, e.g., *United States Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363-64 (2004); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("[A] mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [Administrative Procedure Act]").

⁹ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150, *aff'd*, CLI-01-17, 54 NRC 3 (2001). See also *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (continued...)

the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working or living offsite but within a certain distance of that facility.¹⁰

In ruling on claims of “proximity standing,” we decide the appropriate radius on a case-by-case basis. We determine the radius beyond which we believe there is no longer an “obvious potential for offsite consequences”¹¹ by “taking account the nature of the proposed action and the significance of the radioactive source.”¹²

The initial question we need to address is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action “could plausibly lead to the offsite release of radioactive fission products from ... the .. reactors.”¹³ The burden falls on the petitioner to demonstrate this. If the petitioner fails to show that a particular licensing action raises an “obvious potential for offsite consequences,”

⁹(...continued)
(1979).

¹⁰ *North Anna*, ALAB-522, 9 NRC at 56. See also *Turkey Point*, LBP-01-6, 53 NRC at 146-47; *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation [“ISFSI”]), LBP-02-23, 56 NRC 413, 426-27 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185 (2003).

¹¹ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116 (1995); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

¹² *Georgia Tech*, CLI-95-12, 42 NRC at 116-117. See also *Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 427; *Turkey Point*, LBP-01-6, 53 NRC at 149; *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).

¹³ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271, 277 (1998), *aff’d* CLI-99-4, 49 NRC 185 (1999), *petition for review denied*, *Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000) (table).

then our standing inquiry reverts to a “traditional standing” analysis of whether the petitioner has made a specific showing of injury, causation and redressability.¹⁴

In this proceeding, we conclude that the risks associated with the transfer of the non-operating 50-percent ownership interest are *de minimis* and therefore justify no “proximity standing” at all. For purposes of “proximity standing” analysis, the instant case is quite similar to a license transfer proceeding five years ago involving the Millstone plant -- where we denied “proximity standing” to organizations which claimed to have members living within 5-10 miles of the plant. At issue there was an indirect license transfer involving no change in the facility, its operation, licensees, personnel, or financing. We found that the nature of the Millstone license transfer raised no obvious potential for offsite consequences.¹⁵ In the *Millstone* license transfer, the company operating the plant would continue to do so after completion of the merger.¹⁶ The same is true here with the Peach Bottom merger – Exelon Generation will continue to operate the plant.¹⁷

We concluded in *Millstone* that it was “far from obvious how [the] corporate restructuring would affect Petitioners’ interests.”¹⁸ And we likewise conclude here that Mr. Epstein has failed to show how the pending license transfers present an obvious potential for offsite consequences. The direct license transfer here is similar to the Millstone indirect license

¹⁴ Mr. Epstein attempts no such specific showing in his petition to intervene. His “standing” discussion rests solely on his proximity to the plant and his knowledge about and interest in Peach Bottom.

¹⁵ *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129 (2000).

¹⁶ *Millstone*, CLI-00-18, 52 NRC at 131-32.

¹⁷ Exelon’s Answer at 2; Exelon’s Application for Approval of License Transfers, dated March 3, 2005, at 2.

¹⁸ *Millstone*, CLI-00-18, 52 NRC at 132-33.

transfer insofar as the Peach Bottom transfer will result in no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel.¹⁹ Moreover, Exelon Generation will remain both a wholly-owned subsidiary of Exelon Ventures Company and an indirect wholly-owned subsidiary of Exelon Corporation, which will survive the merger.²⁰ Based on these facts, we find that the proposed license transfers raise no “obvious potential for offsite consequences”²¹ and that Mr. Epstein’s claim of “proximity standing” consequently lacks merit.²²

Our denial of “proximity standing” to Mr. Epstein -- who lives 40 miles from Peach Bottom -- falls comfortably within the parameters of our general “proximity standing” case law.

¹⁹ See Exelon’s Answer at 2. By contrast, we have granted “proximity standing” to intervenors in proceedings addressing the transfer of both operating authority and ownership interests. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317 (2002); *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109 (2001); *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266 (2000); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151 (2000); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193 (2000).

²⁰ Application for Consent to Indirect License Transfers, dated March 3, 2005, at 2.

²¹ *Georgia Tech*, CLI-95-12, 42 NRC at 116; *St. Lucie*, CLI-89-21, 30 NRC at 329-30.

