UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of EXELON GENERATION COMPANY, LLC Three Mile Island Nuclear Station, Units 1 and 2	Docket No. 50-289 50-320

NRC Staff Answer to Three Mile Island Alert Petition

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December 6, 2019

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NRC STAFF ANSWER TO THREE MILE ISLAND ALERT PETITION

INTRODUCTION

The staff of the U.S. Nuclear Regulatory Commission (NRC or Commission) hereby answers the hearing request and petition to intervene filed on November 12, 2019 by Eric J. Epstein on behalf of himself and Three Mile Island Alert (TMIA) (collectively Petitioners). The petition concerns a license amendment request (LAR) submitted by Exelon Generation Company, LLC (Exelon) for Three Mile Island Nuclear Station, Unit 1 (TMI 1), and an associated exemption request. The license amendments and exemptions, if approved by the NRC, would alter TMI's site emergency plan and Emergency Action Levels to account for the permanently defueled condition of TMI 1. Petitioners proffer two contentions asserting the need for financial assurance and for environmental review of the proposed amendment.

The NRC Staff (Staff) finds that the petition is timely. However, Petitioners have neither demonstrated standing nor proffered an admissible contention because proposed contentions 1 and 2 do not satisfy the Commission's contention admissibility standards. Therefore, for the reasons set forth below, the hearing request and petition to intervene should be denied.

BACKGROUND

This proceeding concerns the two units at the Three Mile Island Nuclear Station (TMI), which differ in condition and ownership. TMI 1 and 2 are pressurized water reactors located in Middletown, Pennsylvania, about 10 miles southeast of Harrisburg, Pennsylvania.[1]

TMI 1 operated from 1974 to 2019, and is now in decommissioning after shutting down permanently in September 2019.[2] Because TMI 1 has certified that it has permanently ceased operations and permanently removed fuel from the reactor vessel, its license no longer authorizes operation of the reactor or emplacement or retention of the fuel into the reactor vessel.[3] All fuel from TMI 1 has been placed in the spent fuel pool.[4] There is no independent spent fuel storage installation (ISFSI) on the TMI site, although Exelon plans to build one to hold spent fuel from TMI 1.[5] As part of the decommissioning process, TMI 1 submitted a post-shutdown decommissioning activities report (PSDAR) to NRC and the Commonwealth of Pennsylvania.[6] TMI 1 also submitted a required site-specific decommissioning cost estimate.[7]

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[1] Letter from Michael P. Gallagher (Exelon) to NRC Document Control Desk (April 5, 2019) (Three Mile Island Nuclear Station, Unit 1 – Post-Shutdown Decommissioning Activities Report), at 3 (ADAMS Accession No. ML19095A041) (TMI 1 PSDAR).

[2] Letter from Michael P. Gallagher (Exelon) to NRC Document Control Desk (Sept. 26, 2019) (ML19269E480) (Certification of Permanent Removal of Fuel from the Reactor Vessel for Three Mile Island Nuclear Station, Unit 1). Decommissioning is a years-long process by which a nuclear power plant or other nuclear facility is safely removed from service and residual radioactivity is reduced to a level that permits release of the property and termination of the plant's operating license. *See* 10 C.F.R. § 50.2.

[3] 10 C.F.R. § 50.82(a)(2); Letter from Michael P. Gallagher (Exelon) to NRC Document Control Desk (Sept. 26, 2019) (ML19269E480) (Certification of Permanent Removal of Fuel).

[4] Certification of Permanent Removal of Fuel at 1.

[5] TMI 1 PSDAR at 5.

[6] 10 C.F.R. § 50.82(a)(4)(i). TMI 1 PSDAR.

[7] Letter from Michael P. Gallagher (Exelon) to NRC Document Control Desk (April 5, 2019) (Decommissioning Cost Estimate Report, Three Mile Island, Unit 1) (ML19095A010).

TMI 2 has not been operational since its March 28, 1979 accident, which resulted in severe damage to the reactor core.[8] TMI 2 has been defueled since April 1990[9] and a license amendment converting its operating license to a possession-only license was issued in 1993.[10] This unit is maintained in a safe, inherently stable condition known as Post-Defueling Monitoring Storage.[11] The spent fuel removed from TMI 2 is currently in the possession of the U.S. Department of Energy and stored at an Idaho National Laboratory facility.[12] Some residual fuel remains at TMI 2.[13]

Exelon owns TMI 1 and holds a renewed operating license from the NRC.[14] FirstEnergy Corporation owns TMI 2 and holds a possession-only license from the NRC.[15] Through a service agreement with FirstEnergy, Exelon is responsible for emergency planning, among other functions, for TMI 2 and maintains a site emergency plan encompassing both units.[16]

On July 1, 2019, Exelon submitted a license amendment request (LAR) for TMI 1 pursuant to 10 C.F.R. § 50.90.[17] The proposed license amendment would revise the site emergency plan and Emergency Action Level scheme to reflect TMI 1's permanently shutdown

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[8] "Three Mile Island Accident of 1979 Knowledge Management Digest," NUREG/KM-0001, Revision 1, at 12 (June 2016) (ML16166A337).

[9] SECY-93-238, "Three Mile Island Nuclear Station, Unit 2 Possession Only License Amendment," at 2 (ML12257A733).

[10] U.S. Nuclear Regulatory Commission, Three Mile Island Nuclear Station, Unit No. 2 Possession Only License, Docket No. 50-320 (Sept. 1993) (ADAMS Legacy #9405190046).

[11] Letter from Gregory H. Halnon (GPU Nuclear, Inc.) to NRC Document Control Desk (December 4, 2015) (Three Mile Island Nuclear Station, Unit 2 – Revision to Post-Shutdown Decommissioning Activities Report), Attachment at 3 (ML15338A222) (TMI 2 PSDAR). Post-Defueling Monitoring Storage is technically similar to SAFSTOR.

[12] TMI 2 PSDAR, Attachment at 5.

[13] SECY-93-238, "Three Mile Island Nuclear Station, Unit 2 Possession Only License Amendment," at 3 (ML12257A733).

[14] Exelon Generation Company, LLC (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289, Renewed Facility License No. DPR-50 (ML052720274).

[15] SRM-SECY-93-238, "Three Mile Island Nuclear Station, Unit 2 Possession Only License Amendment," (ML12297A826).

[16] Letter from Michael P. Gallagher (Exelon) to NRC Document Control Desk, at 2 (July 1, 2019) (ML19182A182) (LAR).

[17] *Id.*

and defueled condition.[18] The proposed Permanently Defueled Emergency Plan and Permanently Defueled Emergency Action Levels would reduce the scope of onsite and offsite emergency planning to be commensurate with the reduced risk associated with a reactor that is permanently shutdown, with all fuel removed from the reactor and stored in the spent fuel pool. If NRC approves the license amendment, the Permanently Defueled Emergency Plan and Emergency Action Level changes would be implemented no earlier than 488 days following shutdown of TMI 1, or about January 30, 2021, which allows the spent fuel to decay to the point that a potential accident would not be expected to result in a radioactive release that exceeds U.S. Environmental Protection Agency (EPA) Protective Action Guidelines beyond the site boundary.[19]

The proposed Permanently Defueled Emergency Plan and Permanently Defueled Emergency Action Levels are predicated on NRC's approval of an exemption request Exelon submitted for both units on July 1, 2019.[20] The current site emergency plan encompasses both TMI 1 and TMI 2,[21] and the exemption request would allow for a reduction in the emergency planning requirements consistent with the permanently defueled condition of both units.[22] In accordance with 10 C.F.R. § 50.12(a), Exelon requested exemptions from:

- certain standards in 10 C.F.R. § 50.47(b) for onsite and offsite emergency response plans for nuclear power reactors,
- requirements in 10 C.F.R. § 50.47(c)(2) for plume exposure and ingestion pathway emergency planning zones (EPZs) for nuclear power plants, and
- certain requirements in 10 C.F.R. Part 50, Appendix E for the content of emergency plans.[23]

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[18] *Id.* at 2.

