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In the Matter of	)	Docket Nos.
EXELON GENERATION COMPANY, LLC; EXELON	)	50-317, 50-318, 50-220,
CORPORATION; EXELON FITZPATRICK, LLC;	)	50-410, 72-1036, 50-244,
NINE MILE POINT NUCLEAR STATION, LLC;	)	and 72-67
R. E. GINNA NUCLEAR POWER PLANT, LLC; and	)	
CALVERT CLIFFS NUCLEAR POWER PLANT, LLC	)	
(Calvert Cliffs Nuclear Power Plant, Units 1	)	
and 2; Nine Mile Point Nuclear Station, Units 1 and 2;	)	
R. E. Ginna Nuclear Power Plant)	)	
	)	
(Consideration of Approval of Transfer of Licenses and	)	
Conforming Amendments)	)	
	)	

## I. Introduction

<sup>1</sup> Transfer of Licenses: Braidwood Station, Units 1 and 2; Byron Station, Unit Nos. 1 and 2; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; et al., 86 Fed. Reg. 23,437 (May 3, 2021).

<sup>2</sup> Exelon Generation Company, LLC et al., *Application for Order Approving License Transfers and Proposed Conforming License Amendments* (Feb. 25, 2021) (ML21057A273), as supplemented by letter dated March 25, 2021 (ML21084A165) (“Application”). Unless otherwise stated, citations to Application will refer to the February 25, 2021 submission. The Application is made on behalf of Exelon Generation Company, LLC (“Exelon Generation”), on behalf of itself and Exelon Corporation, Exelon FitzPatrick, LLC (“Exelon FitzPatrick, LLC”), Nine Mile Point

related to a proposed transaction in which Exelon Corporation will transfer its 100% ownership of ExGen to a yet-to-be-created subsidiary that will then be spun off to Exelon Corporation shareholders as a publicly traded entity, becoming ExGen's new parent company ("SpinCo"). Neither the new SpinCo nor ExGen nor its subsidiaries will be affiliated with or receive any financial support from Exelon Corporation post-transaction ("Spin Transaction").

EDF Inc. will suffer injury if the Commission unconditionally approves the Spin Transaction. Such approval would disregard EDF Inc.'s property interest in the nuclear units owned by a subsidiary jointly owned by EDF Inc. and ExGen, would raise financial qualifications issues, and would increase financial risk and liability to that subsidiary and, ultimately, to EDF Inc. and its parent company. Specifically, as noted in the Application, EDF Inc. owns an interest in Constellation Energy Nuclear Group, LLC ("CENG"), a joint venture between ExGen and EDF Inc. ExGen indirectly owns 50.01% of CENG through its subsidiaries, Constellation Nuclear, LLC ("CN") and CE Nuclear, LLC ("CEN"), and EDF owns the remaining 49.99%. In turn, CENG indirectly owns (through its wholly-owned subsidiary, Constellation Nuclear Power Plants, LLC ("CNPP")) 100% of Nine Mile Point Nuclear Station, LLC ("NMP LLC"), R.E. Ginna Nuclear Power Plant, LLC ("Ginna LLC"), and Calvert Cliffs Nuclear Power Plant, LLC ("Calvert LLC"). NMP LLC, Ginna LLC, and Calvert LLC are, respectively, the project-specific owner licensees for the Nine Mile Point, Ginna, and Calvert Cliffs nuclear plants. Following an NRC license transfer approval and transaction among the parties in 2014, ExGen is also the licensed operator

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Nuclear Station, LLC ("NMP LLC"), R.E. Ginna Nuclear Power Plant, LLC ("Ginna LLC"), and Calvert Cliffs Nuclear Power Plant, LLC ("Calvert LLC") (collectively, "Applicants").

of Nine Mile Point, Ginna, and Calvert Cliffs in accordance with the CENG Operating Agreement<sup>3</sup> and the Nuclear Operating Services Agreement (“NOSA”).<sup>4</sup>

Pursuant to a certain Put Agreement entered in connection with the 2014 transaction,<sup>5</sup> and unrelated to the Spin Transaction now proposed by the Applicants, EDF Inc. has exercised a contractual option to sell its 49.99% interest in CENG to ExGen or its subsidiaries (“Put Transaction”). ExGen notified the Nuclear Regulatory Commission (“NRC” or “Commission”) of EDF Inc.’s exercise of the put option in an April 24, 2020 letter. That letter confirmed that, because the Put Transaction does not involve either a direct or indirect transfer of control of CENG, no NRC approval is required for closing the Put Transaction.<sup>6</sup>

In the Application, the Applicants suggest that the Put Transaction is expected to be completed prior to closure of the Spin Transaction, but the Applicants do not expressly condition the latter on the former, and there can be no guarantee that the Put Transaction will in fact close before the Spin Transaction.<sup>7</sup> Indeed, the Applicants’ regulatory filings clearly anticipate the possibility of completing the Spin Transaction before the Put Transaction closes.<sup>8</sup> For instance, on

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<sup>3</sup> *Constellation Energy Nuclear Group, LLC, Fourth Amended and Restated Operating Agreement*, by and among Constellation Nuclear, LLC, CE Nuclear LLC, EDF Inc., and Constellation Energy Nuclear Group, LLC (dated as of April 1, 2014) (“CENG Operating Agreement”). At the NRC’s request, EDF will produce the CENG Operating Agreement and other CENG-related documents at the hearing should the NRC grant this petition.