²² In a belatedly filed reply brief (styled “Supplemental Filing”) addressing Exelon’s Answers in both the *Peach Bottom* and *TMI* matters, Mr. Epstein claims precedential support from the NRC’s grant of standing, in the *TMI* restart proceeding, to an intervenor living 50 miles from the plant. Supplemental Filing, dated Oct. 7, 2005, at 3-4. But under 10 C.F.R. § 2.309(h)(2), Mr. Epstein’s reply brief was due no later than September 22nd, seven days after service of the licensee’s/applicant’s Answer. Mr. Epstein’s references to section 2.309 in the cover letter to his reply brief demonstrate his awareness of this controlling regulation. Moreover, given that the authority Mr. Epstein belatedly cites is 25 years old, we see no good cause for the belated augmentation of his standing position. For all these reasons, we decline to consider the Supplemental Filing’s augmentation of Mr. Epstein’s “proximity standing” argument. But even were we to consider the merits of his latest argument, we would still reject it. Our two key rulings in this decision render the argument irrelevant: approval of these Peach Bottom license transfers presents no “obvious potential for offsite consequences” and therefore *any* “proximity standing” -- regardless of the number of miles a litigant lives from the plant -- is inapplicable to this license transfer proceeding.

For instance, in a case involving a license amendment intended to reflect the Zion plants' shutdown and de-fueled condition, a potential intervenor sought standing based on the facts that his residence was within 8½ - 9 miles of the plant, his children's schooling was within 12 miles, and his own and/or his wife's regular errands and business trips took them to within one mile of the plant.²³ The Board concluded (and we affirmed) that the license amendments at issue created no "obvious potential for offsite consequences" and that "proximity standing" should not be granted.²⁴ The Board therefore required the potential intervenor to show that the "amendments could plausibly lead to the offsite release of radioactive fission products from ... the shutdown and de-fueled ... reactors."²⁵ Similarly in *St. Lucie*, we declined to approve "proximity standing" in a reactor license amendment case where the change at issue was a worker-protection requirement with no "obvious potential for offsite consequences."²⁶

With the exception of one case quite different from ours,²⁷ even in license transfer cases where we have granted "proximity standing," the petitioners lived within a *much* smaller radius

²³ *Zion*, LBP-98-27, 48 NRC at 273-74, *aff'd*, CLI-99-4, 49 NRC at 191-93.

²⁴ *Id.*, LBP-98-27, 48 NRC at 276, *aff'd*, CLI-99-4, 49 NRC at 191.

²⁵ *Id.*, LBP-98-27, 48 NRC at 277.

²⁶ *St. Lucie*, CLI-89-21, 30 NRC at 329-30.

²⁷ *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-5, 37 NRC 96, 98, 106-07 (1993), *aff'd*, CLI-93-16, 38 NRC 25 (1993), where we approved standing for a petitioner living 35 miles from the plant one week per month. The petitioner in *Vogtle* alleged that he could suffer harm from the transfer of operating authority to a company that, according to him, lacked the "character, competence, and integrity to safely operate the Vogtle plant, and lacks the candor, truthfulness, and willingness to abide by the regulatory requirements necessary to operate a nuclear facility." CLI-93-16, 38 NRC at 33. The petitioner also alleged that management had submitted material false statements to the Commission in order to obstruct an NRC investigation. *Id.* Those unusual circumstances are not present here. Yet even in *Vogtle*, the radius we approved was less than the 40 miles urged by Mr. Epstein.

of the plant than does Mr. Epstein – *i.e.*, 6 to 6½ miles,²⁸ 5½ miles,²⁹ and 1 to 2 miles³⁰ from the plants at issue.³¹ And of greater significance, each of those cases involved the transfer of both a *100-percent ownership interest* in the plant and the *operating authority* for the plant -- a kind of transfer implicating more significant safety issues than are present here.

²⁸ *Vermont Yankee*, CLI-00-20, 52 NRC at 163-64.

²⁹ *FitzPatrick & Indian Point*, CLI-00-22, 52 NRC at 293; *Indian Point*, CLI-01-19, 54 NRC at 133 (adopting CLI-00-22's ruling on "proximity standing"). See also *Fitzpatrick*, CLI-00-22, 52 NRC at 295 (finding that a governmental entity seeking intervenor status had standing, given that its "position [was] analogous to that of an individual living or working within a few miles of a plant whose license may be transferred"); *Diablo Canyon*, CLI-02-16, 55 NRC at 347 (same).

³⁰ *Oyster Creek*, CLI-00-6, 51 NRC at 193.

³¹ See generally *Northern States Power Co.* (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000) (granting standing to petitioners who "live, work, or own property in the vicinity of the ... plants").

CONCLUSION

We reject Mr. Epstein's claim of standing and consequently dismiss this proceeding. Consistent with our prior practice, we direct the NRC Staff to consider Mr. Epstein's contentions and Supplemental Filing as if they were "written comments" under 10 C.F.R. § 2.1305.³²

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of October, 2005.

³² See, e.g., *Diablo Canyon*, CLI-02-16, 55 NRC at 348-49; *Duquesne Light Co.* (Beaver Valley Power Station, Units 1 and 2), CLI-99-23, 50 NRC 21, 22 (1999), and CLI-99-25, 50 NRC 224, 225 (1999).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-05-26) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of October 2005