[19] *Id*.

[20] Letter from Michael P. Gallagher (Exelon) to NRC Document Control Desk (July 1, 2019) (ML19182A104) (Exemption Request); LAR at 2.

[21] Exemption Request, Attachment 2 at 1.

[22] *Id.* at 1.

[23] The details of the requested exemptions can be found in Exemption Request, Attachment 1 at 5-35.

According to Exelon, the Permanently Defueled Emergency Plan in its LAR was developed using NSIR-DPR-ISG-02.[24] This Interim Staff Guidance document describes how the NRC staff will evaluate requests for emergency planning exemptions for decommissioning nuclear power plants in a risk-informed way. NSIR-DPR-ISG-02 provides that because "[t]he risk of an offsite radiological release is significantly lower, and the types of possible accidents are significantly fewer, at a nuclear power reactor that has permanently ceased operations and removed fuel from the reactor vessel, than at an operating power reactor," exemptions from the emergency planning requirements for operating reactors may be appropriate for a reactor in decommissioning.[25] Exemption requests that may be appropriate for decommissioning reactors are listed in Table 1 of NSIR-DPR-ISG-02.[26] For a permanently shutdown and defueled reactor, postulated accidents are expected to have a slow progression rate, which would permit licensees sufficient time to initiate appropriate mitigating actions to protect the health and safety of the public.[27] Therefore, a formal offsite radiological emergency plan may not be necessary for a permanently shutdown and defueled nuclear power reactor.[28] Specifically, if a site-specific analysis shows that the spent fuel in the spent fuel pool would not reach the zirconium ignition temperature of 900° Celsius in fewer than 10 hours from loss of cooling (assuming adiabatic heatup),[29] an offsite emergency plan may not be necessary.[30] This conclusion was endorsed by the Commission in 1999[31] and is incorporated in NSIR-DPR-ISG-02. In addition, all exemption requests must be authorized by law, not present an undue risk to public health and safety, and

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[24] LAR Attachment 1 at 7.

[25] NSIR-DPR-ISG-02 at 4.

[26] *Id.* at 10-30.

[27] *Id.* at 29.

[28] *Id.* at 5.

[29] This assumption is conservative because it assumes no cooling and no heat transfer.

[30] NSIR-DPR-ISG-02 at 6.

[31] Staff Requirements—SECY-99-168—Improving Decommissioning Regulations for Nuclear Power Plants (Dec. 21, 1999) (SRM-SECY-99-168).

be consistent with the common defense and security, and the Commission must find that special circumstances are present.[32]

On September 10, 2019, the NRC published a *Federal Register* notice that described Exelon's LAR, informed members of the public of their right to file a hearing request, and described NRC's proposed determination in accordance with 10 C.F.R. § 50.92(c) that the LAR involved no significant hazards consideration.[33] The notice stated that hearing requests should be filed within 60 days of the notice's publication date.[34]

On November 12, 2019, Petitioners filed a request for hearing and petition to intervene.[35] Petitioners state that both Mr. Epstein and TMIA have standing to intervene in this proceeding[36] and propose two labeled contentions, which assert the need for financial assurance and for environmental review of the proposed amendment.[37] While the petition was timely filed, Petitioners lack standing and have not submitted an admissible contention. The Staff addresses these contentions, as well as other claims in the petition that may have been intended as proposed contentions, below.

DISCUSSION

A. Right to Hearing on Exemptions

Under 10 C.F.R. § 50.12(a), the Commission may grant exemptions from the regulations of 10 C.F.R. Part 50 when the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security.[38] In

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[32] 10 C.F.R. § 50.12(a)(1).

[33] Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 84 Fed. Reg. 47542, 47548 (Sept. 10, 2019) (Hearing Notice).

[34] *Id*.

[35] Eric J. Epstein, Chairman of Three Mile Island, Alert Inc.'s Petition to Intervene and Hearing Request (Nov. 12, 2019) (ML19316E095) (Petition).

[36] Petition at 17-21.

[37] *Id.* at 28, 40.

[38] 10 C.F.R. § 50.12(a)(1).

addition, special circumstances must be present.[39] An exemption request standing alone does not give rise to an opportunity for a hearing under the Commission's rules.[40] However, petitioners may challenge exemption requests in licensing actions when those requests "raise[ ] material questions directly connected to" licensing actions for which hearing rights exist.[41] The hearing rights on a license amendment request do not extend to all exemptions requested by the same licensee; rather, for hearing rights to apply, the relevant exemption must be related to the license amendment request.[42]

In this case, Exelon's LAR stated that the proposed changes to the TMI site emergency plan and Emergency Action Level scheme are "predicated on approvals of requests for exemptions from portions of 10 C.F.R. 50.47(b), 10 C.F.R.§ 50.47(c)(2), and 10 C.F.R. Part 50, Appendix E, Section IV, previously submitted."[43] The proposed exemptions are necessary so that the Permanently Defueled Emergency Plan and Permanently Defueled Emergency Action Levels proposed in the LAR will be consistent with 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50, Appendix E.[44] For these reasons, Exelon's exemption request is directly connected to its LAR. Therefore, the Staff believes that the hearing rights associated with the July 1, 2019 LAR extend also to the July 1, 2019 exemption request, and the scope of this proceeding should be construed to include the July 1, 2019 exemption request.

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[39] 10 C.F.R. § 50.12(a)(2).

[40] *Project Management Corporation, Tennessee Valley Authority* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982) ("[F]or there to be any statutory right to a hearing on the granting of an exemption, such a grant must be part of a proceeding for the granting, suspending, revoking, or amending of any license or construction permit under the Atomic Energy Act.")

[41] *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-12, 83 NRC 542, 549 (2016), citing *Private Fuel Storage, L.L.C*. (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001).

[42] *Honeywell Int'l* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013) (citations omitted)

[43] LAR at 2.

[44] Exemption Request at 1.

B. Standing to Intervene

1. Legal Requirements for Standing

A person whose interest may be affected by an NRC proceeding and who desires to participate as a party must file in writing a request for hearing or petition to intervene and a specification of the contentions that the person seeks to have litigated in the hearing.[45] The Atomic Safety and Licensing Board "will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention."[46]

Under the standing requirements in 10 C.F.R. § 2.309(d)(1), a request for a hearing or a petition for leave to intervene must state:

(i) The name, address, and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's or petitioner's right under the Atomic Energy Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's or petitioner's property, financial, or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's or petitioner's interest.[47]

The Commission "insist[s] that an intervenor have some direct interest in the outcome of a proceeding,"[48] not merely an intellectual or academic interest.[49] To this end,

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[45] 10 C.F.R. §2.309(a); *see also* Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239a.(1)(A) ("In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit…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.").

[46] 10 C.F.R. § 2.309(a).

[47] 10 C.F.R. § 2.309(d)(1).

[48] *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579 (2005).

