UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR PALISADES, LLC (Palisades Nuclear Plant)	)	Docket Nos. 50-255-LT-2 and 72-7-LT
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR FITZPATRICK, LLC (James A. FitzPatrick Nuclear Power Plant)	)	Docket Nos. 50-333-LT-2 and 72-12-LT
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR GENERATION CO. (Pilgrim Nuclear Power Station)	)	Docket No. 50-293-LT-2
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR VERMONT YANKEE, LLC (Vermont Yankee Nuclear Power Station)	)	Docket No. 50-271-LT-2 and 72-59-LT
ENTERGY NUCLEAR OPERATIONS, INC.; ENTERGY NUCLEAR INDIAN POINT 2, LLC; and ENTERGY NUCLEAR INDIAN POINT 3, LLC (Indian Point Nuclear Generating Unit Nos. 1, 2, and 3)	)	Docket Nos. 50-003-LT-2, 50-247-LT-2, and 50-286-LT-2 72-51-LT
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR PALISADES, LLC (Big Rock Point)	)	Docket Nos. 50-155-LT-2 and 72-43-LT-2
	)	(CONSOLIDATED[1])

CLI-08-19

MEMORANDUM AND ORDER

[1] The Commission's Office of the Secretary consolidated these proceedings under the Pilgrim docket umbrella for E-filing purposes and for administrative convenience. *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), Order (Feb. 28, 2008) at 1 (unpublished), ADAMS Accession No. ML080590689. The Office of the Secretary will continue to handle consolidations on a case-by-case basis.

Today, we find that no petitioner has demonstrated standing.[2] We therefore deny their petitions to intervene and their associated requests, and we terminate these adjudicatory proceedings.

I. INTRODUCTION

On July 30, 2007, Entergy Nuclear Operations, Inc. (ENO, the operating company for the affected facilities) filed with the Nuclear Regulatory Commission (NRC) an "Application for Order Approving Indirect Transfer of Control of Licenses" (Application) for the captioned facilities.[3] ENO filed the Application on behalf of itself and the owners of the captioned facilities. ENO subsequently submitted supplementary supporting information on October 31 and December 5, 2007, and on January 24, March 17, April 22, and May 2, 2008.[4] The license transfer applications were approved on July 28, 2008.[5] The ultimate goal of the transfers is to enable Entergy Corporation (the

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[2] Because of this finding, we need not reach the question of whether either group has submitted at least one admissible contention, as required under 10 C.F.R. § 2.309(a).

[3] "Indirect transfers involve corporate restructuring or reorganizations which leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license." *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 459-60 n.14 (1999). By contrast, a direct license transfer entails a change to operating and/or possession authority. *AmerGen Energy Co., LLC* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 574 (2005) ("Because the Applicant did not propose to change either operating or possession authority, there is no direct license transfer"). *See also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 161 (2000) (the "direct license transfer . . . application . . . seeks authorization of the transfer of both ownership and operation" of the facility).

[4] The Application and supplements are available at ADAMS Accession Nos. ML072220219 (July 30, 2007), ML073100216 (Oct. 31, 2007), ML072250021 (Dec. 5, 2007), ML080670222 (Jan. 24, 2008), ML080810285 (March 17, 2008), ML081230539 (April 22, 2008), and ML081420500 (May 2, 2008).

[5] In the Matter of: Entergy Nuclear Operations, Inc.; Entergy Nuclear Generation Company (Pilgrim Nuclear Power Station); Order Approving Indirect Transfer of Facility (continued. . .)

parent company acting through subsidiaries, *i.e.*, ENO and all other captioned companies) to place its wholesale business segment under a new holding company and to distribute the shares of that company directly to the shareholders of Entergy Corporation.[6] Under the plan for restructuring set forth in the application, the entities currently licensed to own and operate the facilities would remain the same, and the facilities would likewise experience no physical or operational changes.