<sup>4</sup> *Nuclear Operating Services Agreement*, between Exelon Generation Company, LLC, Constellation Energy Nuclear Group, LLC, Calvert Cliffs Nuclear Power Plant, LLC, Nine Mile Point Nuclear Station, LLC, and R.E. Ginna Nuclear Power Plant, LLC (dated April 1, 2014) (“NOSA”).

<sup>5</sup> The *Put Agreement* entered between ExGen, EDF Inc., and CENG on April 1, 2014, provided EDF Inc. with the ability to sell, transfer, and convey its 49.99% membership interest in CENG to ExGen on certain terms and subject to certain conditions (“Put Agreement”).

<sup>6</sup> Letter from J. B. Fewell, Exelon Generation, to NRC Document Control Desk, “Constellation Energy Nuclear Group, LLC; Notification of Change in Indirect Ownership” (Apr. 24, 2020) (ML20115E609).

<sup>7</sup> See Application, Enclosure 1, at 6 (“The Put Transaction is expected to close before the Spin Transaction occurs.”); *id.* footnote 3 (“The Application assumes that the Put will close before the Spin Transaction, and the Staff should assume the Put closes before the Spin Transaction.”).

<sup>8</sup> See Application, Enclosure 1, at 6 (“Exelon Generation’s 100% indirect ownership interest in CENG, CCNPP, and the Constellation Subsidiary Owner LLCs eliminates the need for the CENG Board of Directors (currently comprised

February 26, 2021, ExGen’s counsel, in a proceeding concerning the Put Transaction before the New York State Public Service Commission (“NYPSC”), stated that if the NYPSC were to authorize the Spin Transaction before acting on the Put Transaction, then ExGen would submit updated corporate organizational charts removing Exelon Corporation as the ultimate beneficial owner of ExGen’s interest in CENG.<sup>9</sup> Likewise, ExGen’s filing with the Federal Energy Regulatory Commission (“FERC”) seeking approval of the Spin Transaction states “whether and when the CENG Acquisition closes will have no impact on the [Spin] Transaction[.]”<sup>10</sup> In a subsequent filing on April 29, Exelon further characterized EDF Inc.’s consent rights regarding the Spin Transaction as “a matter of contractual interpretation” and did not clearly state that Exelon would not close the Spin Transaction until after the Put Transaction’s closing.<sup>11</sup> Indeed, on May 18, Exelon Corporation’s and ExGen’s counsel notified EDF Inc. that “regardless of whether the Put Transaction has closed, the Spin Transaction will nevertheless proceed.”<sup>12</sup> And, most recently, Exelon Corporation’s and ExGen’s counsel stated that the companies “will adjust their plans” if the Put Closing does not precede the proposed Spin Transaction.<sup>13</sup>

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of five Directors appointed by CN and five Directors appointed by EDF Inc.) and the Fourth Amended and Restated Operating Agreement between CENG and CN, CEN, and EDF Inc. as Members of CENG.”).

<sup>9</sup> Letter from D. Saia, Counsel to Exelon Generation Company, LLC, to M. Phillips, Secretary to the New York State Public Service Commission, at 2 (Case 20-E-0371) (Feb. 26, 2021).

<sup>10</sup> Application for Authorization under Section 203 of the Federal Power Act and Request for Expedited Consideration at 11, FERC Docket No. EC21-57-000 (20210225-5246) (Feb. 25, 2021).

<sup>11</sup> Letter from J. English and T. Brecher, Counsel for Applicants, to K. Bose, Secretary, Federal Energy Regulatory Commission, at 6, FERC Docket No. EC21-57-000 (20210429-5376) (Apr. 29, 2021).

<sup>12</sup> Letter from Rahim Moloo, Counsel for Exelon Corporation & Exelon Generation Company, LLC, to Martin Flumenbaum, Counsel for EDF Inc., at 2 (May 18, 2021).

<sup>13</sup> Letter from Rahim Moloo, Counsel for Exelon Corporation & Exelon Generation Company, LLC, to Martin Flumenbaum, Counsel for EDF Inc., at 1 (June 4, 2021). Pursuant to 10 C.F.R. § 2.323(b), EDF Inc. has engaged in correspondence with counsel for Exelon Corporation and ExGen in a sincere effort to resolve the issues related to this petition and request, including obtaining an assurance that the Spin Transaction will be contingent upon the Put Transaction’s closing and relevant records regarding the expected financial condition of the SpinCo. Those efforts have been unsuccessful.

In light of this record and despite whatever their current “expectations” on timing may be, Applicants have decided that they will pursue the Spin Transaction for which they seek NRC approval even if EDF Inc. remains a 49.99% co-owner of the CENG nuclear units. EDF Inc. was not consulted as to the structure of the Spin Transaction as it pertains to CENG, and Applicants have not even sought EDF Inc.’s consent or provided it with sufficient information to allow it to provide informed consent.