[49] *Id.* at 580 (citations omitted).

a petitioner has the burden of proving that standing requirements are met, but for the purpose of a standing determination the Commission will "construe the petition in favor of the petitioner."[50]

Standing requirements for NRC proceedings reflect the nature of the proposed action. The Commission has recognized a "proximity presumption" for standing in certain reactor licensing proceedings, most commonly in proceedings for a construction permit, operating license, or license renewal for a nuclear power plant.[51] If the proximity presumption applies, individuals who live,[52] have a significant property interest,[53] or have frequent contacts[54] in an area within approximately 50 miles (80 kilometers) of a nuclear power reactor may establish standing without the need to make an individualized showing of injury, causation, or redressability.[55] A petitioner must provide specific details concerning its contacts with that area, and a lack of specificity or omission of supporting information is grounds to reject a claim of standing.[56]

Standing based on proximity is not granted mechanistically to every petitioner within 50 miles (80 kilometers) of a nuclear reactor. Rather, the Commission will decide

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[50] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015); *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

[51] *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-916 (2009) (citing *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007)).

[52] *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

[53] *USEC, Inc*. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 314 (2005).

[54] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994).

[55] *Peach Bottom,* CLI-05-26, 62 NRC at 581.

[56] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

claims of proximity-based standing on a "case-by-case basis,"[57] taking the petitioner's distance from the reactor site into account along with "the nature of the proposed action and the significance of the radioactive source."[58]

In license amendment proceedings, the presumption of proximity-based standing applies "only if the challenged license amendments present an obvious potential for offsite [radiological] consequences."[59] Whether there is such obvious potential relates to the "kind of action at issue, when considered in light of the radioactive sources at the plant."[60] Whether a reactor is "permanently shutdown and defueled" is a factor that weighs against the potential for offsite consequences.[61]

If the petitioner has not shown that the licensing action in question raises an obvious potential for offsite consequences, the presumption of proximity-based standing does not apply.[62] In these circumstances, a petitioner then has the burden of establishing standing under traditional standing rules; in other words, the petitioner must demonstrate a "concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision, where the injury is to an interest arguably within the zone of interests protected by the governing statute."[63] In a license amendment

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[57] *Peach Bottom,* CLI-05-26, 62 NRC at 580.

[58] *Id.* at 580-81 (citing *Georgia Tech,* CLI-95-12, 42 NRC at 116).

[59] *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) (citing *St. Lucie*, CLI-89-21, 30 NRC at 330).

[60] *Peach Bottom,* CLI-05-26, 62 NRC at 581.

[61] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999) ("[G]iven the shutdown and defueled status of the units, the license amendments do not on their face present any 'obvious' potential of offsite radiological consequences.")

[62] *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 269 (2008).

[63] *Calvert Cliffs*, CLI-09-20, 70 NRC at 915 (*citing Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (quotations omitted)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992) (describing framework for judicial standing).

proceeding, a petitioner "must assert an injury-in-fact associated with *the challenged license amendment*, not simply a general objection to the facility."[64] Claims of potential radiological harm from a facility that are "not tied to the specific amendment at issue" are not sufficient,[65] nor is merely describing the proposed license amendment and "alleging without substantiation that the changes will lead to offsite radiological consequences."[66] Although the injury need not flow directly from the challenged license amendment, "the chain of causation must be plausible,"[67] showing a "realistic threat…of direct injury."[68]

An organization may establish standing under 10 C.F.R. § 2.309(d) based on harm to its own organizational interests or based on harm to the interests of its members (representational standing). When an organization asserts representational standing, it must demonstrate that: (1) at least one of its members would otherwise have standing to sue in his or her own right; (2) the interests that the organization seeks to protect are germane to its purpose; (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit; and (4) at least one of its members has authorized it to represent the member's interests.[69] Thus, for representational standing, the organization must demonstrate "how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member."[70]

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[64] *Zion*, CLI-99-4, 49 NRC at 188.

[65] *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001) (citation and internal quotation marks omitted).

[66] *Zion*, CLI-99-4, 49 NRC at 192.

[67] *Turkey Point*, CLI-15-25, 82 NRC at 394.

[68] *White Mesa*, CLI-01-21, 54 NRC at 253.

[69] *See Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

[70] *White Mesa*, CLI-01-21, 54 NRC at 250; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 202 (2000).

A petitioner who has demonstrated standing in one proceeding is not automatically granted standing in future proceedings related to the same licensee.[71] In some cases, a petitioner's standing in one proceeding may be recognized in another proceeding that is "merely another round in a continuing controversy" about a given issue.[72] In general, however, a petitioner must "make a fresh standing demonstration in *each* proceeding in which intervention is sought because a petitioner's circumstances [and the nature of the action at issue] may change from one proceeding to the next."[73]

2. Petitioners' Standing

(a) TMIA Has Not Demonstrated Standing to Intervene

Petitioners assert that TMIA has "members that TMI-Alert represents in this proceeding"[74] who reside "within the 10-mile geographical zone that might be affected by a release of fission products into the environment during or after decommissioning."[75] TMIA argues it is entitled to a "presumption of injury-in-fact for persons residing within that zone."[76] In support of its argument for representational standing, TMIA provides affidavits for two of its members, Joyce Corradi and Patricia J. Longnecker.[77] The affidavits, which are substantially identical, state that Ms. Corradi and Ms. Longnecker are impacted by the LAR; they are members of TMIA; they reside within 10 miles of TMI; they have authorized TMIA to advocate for them; and they are opposed to Exelon's license amendment request.[78]

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[71] *Bell Bend,* CLI-10-7, 71 NRC at 138.

[72] *Consumers Power Co.,* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974).

[73] *Bell Bend,* CLI-10-7, 71 NRC at 138 (citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)).

[74] Petition at 20.

[75] *Id.*

[76] *Id.*

[77] Petition Appendix A (ML19316E098).

[78] *Id.* at 1-4.

TMIA states that its members' interest in the proposed LAR extends to "all aspects of TMI's radiological decommissioning, spent fuel management, and site restoration," and that the proposed license amendment "raises significant health, safety, environmental, and financial concerns" for members.[79] With regard to financial concerns, TMIA states that there is a risk that Pennsylvania taxpayers could become the "payers of last resort."[80] And if a shortfall in the decommissioning fund prevents TMI from being fully decontaminated, radiological contamination of land and water is possible.[81] TMIA also suggests that its involvement in previous proceedings related to TMI should suffice to grant it standing in this proceeding.[82]

TMIA's representational standing argument is deficient. As noted above, neither past findings of standing nor past denials of standing are determinative for future proceedings. Consistent with Commission caselaw, TMIA must "make a fresh standing demonstration in *each* proceeding in which intervention is sought,"[83] unless the new proceeding represents "merely another round in a continuing controversy" on the same issue.[84] What is at issue in this proceeding is the LAR and exemption request associated with TMI 1's decommissioning. TMIA has not pointed to any previous proceeding in which it was granted standing that raised the same issues. Moreover, because TMI 1 was not in decommissioning before September 2019,[85] it is not clear how issues associated with TMI 1's decommissioning would have been raised in previous TMI proceedings.

Nor can TMIA benefit from the presumption of proximity-based standing in this proceeding because TMIA has not demonstrated a potential for offsite consequences as a result of this licensing action. "[I]n an operating license amendment proceeding, a petitioner cannot

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[79] Petition at 21.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 18-20.

[83] *Bell Bend,* CLI-10-7, 71 NRC at 138.