On January 16, 2008, the Commission published in the *Federal Register* a series of "Notice[s] of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for Hearing."[7]

On February 5, 2008, in response to these *Federal Register* notices, two groups of petitioners filed timely petitions to intervene, requests for evidentiary hearing, contentions, discovery requests, requests for issuance of protective orders, and requests for the opportunity to supplement contentions related to any information produced under

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Operating License, 73 Fed. Reg. 45,083 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,085 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Palisades, LLC (Big Rock Point); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,086 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear FitzPatrick, LLC (James A. FitzPatrick Nuclear Power Plant); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,088 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Palisades, LLC (Palisades Nuclear Plant); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,252 (Aug. 4, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Indian Point 2, LLC (Indian Point Nuclear Generating Unit No. 2); Entergy Nuclear Indian Point 3, LLC (Indian Point Nuclear Generating Unit No. 3); Order Approving Indirect Transfer of Facility Operating Licenses, 73 Fed. Reg. 45,253 (Aug. 4, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Indian Point 2, LLC (Indian Point Nuclear Generating Unit No. 1); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,255 (Aug. 4, 2008).

[6] ENO's December 5, 2007 Submission at 2.

[7] 73 Fed. Reg. 2948-2958 (Jan. 16, 2008).

the protective orders. Those petitioners are (i) the Union Locals 369 and 590 of the Utility Workers of America, AFL-CIO (UWUA Locals, or Locals) and (ii) Westchester Citizen's Awareness Network (WestCAN), Rockland County Conservation Association (RCCA), Promoting Health and Sustainable Energy (PHASE), Sierra Club – North East Chapter (Sierra Club), and State Representative Richard Brodsky (collectively "Petitioners' Group").[8] Additionally, Mr. Tom Gurdziel of Oswego, NY, submitted two sets of comments on January 21, 2008, as permitted by our procedural rules.[9]

The UWUA Locals represent workers at the Pilgrim facility and express concern that the corporate reorganization may adversely affect Pilgrim and its employees. In their petition, the Locals complained that ENO has not explained either why it is abandoning its earlier (July 30th) restructuring plan or why the new (Dec. 5th) structure yields a "better outcome."[10] Following the Locals' review of confidential material

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[8] The two petitions to intervene are not rendered moot by the NRC Staff's recent order approving ENO's license transfer application. As we explained in *Vermont Yankee*:

> . . . if the Staff approves the [license transfer] application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in the Applicant's favor. In the latter situation, our procedural rules (10 C.F.R. Part 2, Subpart M) leave license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication free to act in reliance on the Staff's order. *See generally* 10 C.F.R. § 2.1327. However, they do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application. In such a case, the Commission may require that the license [transfer approval] be rescinded.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000) (which we clarify with the addition of the bracketed language). *See also Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 286 n.1 (2000), & CLI-01-14, 53 NRC 488, 508 (2001).

[9] 10 C.F.R. § 2.1305.

[10] Petition of Locals 369 and 590, Utility Workers Union of America, AFL-CIO for Leave to Intervene; Request for Initiation of Hearing Procedures, Preliminary Statement of (continued. . .)

pursuant to a protective order, they filed amended contentions expressing in more detail their concerns about the effects of the reorganization.

Petitioners' Group is concerned primarily that the restructuring could adversely affect the "fiscal responsibilities and liability" of the three Indian Point units.[11]

ENO filed answers opposing both Petitions to Intervene.[12] The Locals filed a reply to ENO's answer,[13] but Petitioners' Group did not. The NRC Staff has chosen not to participate as a party. On June 12, 2008, UWUA Local 369 voluntarily withdrew its petition and related requests for relief; therefore, today's decision considers the UWUA Petition only as it relates to UWUA Local 590.[14]

Contentions, Request for Issuance of Protective Order(s) and Related Production of Data, at 3-4 (Feb. 5, 2008) (UWUA Petition).

[11] Petition of Westchester Citizen's Awareness Network (WestCAN), Rockland County Conservation Association (RCCA), Promoting Health and Sustainable Energy (PHASE), Sierra Club – North East Chapter (Sierra Club) and Richard Brodsky (Brodsky), at 2 (Feb. 5, 2008) (Petition of Petitioners' Group).

[12] Answer of Entergy Nuclear Operations, Inc. Opposing WestCAN, et al. Petition for Leave to Intervene and Request for Hearing Concerning Indirect Transfer of Control of Licenses (Mar. 31, 2008); Answer of Energy Nuclear Operations, Inc. Opposing Petition for Leave to Intervene and Request for Hearing of Locals 369 and 590, Utility Workers Union of America, AFL-CIO (Apr. 8, 2008).