The current timeframe for the Put Transaction closing also remains uncertain. In accordance with the Put Agreement, EDF Inc. has initiated a baseball-style arbitration to determine the “Fair Market Value” of its interest in CENG. That arbitration process is ongoing, but there is no set timetable for its completion. Under the terms of the Put Agreement, the Put Transaction closing shall occur on the tenth business day after satisfaction or waiver of all conditions precedent to the closing, as specified in the Put Agreement. As of the date hereof, the only remaining condition precedent to closing the Put Transaction is that Fair Market Value of EDF Inc.’s 49.99% interest in CENG shall have been determined in accordance with the terms of the Put Agreement. While all the conditions precedent to closing may be satisfied in the second half of 2021, there can be no certainty that they will be, or that the Put Transaction will close in that timeframe.

Because EDF Inc.’s ownership interest is in CENG, this hearing request relates only to the NRC approvals required for the Spin Transaction for the CENG-owned plants referenced below (“CENG Nuclear Plants”):

- Calvert Cliffs Nuclear Power Plant, Units 1 and 2  
Renewed Facility Operating License Nos. DPR-53 and DPR-69  
NRC Docket Nos. 50-317 and 50-318
- Nine Mile Point Nuclear Station, Units 1 and 2  
Renewed Facility Operating License Nos. DPR-63 and NPF-69

NRC Docket Nos. 50-220, 50-410, and 72-1036<sup>14</sup>

- R. E. Ginna Nuclear Power Plant  
Renewed Facility Operating License No. DPR-18  
NRC Docket Nos. 50-244 and 72-67

## **II. EDF Inc. Has Standing to Intervene**

The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on such requests shall grant a request for hearing or petition for leave to intervene if it determines that the requestor (i) has standing under 10 C.F.R. § 2.309(d) and (ii) has proposed at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f).<sup>15</sup> With respect to standing, under 10 C.F.R. § 2.309(d), a request for hearing or petition for leave to intervene must state, *inter alia*:

- (i) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (ii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.<sup>16</sup>

The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering these factors.<sup>17</sup>

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<sup>14</sup> CENG indirectly owns 100% of NMP Unit 1 and 82% of NMP Unit 2. The remaining 18% interest in Nine Mile Point Unit 2 is owned by the Long Island Power Authority.

<sup>15</sup> 10 C.F.R. § 2.309(a).

<sup>16</sup> Under 10 C.F.R. § 2.309(1), EDF Inc. must also state "[t]he name, address and telephone number of the requestor or petitioner[.]" EDF Inc.'s address is 4445 Willard Avenue, Suite 600, Chevy Chase, MD 20815 and can be reached through its attorney, Michael Hill, at (202) 368-9559, michael.hill@edf-inc.com.

<sup>17</sup> 10 C.F.R. § 2.309(d)(2). Under the Atomic Energy Act of 1954, as amended, 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." 42 U.S.C. § 2239(a)(1)(A).

The Commission looks to contemporaneous judicial concepts of standing to evaluate whether the petitioner has demonstrated the requisite interest.<sup>18</sup> These concepts require a petition to “(1) allege an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.”<sup>19</sup> With respect to injury in fact, the petitioner need show only that the chain of causation is plausible.<sup>20</sup> The asserted injury also must be arguably within the zone of interests protected by the governing statute—in this case the Atomic Energy Act of 1954, as amended.<sup>21</sup>

EDF Inc. more than meets these standing requirements because of its direct financial interest in the CENG Nuclear Plants and the potential impact of the Applicants’ proposed Spin Transaction on that interest. As noted above, EDF Inc. holds a 49.99% ownership interest in CENG and therefore has a direct financial stake in the CENG Nuclear Plants. As discussed in further detail in Section III, the Applicants propose to terminate financial support agreements for those plants, reorganize CENG under a new, yet-to-be-created publicly traded parent entity, and change other financial mechanisms related to the operations of CENG. These proposed changes fall directly within the scope of the NRC’s safety review of the proposed transferee’s financial qualifications in connection with a proposed license transfer. To the extent any of these proposed changes would be implemented prior to closing the Put Transaction, EDF Inc. has a direct and

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<sup>18</sup> See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015); see also *Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

<sup>19</sup> Turkey Point, CLI-15-25, 82 NRC at 394; see also *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71–72 (1994); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>20</sup> See *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 NRC 216, 228 (2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994) (citing *Nat’l Wildlife Fed. v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1992)).

<sup>21</sup> *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (quoting *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).

substantial financial interest in the CENG Nuclear Plants that is threatened by and “fairly traceable” to the proposed Spin Transaction.

EDF Inc.’s interest also falls within the zone of interests protected by the Atomic Energy Act, as amended, and NRC’s regulations promulgated thereunder. Upon any review of a transaction regarding ownership of a licensed facility the Commission will review the Application to ensure that there will continue to be reasonable assurance that the licensees are financially qualified.<sup>22</sup> In this case, the NRC will examine whether the proposed transaction would result in the CENG Nuclear Plants being underfunded for either normal operations or in the event that one or more units is shut down for an extended period.<sup>23</sup> EDF Inc. has a similar interest in the ongoing financial qualifications of the licensees to ensure the safety and financial viability of the CENG Nuclear Plants and no adverse impact on its property interests.