[84] *Midland,* CLI-74-3, 7 AEC at 12 (1974). This case concerned whether "the licensee can be reasonably expected to comply with [the Commission's] quality assurance regulations" and does not support extending standing in one proceeding to a subsequent proceeding on distinct issues. *Id.*

[85] *See* Certification of Permanent Removal of Fuel.

base his or her standing simply upon a residence or visits near the plant, unless the proposed action quite 'obvious[ly]' entails an increased potential for offsite consequences."[86] The proximity presumption confers standing most often in cases involving "construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool."[87] These cases, unlike the matter now before the Board, "involve[ ] the construction or operation of the reactor itself, with clear implications for the offsite environment or major alterations to the facility with a clear potential for offsite consequences."[88] The potential for offsite consequences is more likely to be a factor in cases related to whether the reactor will operate than by a change to the emergency plan and Emergency Action Levels at a permanently defueled reactor that will never operate again.

In the absence of proximity-based standing, TMIA must make "a specific showing of injury, causation, and redressability" under traditional standing jurisprudence to meet the Commission's standing requirements.[89] In other words, TMIA must show "some scenario suggesting how these particular license amendments would result in a distinct new harm or threat to" its members.[90] Although the cause of the injury need not flow directly from the challenged action, "the chain of causation must be plausible."[91] Here, TMIA can show neither proximity-based nor traditional standing to intervene. The Commission has, in fact, already assessed similar standing arguments for a site in decommissioning. In *Zion*, for example, a licensee requested changes to its technical specifications and associated license conditions to reflect the permanently shutdown and defueled conditions of both Zion units.[92] An individual sought to establish standing based on his residence approximately 10 miles from the site and

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[86] *Zion*, CLI-99-4, 49 NRC at 191 (citing *St. Lucie*, 30 NRC at 329-30).

[87] *St. Lucie,* CLI-89-21, 30 NRC at 329 (citing *Virginia Electric Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB–522, 9 NRC 54 (1979)).

[88] *Id.* (citing *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB–183, 8 AEC 222, 226 (1974).

[89] *Palisades*, CLI-08-19, 68 NRC at 269.

[90] *Zion*, CLI-99-04, 49 NRC at 192.

[91] *Turkey Point*, CLI-15-25, 82 NRC at 394.

[92] *Zion*, CLI-99-4, 49 NRC at 187.

other contacts with the area.[93] The Commission found that the presumption of proximity-based standing did not apply given "the shutdown and defueled status of the units," adding that "all of the fuel at Plant Zion is in the spent fuel pool," and that "[b]ecause neither reactor will ever operate again, the scope of activities at the plant has been greatly reduced" and "the spectrum of accidents and events that remain credible is significantly reduced."[94] With respect to traditional standing, along with the condition of the plant, the Commission considered the nature of the "challenged license amendments…[which were] based largely on the non-operational status and concomitant reduced scope of work at the facility."[95] Therefore, the type of accident that could result from the LARs at issue was "anything but self-evident."[96] The Commission found that the petitioner had failed to demonstrate a causal connection between his proximity to Zion and the potential for any offsite consequences that might impact him,[97] concluding that the petitioner had failed to establish standing based on "conclusory" and "unsubstantiated" claims, some of which "patently have no relation to the license amendments at issue."[98]

Almost word for word, the same analysis could be applied to TMIA's standing here. As with *Zion*, both units at TMI are permanently shutdown and defueled; the scope of activities and spectrum of credible accidents is reduced; and all the fuel from TMI 1 is in the spent fuel pool, while all except the residual fuel from TMI 2 has been shipped off site.[99] The challenged LAR and exemption request at issue in this proceeding would revise the TMI site emergency plan and Emergency Action Levels to account for the permanently shutdown and defueled condition

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[93] *Id.* at 191.

[94] *Id.*

[95] *Id.*

[96] *Zion*, CLI-99-4, 49 NRC at 192 (quoting *In the Matter of Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271, 277 (1998)).

[97] *Id.* at 192 (quoting approvingly the Board's statement that "nowhere does the Petitioner set forth a plausible or credible causal chain" or "explain how the risk of such an accident is increased by the Applicant's proposed amendments").

[98] *Id.* at 193.

[99] *Supra* at 2-3.

of both units.[100] Instead of explaining how these changes could result in offsite radiological consequences or another harm to its members, TMIA offers vague allusions to its members' "health, safety, welfare, and economic interests"[101] and "health, safety, environmental, and financial concerns."[102] The affidavits state that Ms. Corradi and Ms. Longnecker "oppose" the LAR, without describing a potential injury.[103] Just as in *Zion,* these abstract and conclusory statements do not constitute a specific showing of injury.

Moreover, as in *Zion*, some of TMIA's concerns patently have no relation to this proceeding. Discussing the cost of emergency response to the Commonwealth[104] and the risk of contamination that could result from lack of funding for decommissioning,[105] TMIA fails to draw a connection between these concerns and the LAR at issue, which does not change decommissioning or emergency response funding. NRC regulations establish the level of emergency planning needed, but do not specify how offsite planning is to be funded.[106]

(b) Mr. Epstein Has Not Demonstrated Standing to Intervene

Mr. Epstein has not demonstrated standing for many of the same reasons that TMIA has not done so. In addition, Mr. Epstein has not described his contacts with the vicinity of TMI with sufficient specificity to support standing. The Petition asserts that Mr. Epstein "will be affected by this proceeding"[107] as a local resident[108] and "school board director for the Central Dauphin School District which is within [ ] ten miles of Three Mile Island."[109] No detail is provided about Mr. Epstein's residence or the frequency of his contacts with the area as a result of his school

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[100] LAR at 2; Exemption Request at 1.

[101] Petition at 22.

[102] *Id.* at 21.

[103] Petition Appendix A at 2, 4.

[104] Petition at 21.

[105] *Id.*

[106] 10 C.F.R. Part 50, Appendix E, "IV. Content of emergency plans."

[107] Petition at 17.

[108] *Id.* at 18.

[109] *Id.* at 20.

board position. A petitioner who wishes to establish proximity-based standing must "clearly indicate where he works and lives;"[110] a lack of specificity or failure to provide this information is grounds for denying standing.[111] Mr. Epstein should be on notice of this requirement—in a previous proceeding, the Commission denied him standing because he similarly failed to provide the requisite detail concerning his contacts with the relevant area.[112] Further, as noted above, even if Mr. Epstein were to provide sufficient support for his contacts with the area, the proximity presumption would not apply because the proposed LAR does not involve a clear potential for offsite consequences.

In addition to failing to provide enough information to support proximity-based standing, Mr. Epstein presents the same vague and conclusory statements of injury as TMIA. Mr. Epstein has thus failed to show a clear increase in the potential for offsite harm[113] or a specific and plausible injury that could result from the licensing action at issue.[114] Therefore, Mr. Epstein has not demonstrated standing to intervene in his individual capacity in this license amendment proceeding.

(c) Conclusion on Standing to Intervene

TMIA and Mr. Epstein have failed to demonstrate a clear potential for offsite consequences as a result of the proposed LAR or exemption request; therefore, the proximity presumption does not establish standing for either of them. And, because neither TMIA nor Mr. Epstein has made a specific showing of a plausible injury as a result of the proposed LAR or

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[110] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991) (no standing when petitioner alleged proximity but failed to state his physical address or elaborate on the extent of his activities in the area).

[111] *Private Fuel Storage,* CLI-99-10, 49 NRC at 325.

[112] *Bell Bend,* CLI-10-7, 71 NRC at 138. ("Mr. Epstein's additional claim that he is on the board of directors of two organizations with interests within 50 miles of the site is likewise insufficiently specific to articulate the requisite pattern of regular contacts with the area.") (citation omitted).

[113] *Zion*, CLI-99-4, 49 NRC at 191.