[13] Reply of Locals 369 and 590, Utility Workers Union of America, AFL-CIO to Answer of Entergy Nuclear Operations, Inc. Opposing Petitions for Leave to Intervene, Request for Hearing, and Related Requests for Relief (Apr. 15, 2008) (UWUA Reply).

[14] Notice of Withdrawal of Petition to Intervene of Local 369, Utility Workers Union of America, AFL-CIO (June 12, 2008).

II. DISCUSSION

A. Standing

1. Standards for Standing

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing."[15] To make such a demonstration, the petitioner must:

(1) identify an interest in the proceeding by

(a) alleging a concrete and particularized injury (actual or threatened) that

(b) is fairly traceable to, and may be affected by, the challenged action (here, the grant of an application to approve a license transfer), and

(c) is likely to be redressed by a favorable decision, and

(d) lies arguably within the "zone of interests" protected by the governing statute(s) (here the AEA and the National Environmental Policy Act).

(2) specify the facts pertaining to that interest.[16]

Moreover, any organization seeking "representational standing" (i.e., permission to represent the interests of one or more of its members) must also show that at least one of its members may be affected by the Commission's approval of the transfer (such as by the member's domicile, work or activities on or near the site), must identify that member by name, and must demonstrate that the member has (preferably by affidavit) authorized the organization to represent him or her and to request a hearing on his or

[15] *See* Atomic Energy Act of 1954, as amended (AEA), § 189a, 42 U.S.C. § 2239(a).

[16] *See Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-09, *reconsid'n denied*, CLI-07-22, 65 NRC 525 (2007); *FitzPatrick*, CLI-00-22, 52 NRC at 293; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority); 10 C.F.R. § 2.309(d)(1).

her behalf.[17] The member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its own purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action.[18]

2. Standing of UWUA Local 590

Local 590 asserts, in support of its claims of standing, that an approval of the indirect license transfer could adversely affect its members and the citizens of the community surrounding the Pilgrim facility – a community that includes those same workers. Local 590 directs our attention to its "substantial interest in the safe operation and good financial standing" of Pilgrim. According to the Local, the "proposed transfer may have a negative impact on the safe operations of [Pilgrim], which would have a corresponding and adverse impact upon the surrounding community." The Local also claims that a risk to the reputation of Pilgrim would also constitute a threatened injury to its members' interests.[19] Finally, the Local seeks standing to challenge the license transfer application insofar as it applies to facilities other than Pilgrim.

a. Representational Standing

Local 590 claims representational standing for its members at the Pilgrim facility. Yet the Local's claim suffers from multiple flaws.

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[17] *See Palisades*, CLI-07-18, 65 NRC at 409; *FitzPatrick*, CLI-00-22, 52 NRC at 293; *Vermont Yankee*, CLI-00-20, 52 NRC at 163; *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000), and cited authority.

[18] *See*, *e.g.*, *Palisades*, CLI-07-18, 65 NRC at 409; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999), & CLI-98-13, 48 NRC 26, 30-31 (1998), *petition for review held in abeyance*, *Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007).

[19] UWUA Petition at 4, 6-7.

i. Insufficient Assertions in Affidavit.

Local 590 recognized that, in claiming representational standing, it was required under Commission case law to "demonstrat[e] that [an] individual member has standing to participate, and has authorized the organization to represent his or her interests."[20] To satisfy this requirement, the Local appended to its reply an "authorization affidavit" from Mr. Murray E. Williams, a member of Local 590.[21] The affidavit indicates that Mr. Williams currently is employed full-time as an engineer at the Pilgrim facility, intends to continue working there indefinitely, lives within 10 miles of the facility, engages in activities that take him within a 5-mile radius of Pilgrim approximately 10 hours per week, and authorizes Local 590 to represent his interests in this proceeding.[22]

The affidavit is insufficient to justify a finding of proximity-based standing. As our now-defunct Atomic Safety and Licensing Appeal Board[23] correctly stated in *Allens Creek*, this agency cannot automatically assume that an organization member necessarily considers him- or herself "potentially aggrieved by [a particular] outcome of the proceeding (an essential ingredient of standing)."[24] The Williams Affidavit does not contain this "essential ingredient" – i.e., precisely how the affiant is aggrieved – whether based on his employment, residence or activities.