The Commission’s established precedent holds that co-owners have standing to intervene in connection with proposed license transfers that could affect the plants in which they hold ownership interests—because potential underfunding related to plant operations could affect plant availability and, ultimately, safety.<sup>24</sup> As in the Commission’s decision in *River Bend*, EDF Inc.’s interest here “bears on safety in relation to the underlying financing for the plant[s], a matter that

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<sup>22</sup> In accordance with 10 C.F.R. § 50.80(b)(1)(i), the NRC will consider as much of the information required for an application for a new license under 10 C.F.R. § 50.33 as necessary to determine the technical and financial qualifications of a proposed transferee. Financial qualifications of an applicant are addressed under 10 C.F.R. § 50.33(f)(2). The Applicants acknowledge, at Enclosure 1, page 8, that neither SpinCo nor the project-specific owners will be electric utilities and therefore are subject to a financial qualifications review.

<sup>23</sup> NRC guidance on the scope and substance of the financial qualifications review for license transfer applications is set forth in NUREG-1577, Rev. 1, “Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance” (February 1999). *See id.* at 4–7.

<sup>24</sup> *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994); *see also North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201, 202 (Mar. 5, 1999).



[NRC] regulations address.”<sup>25</sup> The Commission’s decision in *Seabrook*<sup>26</sup> is consistent. There, the Commission held that the petitioner had standing because it advanced “a plausible claim of injury: the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing [Petitioner’s] risk of radiological harm to its property and its risk of being forced to assume a greater-than-expected share of Seabrook’s operating and decommissioning costs.”<sup>27</sup> In this matter, the Applicants seek to reorganize ownership of NMP LLC, Ginna LLC, and Calvert LLC, in which EDF Inc. currently holds a 49.99% ownership, under a yet-to-be-formed ultimate parent company (*i.e.*, SpinCo) and without providing sufficient showing of the financial capabilities of that parent or of ExGen post-transaction. In addition, the Applicants propose to alter a plant support agreement and a parent guarantee from Exelon Corporation, currently required by NRC license conditions, with support commitments from the yet-to-be-formed SpinCo. These proposals directly relate to the NRC’s review of the Application and impact EDF Inc.’s interests.

### **III. EDF Presents Three Admissible Contentions for Hearing**

In addition to establishing standing, the Petitioner must propose at least one admissible contention that meets the requirements of 10 C.F.R. §§ 2.309(a) and 2.309(f). EDF offers three such admissible contentions.

**Contention 1: The proposed Spin Transaction requires the consent of EDF Inc. as long as EDF Inc. holds its ownership interest in CENG. Because EDF Inc. has not provided any such consent, in accordance with 10 C.F.R. § 50.80(b)(2) the proposed license transfer approval should not be granted or made effective until after closing the Put Transaction.**

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<sup>25</sup>*River Bend*, CLI-94-10, 40 NRC at 48.

<sup>26</sup> *Seabrook*, CLI-99-06, 49 NRC at 202.

<sup>27</sup> *Id.*

The Application presents financial projections premised upon sole ownership of CENG by SpinCo following both the Put Transaction and the Spin Transaction. Yet, the Application does not clearly state that the Spin Transaction is conditioned or predicated upon the Put Transaction's closing.<sup>28</sup> As noted above, the Applicants have equivocated in public regulatory filings with respect to whether the Put Transaction must be completed prior to the Spin Transaction.<sup>29</sup> In correspondence with EDF Inc., Exelon and ExGen have expressly stated that the Spin Transaction will proceed whether or not the Put Transaction closes first.<sup>30</sup> And there can be no certainty as to when, or if, the Put Transaction will close. To complete the Spin Transaction prior to the Put Transaction, the Applicants would need to obtain EDF Inc.'s consent to take certain actions or modify certain agreements in order to execute the Spin Transaction in the manner described in the Application and in ExGen's filings with the NYPSC and the FERC.

The consent rights of EDF Inc. include the following:

*First*, the Applicants intend to terminate the CENG Operating Agreement, which governs the management of CENG and the rights and obligations of CENG's members, and dissolve CENG's Board of Directors.<sup>31</sup> The Board of Directors is comprised of five members appointed by EDF Inc., and five members appointed by Exelon Corporation. The Joint Petition does not state on what grounds, if any, the Petitioners would seek to terminate the CENG Operating Agreement or dissolve its Board of Directors if the Spin Transaction occurs before the Put Transaction has

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<sup>28</sup> Absent completion of the Put Transaction prior to the Spin Transaction, Applicants would need, at a minimum, to revise the financial projections in the Application to conform the assumptions to the current joint ownership of CENG with EDF Inc.

<sup>29</sup> *See supra*, notes 8-11.

<sup>30</sup> *See supra*, notes 12-13.