[114] *Entergy Nuclear Operations, Inc.*, CLI-08-19, 68 NRC at 268-69.

exemption request, TMIA has failed to demonstrate a basis for representational standing. Therefore, the petition should be denied.[115]

C. Admissibility of Petitioners' Contentions

1. Timeliness of Contentions

The request for hearing was timely filed on November 12, 2019, consistent with the deadline published in the Federal Register.[116] The Staff does not dispute the timeliness of the request.

2. Legal Requirements for Contention Admissibility

The legal requirements governing the admissibility of contentions are set forth in 10 C.F.R. § 2.309(f)(1) of the Commission's Rules of Practice and Procedure. To be admissible under 10 C.F.R. § 2.309(f)(1), a proposed contention 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]

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[115] In addition, TMIA argues that it "should be granted standing because its participation may reasonably be expected to assist in developing a sound record (Petition at 23)." This reference to 10 C.F.R. § 2.309(e), the discretionary intervention standard, is not relevant because this regulation applies only "when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held." 10 C.F.R. § 2.309(e). Discretionary intervention will not be granted unless at least one petitioner has previously established standing and at least one admissible contention. *See Palisades*, CLI-08-19, 68 NRC at 267 (finding that, because no petitioner had demonstrated standing, the prerequisites for applying 10 C.F.R. § 2.309(e) standards were not present).

[116] Hearing Notice, 84 Fed. Reg. at 47,542

> (vi) …[P]rovide sufficient information to **show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact**. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief…
>
> (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report.[117]

The Commission's rules governing the admissibility of contentions are "strict by design;"[118] mere notice pleading does not suffice.[119] The Commission's intention is not to expend resources on the hearing process unless "there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[120] The purpose for requiring a would-be intervenor to establish the basis of each proposed contention is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose.[121] Failure to comply with any of the requirements is grounds for the dismissal of a contention.[122]

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[117] 10 C.F.R. § 2.309(f)(1) (emphases added).

[118] *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2) CLI-16-5, 83 NRC 131, 136 (2016) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)).

[119] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (citations omitted).

[120] Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[121] *Philadelphia Elec. Co. (*Peach Bottom Atomic Power Station) ALAB-216, 8 AEC 13, 20-21 (1974).

[122] *Private Fuel Storage,* CLI-99-10, 49 NRC at 325; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

3. Analysis of Petitioners' Contentions

(a) Proposed Contention 1: Lack of Financial Assurance and Lack of Character and Integrity

> Exelon's LAR does not provide financial assurances. It does not demonstrate that either Exelon or FirstEnergy are fiscally responsible, or that either have access to adequate funds for decommissioning, Neither does the LAR address the confused management organization, or where resources will be derived to deal with environmental impacts that would place the public health, safety, and the environment at risk.[123]

(i) Basis for Contention 1

Petitioners state that "the LAR does not show that either Exelon, or FirstEnergy [is] financially responsible, or that either has or has access to adequate funds for decommissioning"[124] and that the LAR "provides no assurance that TMI 1 and TMI 2 have the funds necessary to decommission the ISFSI."[125] Petitioners assert that FirstEnergy's bankruptcy proceeding must be resolved before NRC can approve the LAR[126] and that Exelon may shut down other nuclear plants it operates.[127] Petitioners describe the importance of financial assurance for decommissioning, citing a Federal Register notice in which the NRC issued regulations for decommissioning.[128] Petitioners outline the possibility of a spent fuel pool accident[129] and technical issues associated with high-burnup nuclear fuel,[130] concluding that "spent fuel management is expensive."[131] Petitioners articulate objections to Exelon's decommissioning cost estimate,[132] and state that "NRC approval of the License Amendment Request would effectively approve the PSDAR [Post-Shutdown Decommissioning Activities

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[123] Petition at 28. Typographical errors are in original.

[124] *Id.* at 28.

[125] *Id.* at 40.

[126] *Id.* at 16.

[127] Petition at 16.

[128] General Requirements for Decommissioning Nuclear Facilities; Final Rule, 53 Fed. Reg. 24018 (June 27, 1988).

[129] Petition at 35-37, 39.

[130] *Id.* at 7 n. 4, 38; *see also generally* Petition Exhibit 6 (ML19316E125).

[131] Petition at 35.

[132] *Id.* at 32-34, 40.

Report]."[133] In addition, Petitioners state that the LAR does not show that Exelon or FirstEnergy has the "necessary character and integrity"[134] and that Exelon is under investigation by the Department of Justice and the Securities and Exchange Commission.[135]

(ii) The Staff Opposes Admission of Proposed Contention 1

Contention 1 is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) because it is outside the scope of this proceeding. In a license amendment proceeding such as this one, the hearing notice determines the scope of the proceeding, which includes the LAR and any "health, safety or environmental issues fairly raised" in it.[136] As described in the hearing notice, Exelon's LAR would "revise the site emergency plan (SEP) and Emergency Action Level (EAL) scheme for the permanently defueled condition [of TMI 1]."[137] The LAR does not relate to or amend funding, financial assurance, or cost estimates for decommissioning at either TMI 1 or TMI 2, nor does it relate to decommissioning of an ISFSI.[138] There is no ISFSI present at TMI.[139] The same statements are true of the related July 1, 2019 exemption request.[140]

Petitioners' challenge to the PSDAR is similarly outside the scope of this proceeding.[141] The Staff does not agree that NRC approval of the LAR "would effectively approve the PSDAR."[142] The PSDARs, which have already been submitted for both TMI 1 and TMI 2, [143] are not part of

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[133] *Id.* at 31.

[134] *Id.* at 24.

[135] Petition at 32.

[136] *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

[137] Hearing Notice, 84 Fed. Reg. 47542.

[138] *See* LAR, Attachment 1 at 2 (summary description of proposed changes). Petitioners' statement that the LAR would "defund emergency responders" while "raiding" TMI 1's decommissioning trust fund (Petition at 2) is also incorrect. The LAR, if approved, would have no effect on TMI 1's decommissioning trust fund or on funding for emergency response organizations.

[139] *See supra* at 2.

[140] *See* Exemption Request, Attachment 1 at 2 (specific exemption request).

[141] From context, the Staff understands Petitioners' concerns about the PSDAR to refer to the TMI 1 PSDAR.

[142] Petition at 31.

[143] TMI 1 PSDAR; TMI 2 PSDAR.

either the LAR or the July 1, 2019 exemption request; nor is the decommissioning cost estimate, which Exelon submitted separately for TMI 1.[144] Moreover, although licensees for plants in decommissioning must submit PSDARs under the provisions of 10 C.F.R. § 50.82(a)(4)(i), the NRC does not approve PSDARs.[145] Therefore, Petitioners cannot satisfy 10 C.F.R. § 2.309(f)(1)(iii) because none of Petitioners' claims concerning the PSDAR for TMI 1 or the related decommissioning cost estimate are within the scope of this proceeding.

In addition to being outside the scope of the proceeding, Contention 1 is also inadmissible because Petitioners cannot satisfy 10 C.F.R. § 2.309(f)(1)(iv): they have not demonstrated that the contention raises an issue material to the findings that NRC must make to support the action that is involved in this proceeding.[146] This admissibility criterion requires petitioners to show why the claimed error or omission is of significance to the outcome of the proceeding, demonstrating a significant link between its contention and the agency's ultimate determination.[147]

Petitioners confuse and conflate the standards for a license transfer proceeding and a license amendment review. For example, Petitioners state that "[i]n this license transfer proceeding [sic], the NRC must evaluate the finances, and also Exelon's character and integrity, and decide whether the LAR as proposed, shows they meet NRC financial qualifications regulations…and posses[s] the requi[si]te character an[d] integrity to maintain TMI in safe defueling status until 2073."[148] This proceeding, however, is not a license transfer because it

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[144] Letter from Michael P. Gallagher (Exelon) to NRC Document Control Desk (April 5, 2019) (Decommissioning Cost Estimate Report, Three Mile Island, Unit 1) (ML19095A010).