<sup>31</sup> Application, Enclosure 1, at 6 ("Exelon Generation and the Constellation Subsidiary Owner LLCs plan to terminate this unnecessary agreement and dissolve the CENG Board as part of the Spin Transaction, and hereby request the NRC's written consent to eliminate the corresponding license conditions that reference the CENG Board and the Fourth Amended and Restated Operating Agreement.").

closed. The CENG Operating Agreement does not grant Petitioners a unilateral termination right, and amending the CENG Operating Agreement would require written consent of all CENG Members, including EDF Inc.<sup>32</sup>

*Second*, the Applicants state that upon closing of the Spin Transaction, they intend to terminate the financial support agreements between Exelon Corporation and CENG and replace them with new support agreements between the SpinCo and the individual project subsidiaries (*i.e.*, Calvert LLC, Ginna LLC, and NMP LLC).<sup>33</sup> Specifically, the Applicants “request the NRC’s consent to terminate the existing Exelon Corporation Support Agreement, Exelon Corporation Guarantee, and CENG cash pool arrangement and associated Master Demand Notes for Calvert Cliffs, NMP, and Ginna[.]”<sup>34</sup> The Applicants also request NRC’s permission to terminate the Nuclear Operating Services Agreement (“NOSA”) with CENG and replace it with new services agreements for each operating subsidiary.<sup>35</sup> However, the existing Exelon Corporation Support Agreement, Exelon Corporation Guarantee, and NOSA are all “Affiliate Contracts” under the

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<sup>32</sup> CENG Operating Agreement § 7.7.

<sup>33</sup> See Application, Enclosure 1, at 11 (“SpinCo will maintain separate support agreements for the benefit of each of the Subsidiary Owner LLCs . . . . These new support agreements will replace the existing financial support terms referenced in the licenses for these facilities. . . . Applicants request the NRC’s consent to terminate the existing Exelon Corporation Support Agreement, Exelon Corporation Guarantee, and CENG cash pool arrangement and associated Master Demand Notes for Calvert Cliffs, NMP, and Ginna and the Exelon Generation Support Agreement for FitzPatrick —and instead implement the updated SpinCo support agreements discussed above.”); Encl. 9 (Form of Financial Support Agreement”).

<sup>34</sup> *Id.* The Exelon Corporation Support Agreement and Exelon Corporation Guarantee are attached as Exhibits 3 and 4, respectively, to the letter from J. B. Fewell, Exelon Generation, to NRC Document Control Desk, “Constellation Energy Nuclear Group, LLC; Notification of Change in Indirect Ownership” (Apr. 24, 2020) (ML20115E609).

<sup>35</sup> Application, Enclosure 1, at 5 (requesting NRC approval “to replace the existing Nuclear Operating Services Agreements (“NOSA”) between Exelon Generation and Exelon FitzPatrick, LLC, NMP LLC, Ginna LLC, and Calvert LLC with NOSAs between SpinCo and the Subsidiary Owner LLCs that contain materially the same terms as the existing NOSAs.”).

CENG Operating Agreement.<sup>36</sup> Under Section 7.2(k) of the CENG Operating Agreement, EDF Inc.’s consent is required for the termination or amendment of Affiliate Contracts.<sup>37</sup>

*Third*, Applicants intend to alter the ownership structure of CENG as part of the Spin Transaction.<sup>38</sup> As part of the proposed Spin Transaction, the Applicants call for, *inter alia*, the indirect transfers of NMP LLC’s and Ginna LLC’s respective ownership interests in Nine Mile Point Nuclear Station, Units 1 and 2, and the R.E. Ginna Nuclear Power Plant. As part of this transfer, “these entities and, as applicable, parent entities, would become subsidiaries of a newly-created, wholly-owned subsidiary of SpinCo.”<sup>39</sup> This, too, requires EDF Inc.’s consent prior to the Put Transaction closing. Among other things, the CENG Operating Agreement requires unanimous approval of the CENG Board of Directors for any decision to dispose of CENG’s interest in a nuclear facility.<sup>40</sup>

Despite EDF Inc.’s consent rights under the CENG Operating Agreement, Applicants have not consulted with EDF Inc. as to the structure of the Spin Transaction as it pertains to CENG, and have been unwilling to provide sufficient information to EDF Inc. to allow it to exercise its consent in a knowing or informed fashion. Thus, EDF Inc. to date has not provided its consent. Accordingly, Applicants do not presently have authority to implement the Spin Transaction to the extent it relates to CENG or the CENG Nuclear Plants.

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<sup>36</sup> CENG Operating Agreement § 7.2(k); Ex. D.

<sup>37</sup> CENG Operating Agreement § 7.2(k)(xxiv).

<sup>38</sup> Application, at 4.

<sup>39</sup> Application, Enclosure 1, at 3.

<sup>40</sup> CENG Operating Agreement § 7.2(j)(xxiv) (requiring approval of all directors then in office, including those appointed by EDF Inc., for any “decision to buy, sell, lease or otherwise dispose of its interest in a nuclear facility”).

Under 10 C.F.R. 50.80(b)(2), the Commission may require an applicant for approval of a license transfer to demonstrate that it has the consent of an existing licensee.<sup>41</sup> Similarly, the consent of an existing co-owner potentially impacted by the proposed transfer should be required—particularly where, as here, that co-owner has contractual rights of approval and would be impacted by the proposed transfer and related financial support changes. While EDF Inc. is not a co-licensee, it is responsible under the CENG Operating Agreement for its pro-rata share of appropriate operating costs of the CENG Nuclear Plants. EDF Inc. also has an obligation under current license conditions that, for so long as it is a member of CENG, its upstream parent, EDF International S.A.S., maintain a financial support agreement for CENG operations independent from the support obligations required for Exelon Corporation.<sup>42</sup>

Disregarding EDF Inc.’s contractual rights to approve the proposed transaction would (as discussed in more detail in Contention 2) decrease the funds available for supporting the CENG Nuclear Facilities and could therefore decrease the financial qualifications of the licensees, thereby increasing radiological safety risk and EDF Inc.’s financial exposure relating to operating the CENG Nuclear Facilities.<sup>43</sup>

Because EDF Inc.’s consent rights cease upon completion of the Put Transaction, this contention would be resolved if NRC approval of the proposed license transfer (or the

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<sup>41</sup> 10 C.F.R. § 50.80(b)(2) (“The Commission may require any person who submits an application for license pursuant to the provisions of this section to file a written consent from the existing licensee or a certified copy of an order or judgment of a court of competent jurisdiction attesting to the person’s right (subject to the licensing requirements of the Act and these regulations) to possession of the facility or site involved.”).

<sup>42</sup> Support Agreement between E.D.F. International S.A. and Calvert Cliffs Nuclear Power Plant, LLC, Nine Mile Point Nuclear Station, LLC, and R. E. Ginna Nuclear Power Plant, LLC (November 6, 2009), attached as Exhibit 2 to the letter from J. B. Fewell, Exelon Generation, to NRC Document Control Desk, “Constellation Energy Nuclear Group, LLC; Notification of Change in Indirect Ownership” (Apr. 24, 2020) (ML20115E609).

<sup>43</sup> *River Bend*, CLI-94-10, 40 NRC at 48; *Seabrook*, CLI-99-06, 49 NRC at 202.

effectiveness of the approval) were expressly conditioned upon the prior completion of the Put Transaction.

**Contention 2: The Spin Transaction would harm EDF and potentially reduce financial support for nuclear operations and decommissioning.**

Under 10 C.F.R. § 50.33(f)(2) and related NRC guidance, applicants—with the exception of electric utilities—seeking to operate a facility must demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operating costs, including fixed costs of maintaining a plant in shutdown conditions during an extended outage (during which there would be no revenues from electricity sales).<sup>44</sup> In 2014 the NRC approved a transfer of control of the CENG Nuclear Plants to allow ExGen to become the licensed operator of those nuclear facilities.<sup>45</sup> Consistent with that approval, the licenses for the CENG Nuclear Plants include a condition requiring Exelon Corporation to enter a support agreement for up to \$245 million for the CENG Nuclear Plants.<sup>46</sup> Another condition of the licenses requires Exelon Corporation to provide a parent guarantee of up to \$165 million in loans or advances to the project-

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<sup>44</sup> See *supra*, note 22.

<sup>45</sup> Letter from N. Morgan (U.S. Nuclear Regulatory Commission) to M. Korsnick (Constellation Energy Nuclear Group, LLC) and B. Wright (Constellation Energy Nuclear Group, LLC), “Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2 – Order Approving Direct Transfer of Renewed Operating Licenses, Independent Spent Fuel Storage Installation License, and Conforming Amendments (TAC Nos. MF2584, MF2585, and L24780),” dated March 24, 2014 (Order – ADAMS Accession No. ML14063A125); Letter from N. Morgan (U.S. Nuclear Regulatory Commission) to M. Korsnick (Constellation Energy Nuclear Group, LLC) and B. Wright (Constellation Energy Nuclear Group, LLC), “Nine Mile Point Nuclear Station, Unit Nos. 1 and 2 – Order Approving Direct Transfer of Renewed Operating Licenses and Conforming License Amendments (TAC Nos. MF2586 and MF2587),” dated March 25, 2014 (Order – ADAMS Accession No. ML1463A184); and Letter from N. Morgan (U.S. Nuclear Regulatory Commission) to M. Korsnick (Constellation Energy Nuclear Group, LLC) and B. Wright (Constellation Energy Nuclear Group, LLC), “R.E. Ginna Nuclear Power Plant - Order Approving Direct Transfer of Renewed Operating License and Conforming License Amendment (TAC No. MF2588),” dated March 25, 2014 (Order – ADAMS Accession No. ML14063A211).

<sup>46</sup> “Exelon Corporation shall, no later than the time the license transfers occur, enter into a Support Agreement of approximately \$245 million with the licensee.” (Ginna Renewed Facility Operating License, License Condition 2.C.(11); Nine Mile Point Unit 1 Renewed Facility Operating License, License Condition 2.D.(17); Nine Mile Point Unit 2 Renewed Facility Operating License, License Condition 2.C.(23); Calvert Cliffs Unit 1 Renewed Facility Operating License, Appendix C, Amendment 305, Item (2); Calvert Cliffs Unit 2 Renewed Facility Operating License, Appendix C, Amendment 283, Item (2)).

specific owner licensees.<sup>47</sup> This amounts to a current requirement that Exelon maintain support agreements for a total of \$410 million for CENG nuclear operations.

Applicants propose to replace the current support agreement and parent guarantee from Exelon Corporation with separate, project-specific support agreements for each of the owner licensees in a combined amount of up to \$372 million.<sup>48</sup> This proposal would diminish financial support for the CENG Nuclear Plants in two ways. First, the aggregate commitment would be reduced from \$410 million to \$372 million. Second, the proposal imposes plant-specific caps. This is in contrast to the current arrangement, in which Exelon Corporation would be required to provide up to the total support of \$410 million if there were funding shortfalls at any one of the plants.