[145] Although the NRC does not approve the PSDAR, the licensee cannot perform major decommissioning activities until 90 days after NRC has received the PSDAR. 10 C.F.R. § 50.82(a)(5). The PSDAR is made available for public comment and a public meeting near the relevant site will be held to discuss the PSDAR. 10 C.F.R. § 50.82(a)(4)(ii). The NRC inspects sites in decommissioning to ensure that decommissioning activities are conducted in accordance with applicable regulations and commitments. NRC Inspection Manual Chapter 2561, "Decommissioning Power Reactor Inspection Program," at 1 (ML17348A400).

[146] 10 C.F.R. § 2.309(f)(1)(iv).

[147] Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (stating that a material issue is one where "resolution of the dispute would make a difference in the outcome of the proceeding).

[148] Petition at 25 (citing *Pacific Gas & Electric Co*. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 340 (2002)). The *Diablo Canyon* case cited by Petitioners, which denied three

would not, directly or indirectly, transfer control of an NRC license.[149] The LAR and exemption request, if approved, would not change the existing ownership structure of either unit of TMI.[150]

The standards by which the NRC evaluates LARs and exemption requests are found in 10 C.F.R. Part 50 (most relevantly in 10 C.F.R. §§ 50.90(a), 50.40, and 50.12(a)). Standards for license amendments and exemptions related to emergency preparedness do not require the NRC Staff to make a finding on Exelon's or FirstEnergy's finances, nor do they require a finding on the PSDAR or the decommissioning cost estimate.[151] Because these issues are not relevant to NRC's evaluation of the LAR and the exemption request, Contention 1 is not material to a finding the NRC must make on the LAR or exemption request and is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(iv).[152]

The Petitioners' concern that the LAR does not demonstrate Exelon's character and integrity appears in part to be a reference to an Atomic Energy Act provision that allows the Commission to consider "the character of the applicant" in making a determination on a license application.[153] However, the Commission has made it clear that "licensing actions as a rule do not throw open an opportunity to engage in a free-ranging inquiry into the character of the licensee;" rather, there must be some relationship between the licensing action at issue and potential character issues.[154] This portion of Contention 1 is also inadmissible under 10 C.F.R. § 2.309(f)(1)(i), (ii), (v) and (vi) because of its vagueness and lack of basis. With regard to character and integrity, Petitioners state that Exelon is under investigation by federal agencies,[155] but do not provide

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petitions to intervene and found no litigable issue related to decommissioning funding in a license transfer proceeding, does not support Petitioners' statement.

[149] *Cf.* 10 C.F.R. § 50.80(a).

[150] LAR at 2; Exemption Request, Attachment 1 at 2.

[151] *See generally* 10 C.F.R. §§ 50.90(a), 50.40, and 50.12(a).

[152] Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172 (Aug. 11, 1989).

[153] 42 U.S.C. § 2232a.

[154] *Zion*, CLI-99-4, 49 NRC at 189 (citing *Georgia Power Co.* (Vogtle Electric Generating Plant, Unit 1 and 2), 38 NRC 25, 32 (1993).

[155] Petition at 32.

enough information on these investigations for the Staff to determine whether they have any relationship to TMI or to this proceeding.[156]

Finally, Contention 1 is also inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) insofar as it constitutes a contention of omission of required financial information.[157] As noted above, the NRC does not require financial information as part of its review of a LAR and exemption request pertaining to emergency preparedness. For a contention of omission to be admissible, its proponent must demonstrate that the omitted information is "required by law" to be included.[158] Petitioners' claims that the LAR must include information on Exelon's and FirstEnergy's financial responsibility or those companies' access to decommissioning funds are not supported by a showing that this LAR is required to include this information.[159] Petitioners' citations to 10 C.F.R. § 72.30(b), which requires holders of and applicants for licenses under 10 C.F.R. Part 72 to submit decommissioning funding plans, are not relevant here. This regulation does not apply to Exelon's LAR or to the July 1, 2019 exemption request because these licensing actions do not involve applications for a license under Part 72. Because Petitioners have failed to demonstrate that the omitted information is required, Contention 1 is inadmissible.[160]

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[156] *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985) (stating that the Commission, in making a character determination, "may consider evidence regarding licensee behavior having a rational connection to the safe operation of a nuclear power plant") (citation omitted).

[157] A contention of omission is one that alleges failure to include required information. *See, e.g., Tennessee Valley Authority* (Clinch River Nuclear Site Early Site Permit Application), CLI-18-5, 87 NRC 119, 122 (2018) (citing *Duke Energy Corp*. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)).

[158] 10 C.F.R. § 2.309(f)(1)(vi); *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 456 (2006).

[159] Petition at 28, 40.

[160] The Staff does not contest whether the financial qualification portion of Contention 1 meets the criteria in 10 C.F.R. § 2.309(f)(1)(i), (ii), or (v).

(b) Proposed Contention 2: Need for Environmental Review

The License Amendment Request Does Not Include the Environmental Report Required by 10 C.F.R. 51.53(d), and has Not Undergone the Environmental Review Required by the National Environmental Policy Act.[161]

(i) Basis for Contention 2

Citing the National Environmental Policy Act (NEPA),[162] Petitioners argue that the NRC's approval of the LAR would be a "major federal action," which requires an environmental impact statement (EIS).[163] If the NRC determines that an EIS is not necessary, Petitioners state that the agency must prepare a Finding of No Significant Impact (FONSI).[164] Noting TMI's proximity to the Susquehanna River, Petitioners list safety and environmental concerns associated with flooding at nuclear power plants.[165] Petitioners are concerned that flooding could also affect communication and transportation networks in an emergency.[166]

(ii) The Staff Opposes Admission of Proposed Contention 2

Contention 2 is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) because Petitioners have not provided sufficient information to show that a genuine dispute exists with the licensee on a material issue of law or fact. It is a petitioner's burden to supply "some reasonably specific factual or legal basis" for its contention.[167] To meet this standard, it is not enough to supply materials or documents without setting forth an explanation of their significance.[168] Rather, a

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[161] Petition at 40.

[162] 42 U.S.C. § 4321-74.

[163] *Id*. at 41-44. Petitioners also state that "the LAR cannot be approved without an updated environmental report based on a thorough environmental assessment performed at the beginning of the decommissioning process." Petition at 25.

[164] Petition at 46.

[165] *Id.* at 47-48.

[166] *Id.* at 49.

[167] *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 504-06 (2015) (quoting *Dominion Nuclear Conn.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003)); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

[168] *Fansteel* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003).

petitioner must "provid[e] a reasoned basis or explanation" for its conclusion[169] that is more than mere speculation and more than a bare or conclusory assertion.[170]

In addition, this contention is not admissible under 10 C.F.R. § 2.309(f)(1)(v) because it does not provide facts or expert opinions that support its position. Petitioners reference NEPA, NRC regulations, and a number of federal court decisions in support of the conclusion that the NRC must prepare an EIS for this license amendment.[171] However, none of these references are sufficient to demonstrate a genuine dispute with the LAR that is supported by facts or expert opinion.