Moreover, those replacement support agreements will be from the yet-to-be-created SpinCo rather than Exelon Corporation. By separating ExGen and the nuclear licensees from the rate-regulated utility businesses of Exelon Corporation, the proposed Spin Transaction would harm EDF Inc. Because Exelon has a more diversified and financially sound business than will the SpinCo, the replacement agreements would be with a less creditworthy counterparty, adding risk to CENG. Furthermore, such separation could reduce the support for nuclear operations, including the financial assurances for technical services supporting ExGen and the operations of the CENG Nuclear Plants. As noted above, under the current licenses, EDF Inc.'s upstream parent, EDF

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<sup>47</sup> "Exelon Corporation shall, no later than the time the license transfers occur, provide a parent guarantee in the amount of \$165 million to ensure a source of funds for the facilities in the event that the existing cash pool between the Owner-Licensees and CENG is insufficient to cover operating costs." (Ginna Renewed Facility Operating License, License Condition 2.C.(12); Nine Mile Point Unit 1 Renewed Facility Operating License, License Condition 2.D.(18); Nine Mile Point Unit 2 Renewed Facility Operating License, License Condition 2.C.(24); Calvert Cliffs Unit 1 Renewed Facility Operating License, Appendix C, Amendment 305, Item (3); Calvert Cliffs Unit 2 Renewed Facility Operating License, Appendix C, Amendment 283, Item (3).)

<sup>48</sup> The aggregate maximum liability under the proposed new support agreements is \$372 million for the CENG Units (Calvert \$126 million, NMP \$128 million, and Ginna \$118 million). *See* Application, Enclosure 1, at 11.

International S.A.S., must also maintain a financial support agreement for CENG operations.<sup>49</sup> A support agreement from SpinCo rather than Exelon Corporation increases the financial exposure of EDF Inc.’s parent in the event of degraded nuclear operations at the CENG Nuclear Plants.

More specifically, Exelon Corporation states that it is currently composed of two distinct businesses—a regulated utility business and a competitive electric and gas business.<sup>50</sup> The former is comprised of six regulated utilities in Illinois (Commonwealth Edison Company), Pennsylvania (PECO Energy Company), Maryland (Baltimore Gas & Electric Company and PECO Potomac Electric Power Company “PEPCO”), Delaware (Delmarva Power & Light Company), New Jersey (Atlantic City Electric Company), and Washington D.C. (PEPCO) that deliver electricity and gas to customers in these service territories.<sup>51</sup> The competitive electric and gas business’s portfolio, on the other hand, principally includes its merchant generating fleet and its customer serving business operating in wholesale and retail competitive electric and gas markets.<sup>52</sup>

The Spin Transaction would separate these two businesses such that liabilities and risks of the merchant generation fleet, including the CENG Nuclear Plants, would not be shared by the regulated utility side of the business. Post-Spin Transaction, if there is a significant financial loss in the CENG Nuclear Plants, Exelon Corporation’s remaining regulated utility business would not be available or required to devote funds to those losses. Indeed, media reports indicate that S&P Global Ratings, Moody’s, and Fitch Group either downgraded their ratings or lowered their ratings

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<sup>49</sup> As explained in the Exelon letter to NRC dated April 24, 2020, the support agreement from EDF International S.A.S. terminates upon closing of the Put Transaction and termination of EDF Inc.’s participation in CENG. *See supra*, note 6, at 3.

<sup>50</sup> New York Public Service Commission, Case 21-E-0130, *Joint Petition of Exelon Corporation and Exelon Generation Company, LLC for a Declaratory Ruling Disclaiming Jurisdiction Over or Abstaining from Further Review of the Proposed Transaction or, in the Alternative, an Order Authorizing the Proposed Transaction Pursuant to Section 70 of the New York Public Service Law* (Feb. 25, 2021), at 4–5.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



outlook of ExGen upon announcement of the Spin Transaction.<sup>53</sup> Financial losses from ExGen's businesses unrelated to the CENG Nuclear Plants also could impact ExGen's and SpinCo's financial health and their collective ability to support the CENG Nuclear Plants. S&P Global Ratings, for instance, noted that its ratings downgrade reflected the underperformance of ExGen's fleet "at the peak of the polar vortex crisis in the Electric Reliability Council Of Texas Inc., with the impact estimated at about \$750 million to \$950 million across its portfolio."<sup>54</sup>

In this way, the proposed termination of the current Exelon Corporation Support Agreement and Exelon Corporation Guarantee (with Exelon Corporation as the counterparty) and replacement with new support commitments from the SpinCo to the project subsidiaries potentially undermines the financial resources available to the CENG owner licensees and the operating licensee. Similar issues may exist with respect to the proposed termination of the Master Demand Notes and cash pooling arrangements for the CENG Nuclear Plants,<sup>55</sup> as presently required by NRC.