First, Petitioners cite the regulation at 10 C.F.R. § 51.53(d) to support the statement that "NRC regulations require an environmental impact statement."[172] However, 10 C.F.R. § 51.53(d) does not concern EISs and is not applicable to this licensing action. This regulation's requirement to submit a supplement to the applicant's environmental report only applies to an "applicant for a license amendment authorizing decommissioning activities for a production or utilization facility…[an] applicant for a license amendment approving a license termination plan or decommissioning plan under § 50.82 of this chapter…[or an] applicant for a license or license amendment to store spent fuel at a nuclear power reactor after expiration of the operating license for the nuclear power reactor." Because the license amendment and exemptions at issue here would not authorize decommissioning activities, approve a license termination plan or decommissioning plan, or authorize the storage of spent fuel, 10 C.F.R. § 51.53(d) does not apply.[173] Other regulations cited by Petitioners also do not support Contention 2.[174] Statements

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[169] *USEC,* CLI-06-10, 63 NRC at 472 (citation omitted).

[170] *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-16-12, 83 NRC 542, 558 (2016); *USEC,* CLI-06-10, 63 NRC at 472.

[171] Petition at 41-46.

[172] *Id.* at 44.

[173] *See* LAR, Attachment 1 at 2 (summary description of proposed changes); Exemption Request at 1.

[174] *See generally* 10 C.F.R. § 51.10, "Purpose and scope of subpart; application of regulations of Council on Environmental Quality;" 10 C.F.R. § 51.20, "Criteria for and identification of licensing and regulatory actions requiring environmental impact statements;" 10 C.F.R. § 51.70, "Draft environmental impact statement—general;" 40 C.F.R. § 1508.14 (defining "human environment"); 40 C.F.R. § 1508.18 (defining "major federal action").

by Petitioners that the LAR is a "major federal action," a term of art under NEPA,[175] because it "has effects that 'may be major,'"[176] are conclusory and unsupported.

Second, the federal court decisions cited by Petitioners do not support Contention 2. An examination of those cases reveals that none of the cited decisions relates to the type of proceeding at issue here: a LAR and exemption request related to emergency planning at a decommissioning facility.[177] Nor have Petitioners explained why any of these cases should be interpreted to apply to this proceeding.

Finally, Petitioners state that, to approve the LAR, "the NRC must decide whether the environmental impacts of decommissioning are bounded by [previous] Environmental Impact Statements."[178] This portion of Contention 2 is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii), as well as not providing sufficient information to show a genuine dispute. Petitioners' statement appears to be a reference to 10 C.F.R. § 50.82(a)(4)(i), which requires power reactor licensees in decommissioning to submit a PSDAR containing, among other things, a discussion of why the environmental impacts associated with site-specific decommissioning will be bounded by previously issued EISs. Because the scope of this LAR and associated exemption request does

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[175] 40 C.F.R. § 1508.18.

[176] Petition at 42.

[177] *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (finding EIS required for liquid metal fast breeder reactor program); *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 293 (1st Cir. 1995) (finding that NRC was arbitrary and capricious when allowing licensee to complete 90% of decommissioning at plant prior to any environmental review); *Duke Energy Corp*. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 5 (2002) (admitting contention related to Severe Accident Mitigation Alternatives analysis in reactor license renewal); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n,* 449 F.3d 1016, 1030 (9th Cir. 2006) (finding that NRC's categorical refusal to consider environmental effects of potential terrorist attack on nuclear facilities was not reasonable); *New York v. Nuclear Regulatory Comm'n,* 681 F.3d 471, 477 (D.C. Cir. 2012) (finding that waste confidence decision rulemaking was major federal action).

For reasons of space, the NRC Staff will not summarize all of the federal cases cited by Petitioners. The Staff notes, however, that Petitioners' description of the case of *Ramsey v. Kantor*, 96 F.3d 434, 445 (9th Cir. 1996), on p. 42 of the Petition, is not accurate. This case concerned the Secretary of Commerce's obligation to review plans prepared by the North Pacific Fish Management Council, not NRC's obligation to review Exelon and FirstEnergy's plans.

[178] *Id.* at 25.

not include the PSDAR for either unit, claims related to PSDARs are out of scope of this proceeding and therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(iii). In addition, 10 C.F.R. § 50.82(a)(4)(i) does not support Contention 2 because it does not contain a requirement for NRC to prepare an EIS.

In fact, Part 51 and NEPA regulations weigh against admission of Contention 2. When a categorical exclusion applies, under NEPA and NRC regulations, no EIS or environmental assessment is required for that action, unless the Commission determines that special circumstances apply.[179] In its LAR, Exelon stated that its proposed license amendment does not require an EIS or environmental assessment because it satisfies the categorical exclusions in 10 C.F.R. § 51.22(c)(9) and 10 C.F.R. § 51.22(c)(10).[180] Section 51.22(c)(9) states that no EIS or environmental assessment is necessary for issuance of an amendment under Part 50 that changes a requirement with respect to installation or use of a facility component located within the restricted area, with certain provisions.[181] Similarly, 10 C.F.R. § 51.22(c)(10) states that no EIS or environmental assessment is necessary for a license amendment under Part 50 that changes certain specified administrative requirements.[182] Exelon also stated that its exemption request satisfies the categorical exclusion in 10 C.F.R. § 51.22(c)(25), which applies to exemptions that satisfy criteria in that regulation.[183] The decision as to whether a categorical

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[179] 10 C.F.R. § 51.53(b).

[180] LAR, Attachment 1 at 13.

[181] This categorical exclusion applies provided that

> (i) The amendment or exemption involves no significant hazards consideration;
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> (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and
>
> (iii) There is no significant increase in individual or cumulative occupational radiation exposure.

10 C.F.R. § 51.22(c)(9).

[182] 10 C.F.R. § 51.22(c)(10).

[183] Exemption Request, Attachment 1 at 55.

exclusion applies to a given licensing action will be made by the NRC; if a categorical exclusion applies, the licensee need not prepare an environmental report.[184]

Petitioners are obligated to carefully examine publicly available information in preparing their contention.[185] Instead of explaining why these categorical exclusions might or might not apply, Petitioners do not address them at all.[186] Because Petitioners have failed to address publicly available information and failed to supply a reasoned basis for their conclusion that is more than conclusory, they have failed to show a genuine and material dispute with the LAR. Therefore, Contention 2 is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi).[187]

(c) Other Potential Contentions

Although Contentions 1 and 2 are the only labeled contentions in the petition, other claims in the document appear as if Petitioners may have intended them to be considered as contentions. Understanding that contentions need not be presented with technical perfection,[188] particularly when petitioners are not represented by counsel,[189] the Staff will briefly address two other potential contentions. The Staff has not addressed Petitioners' challenge to the Staff's proposed no significant hazards consideration determination, presented in the first several pages of the

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[184] *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 396 (1995) (citation omitted).

[185] *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1401 (1983).

[186] *Cf. Pa'ina Hawai'i, LLC*, LBP-06-4, 63 NRC 99, 113-14 (2006) (finding that categorical exclusion did not preclude admission of environmental contention when petitioner "identified a specific omission in the Staff's analysis," described "the basis for its allegations, and "affirmatively assert[ed] that special circumstances are present that preclude the application of the categorical exclusion.").

[187] The Staff does not contest admission of Contention 2 under the criteria in 10 C.F.R. § 2.309(f)(1)(i), (ii), (iii) and (iv), with the exception that the portion of the contention that challenges the PSDAR is out of scope and inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

[188] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001) (citing *Houston Lighting & Power Co*. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)).