**Contention 3: The Application contains insufficient information regarding the Spin Transaction's technical and financial implications.**

The Spin Transaction may have important technical and financial implications in addition to those addressed in Contention 2. However, the Application fails adequately to address these

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<sup>53</sup> See *S&P downgrades Exelon Generation to BBB- following spinoff announcement* (Feb. 25, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/s-p-downgrades-exelon-generation-to-bbb-following-spinoff-announcement-62859923>; *Moody's lowers Exelon Generation to negative outlook after spinoff plans* (Feb. 25, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/moody-s-lowers-exelon-generation-to-negative-outlook-after-spinoff-plans-62883918>; *Fitch Places Exelon Corp. and Exelon Generation on Negative Watch; Affirms Utilities' Ratings* (Feb. 24, 2021), <https://www.fitchratings.com/research/corporate-finance/fitch-places-exelon-corp-exelon-generation-on-negative-watch-affirms-utilities-ratings-24-02-2021>.

<sup>54</sup> See, e.g., *S&P downgrades Exelon Generation to BBB- following spinoff announcement* (Feb. 25, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/s-p-downgrades-exelon-generation-to-bbb-following-spinoff-announcement-62859923>.

<sup>55</sup> See *supra*, note 32.

potential implications, thus providing the Commission with insufficient information on which to make a determination.

*First*, the proposed transfer raises technical qualifications issues that are not addressed in the Application. In Section V of the Application, Applicants provide insufficient detail on the continuity of support services, such as information technology, cybersecurity, offsite emergency response capabilities, or physical security support. The Application does not address how the loss of support services currently provided by Exelon Business Services Company (“BSC”) will affect CENG generally, or nuclear operations specifically. The Application does not identify any plan for transitioning any required support services to ExGen or contractors or explain how ExGen will ensure no adverse operational risks resulting from loss of BSC services.

*Second*, the Application fails to address the continuation of the existing cash pooling arrangement. The NRC’s October 2009 transfer consent orders regarding the restructuring of Constellation Energy Group and CENG—*i.e.*, the transfer associated with EDF Inc.’s acquisition of its current 49.99% interest in CENG—included conditions related to certain “financial arrangements” for the restructured companies.<sup>56</sup> These arrangements included Inter-Company Credit Agreements, cash pooling commitments, and Master Demand Notes. In ExGen’s April 24, 2020 letter notifying the NRC of EDF Inc.’s exercise of its put option, ExGen reaffirmed that the Master Demand Notes and cash pooling arrangements would survive closing of the Put Transaction.<sup>57</sup> The Applicants now state, however, that they seek to terminate its Master Demand

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<sup>56</sup> See *Order Superseding Order of October 9, 2009, Approving Application Regarding Proposed Corporate Restructuring* (Oct. 30, 2009), as revised by correction letter dated Nov. 30, 2009, § III (ML093310366) (R.E. Ginna Nuclear Power Plant); *Order Superseding Order of October 9, 2009, Approving Application Regarding Proposed Corporate Restructuring* (Oct. 30, 2009), as revised by correction letter dated Nov. 30, 2009, § III (ML093290246) (Calvert Cliffs Nuclear Power Plant); *Order Superseding Order of October 9, 2009, Approving Application Regarding Proposed Corporate Restructuring* (Oct. 30, 2009), as revised by correction letter dated Nov. 30, 2009, § III (ML093310365) (Nine Mile Point Nuclear Station).

<sup>57</sup> See *supra*, note 6, at 7 (“The Master Demand Notes for each Owner Licensee will remain in effect following the closing of the transaction.”).

Notes and cash pooling arrangements for the CENG Nuclear Plants.<sup>58</sup> The Application does not explain this discrepancy.

#### **IV. Conclusion**

For the foregoing reasons, EDF Inc. requests that the Commission grant its petition to intervene with respect to the Application and requests a hearing on the proposed license transfer approval in accordance with the procedures in 10 C.F.R. Part 2, Subpart M. EDF Inc. further requests the Commission rule that the Application should not be granted or, in the alternative, if it is granted, the approval or its effectiveness should be conditioned upon closing of the Put Transaction.

Dated: June 14, 2021

Respectfully submitted,

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

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<sup>58</sup> See Application, at 11 (“Applicants request the NRC’s consent to terminate the existing Exelon Corporation Support Agreement, Exelon Corporation Guarantee, and CENG cash pool arrangement and associated Master Demand Notes for Calvert Cliffs, NMP, and Ginna and the Exelon Generation Support Agreement for FitzPatrick—and instead implement the updated SpinCo support agreements discussed above. A form of the SpinCo Financial Support Agreement is provided in Enclosure 9.”).



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

In the Matter of

EXELON GENERATION COMPANY, LLC; EXELON  
CORPORATION; EXELON FITZPATRICK, LLC;  
NINE MILE POINT NUCLEAR STATION, LLC;  
R. E. GINNA NUCLEAR POWER PLANT, LLC; and  
CALVERT CLIFFS NUCLEAR POWER PLANT, LLC

(Calvert Cliffs Nuclear Power Plant, Units 1  
and 2; Nine Mile Point Nuclear Station, units 1 and 2;  
R. E. Ginna Nuclear Power Plant)

(Consideration of Approval of Transfer of Licenses and  
Conforming Amendments)

Docket Nos.

50-317, 50-318, 50-220,  
50-410, 72-1036, 50-244,  
and 72-67

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I certify that the foregoing Petition of EDF Inc. for Leave to Intervene and Request for a Hearing was served upon the Electronic Information Exchange (the NRC's E-Filing system), in the above-captioned proceeding.

Dated: June 14, 2021

Respectfully submitted,

Signed (electronically) by Peter S. Ross

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