[189] *Shieldalloy Metallurgical Corp.,* CLI-99-12, 49 NRC 347, 354 (1999).

petition,[190] because challenges to no significant hazards consideration determinations are categorically inadmissible under NRC regulations.[191]

(i) Alleged Deficiencies in the Permanently Defueled Emergency Plan for TMI

With regard to the Permanently Defueled Emergency Plan proposed by Exelon in its LAR, Petitioners argue that the Emergency Plan does not account for TMI's "unique status as an isolated island with limited access."[192] Also, according to Petitioners, the Emergency Plan does not appropriately account for certain features of TMI's environs, such as an international airport, day care facilities, memory care facilities, tourist attractions, and Amish communities.[193] The Emergency Plan does not acknowledge a history of communication problems and blizzards in the area,[194] and it does not appropriately consider risks associated with flooding in the Susquehanna River basin.[195]

This contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and § 2.309(f)(1)(vi). To support a proposed contention on emergency planning, Petitioners must not only state that they object to the Permanently Defueled Emergency Plan, but also explain their objection with specificity, providing supporting facts or expert opinions. Petitioners are responsible for setting forth their grievances clearly, and it should not be necessary to speculate about the meaning of a contention.[196] In this case, Petitioners describe some faults they believe exist in the Permanently Defueled

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[190] Petition at 2, 4-8.

[191] 10 C.F.R. § 50.58(b)(6) ("No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission"); Memorandum from Annette L. Vietti-Cook (Secretary of the Commission) to E. Roy Hawkens (Chief Administrative Judge, Atomic Safety and Licensing Board Panel), Request for Hearing Submitted with Respect to the License Amendment Application of Exelon Generation Company, LLC for Three Mile Island, Units 1 and 2 (Dockets Nos. 50-289 and 50-320) (Dec. 5, 2019).

[192] Petition at 4.

[193] *Id.* at 4, 47; Petition Exhibit 3 at ii (ML19316E113).

[194] Petition Exhibit 3 at i.

[195] Petition at 47-49.

[196] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010).

Emergency Plan, but they do so without drawing a connection between those improvements and NRC's regulations for emergency planning. Petitioners do not point to any law or regulation violated by the Permanently Defueled Emergency Plan and do not address the NRC's publicly available guidance related to emergency planning for decommissioning reactors.[197] For these reasons, this proposed contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and § 2.309(f)(1)(vi) because it does not provide supporting facts or expert opinions and because it does not provide sufficient information to show that a genuine dispute on a material issue of law or fact exists.[198]

(ii) Claims Related to Exelon's Relationship with FirstEnergy

Petitioners claim that the proposed LAR "violates the Atomic Energy Act by unilaterally 'amending' and 'suspending'" FirstEnergy's license for TMI 2[199] and that Exelon does not have the authority to amend FirstEnergy's license using "an omnibus LAR."[200] Additionally, Petitioners state that the Permanently Defueled Emergency Plan usurps FirstEnergy's license,[201] that FirstEnergy must submit a separate LAR for TMI 2,[202] that approval of the LAR should be contingent on NRC executing a Memorandum of Understanding on the service agreement between FirstEnergy and Exelon,[203] and that the LAR should be held in abeyance until Exelon provides Mr. Epstein with a copy of its service agreement and Memorandum of Understanding with FirstEnergy.[204]

This proposed contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi) because Petitioners have not provided support for their claim and have not provided enough information

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[197] *See, e.g.,* NSIR-DPR-ISG-02; Staff Requirements—SECY-99-168—Improving Decommissioning Regulations for Nuclear Power Plants (Dec. 21, 1999) (SRM-SECY-99-168).

[198] This contention is also inadmissible under 10 C.F.R. § 2.309(f)(1)(i) because it does not specifically state the issue of law or fact to be raised or controverted. The Staff does not contest admission of this proposed contention under the criteria in 10 C.F.R. § 2.309(f)(1)(ii), (iii), or (iv).

[199] Petition at 9.

[200] *Id.* at 18.

[201] *Id.* at 7.

[202] *Id.* at 14, 18.

[203] Petition at 14.

[204] *Id.* at 16.

to show a genuine dispute with the licensee on a material issue of law or fact. Petitioners do not explain why Exelon, the licensee for TMI 1, would not have the authority to submit the LAR and exemption request.

As background, because of the non-operating and defueled status of TMI 2, there is no potential for any significant off-site radiological release resulting from a potential accident at TMI 2.[205] Therefore, the limited emergency planning necessary for TMI 2 is integrated into the overall Emergency Plan for the TMI site,[206] and the analysis that informed the TMI Emergency Plan and Emergency Action Levels is dominated by potential events that could occur at TMI 1.[207] Under a service agreement between Exelon and FirstEnergy, and as stated in TMI 2's post-defueling monitored storage safety analysis report, the Emergency Plan is under the authority of Exelon.[208] For these reasons, Exelon, the licensee for TMI 1 and the holder of emergency planning responsibilities for TMI 2, submitted the LAR for TMI 1 and exemption request at issue. Although Exelon references TMI 2 in its LAR, the LAR, if approved, would amend TMI 1's license without altering TMI 2's,[209] and the exemption request was made in response to the change in TMI 1's condition when it permanently ceased operations in September 2019.[210]

Petitioners have not provided alleged facts or expert opinions that would support a claim that a LAR or exemption request related to emergency planning and submitted by the licensee for one unit and the holder of emergency planning responsibilities for the second unit would violate applicable law or regulations. Instead, Petitioners proffer conclusory statements suggesting that FirstEnergy's rights have been violated or that FirstEnergy must submit a separate LAR, without explanation or supporting basis.[211] Moreover, in addition to the lack of

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[205] Letter from Gregory H. Halnon (GPU Nuclear) to NRC Document Control Desk (August 23, 2019), Three Mile Island Nuclear Station, Unit 2 – Update 12 of the Post-Defueling Monitored Storage Safety Analysis Report, Attachment at 10-2 (ML19235A001) (TMI 2 PDMS SAR).

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] LAR at 1, Attachment 1 at 2 (summary description of proposed changes).

[210] Exemption Request, Attachment 2 at 1.

[211] Petition at 7, 14, 18.

standing previously articulated in this document, it is far from clear how Petitioners would have standing to raise a claim on behalf of FirstEnergy. Petitioners do not identify any legal requirement that would require NRC to execute a Memorandum of Understanding or require Exelon to provide Mr. Epstein with a copy of the requested documents. If Petitioners believe that Exelon is in violation of applicable requirements outside the scope of this proceeding, Petitioners can file a petition for enforcement filed under 10 C.F.R. § 2.206.[212] This contention, therefore, is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi).[213]

[212] *Fla. Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167, 179 (2014) ("[The 2.206] process provides stakeholders a forum to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted.") (citations omitted).

[213] The Staff does not contest admission of this contention under the criteria in 10 C.F.R. § 2.309(f)(1)(i), (ii), (iii), or (iv).

CONCLUSION

For the reasons set forth above, neither Mr. Epstein nor TMIA has demonstrated standing to intervene in this proceeding or proffered an admissible contention. Therefore, the Petition should be denied.

Respectfully submitted,

/Signed (electronically) by/

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

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Dated in Rockville, MD
this 6th day of December 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of EXELON GENERATION COMPANY, LLC Three Mile Island Nuclear Station, Units 1 and 2	Docket No. 50-289 50-320

Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC Staff Answer to Three Mile Island Alert Petition," dated December 6, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 6th day of December 2019.

/Signed (electronically) by/

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this 6th day of December 2019