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[20] *Id.* at 8, quoting *Georgia Institute of Technology*, CLI-95-12, 42 NRC 111, 115 (1995).

[21] *See* UWUA Reply, Attachment 1, Affidavit of Murray E. Williams (Apr. 15, 2008)(Williams Affidavit).

[22] Mr. Williams also authorized Local 369 to represent his interests here. We need not consider whether Local 369 may represent the interests of an individual that is not a member, given that Local 369 has withdrawn from this proceeding.

[23] Although the Commission abolished the Atomic Safety and Licensing Appeal Board in 1991, its decisions still carry precedential weight. *Sequoyah Fuels Corp.*, CLI-94-11, 40 NRC 55, 59 n.2 (1994), and cited authority.

[24] *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979).

This omission is not merely a matter of failing to cross a "t" or dot an "i." Our rules require those seeking NRC hearings to show "the nature and extent" of their interest and the "possible effect" of the challenged NRC licensing action on that interest.[25] Local 590 seems to assume that living or working near or around a reactor justifies standing in and of itself – even in an indirect license transfer case. It does not. Absent an "obvious" potential for harm, it is a petitioner's burden to show how harm will or may occur.[26]

The Williams Affidavit does not meet this burden. In an indirect license transfer case like this one, the plant continues to operate much as before: there is no change in the operator, no change in the direct owner, and no change in the physical plant. In other words, the indirect transfer creates no obvious source of actual or potential harm. It is largely a bookkeeping transaction. The Williams Affidavit, which rests on proximity alone, simply does not explain how the indirect license transfer at issue here will harm Mr. Williams. The affidavit does not show standing.[27]

ii. Untimely Submission of Affidavit.

Even were we to overlook the Williams Affidavit's substantive deficiency described above, we would still reject it as untimely filed.

Local 590 submitted no authorization affidavits with its petition to intervene. After ENO's answer drew the Local's attention to this flaw, it sought to correct it by appending an authorization affidavit to its reply brief. But for the reasons set forth below, our

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[25] 10 C.F.R. § 2.309(d).

[26] *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005).

[27] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188-97 (1999), *pet. for review den. sub nom. Dienenthal v. NRC*, 203 F.3d 52 (Table), 2000 WL 158835 (D.C. Cir. 2000) (petitioners claiming standing have the burden of alleging in their pleadings how they may be harmed by a licensing action without any obvious radiological consequences).

acceptance and consideration of such belatedly submitted evidence regarding standing would deprive ENO of the opportunity to challenge the substantive sufficiency of the affidavit[28] – an opportunity ENO could have exercised had Local 590 submitted a timely affidavit with its petition to intervene. Our regulations provide for only three pleadings that can be filed "as of right" regarding standing (and admissibility of contentions). [29] The reply brief, through which the Williams Affidavit was filed, is the *final* of these three. Hence, were we to consider the affidavit, ENO would have no right under our regulations to challenge its adequacy.[30]

We faced a somewhat similar situation last year in the *Palisades* license transfer adjudication, where a petitioner sought to submit authorization affidavits in its petition for reconsideration of our final decision. We rejected the eleventh-hour submission on the ground (among others) that it

> is not acceptable in NRC practice for a petitioner to claim standing based on vague assertions, and when that fails, to attempt to repair the defective pleading with fresh details offered for the first time in a petition for reconsideration.[31]

The same rationale strikes us as equally applicable to authorization affidavits filed with replies, as here.[32]

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[28] ENO has, by filing a Motion to Strike (Apr. 25, 2008), lodged a *procedural* challenge as to the affidavit's timeliness.

[29] 10 C.F.R. § 2.309(h).

[30] *See generally Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("Allowing new claims in a reply . . . would unfairly deprive other participants of an opportunity to rebut the new claims" supportive of contentions).

[31] *Palisades*, CLI-07-22, 65 NRC at 527-28.

[32] Along similar lines, we have addressed the permissible parameters of a reply outside the standing context. For instance, in *Louisiana Energy Services*, we indicated that petitioners may not use replies as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25, (continued. . .)

Consistent with our responsibilities to protect public health and safety and to conduct fair adjudications,[33] we endeavor to resolve those adjudications promptly.[34] To this end, we seek wherever possible to avoid the delays (such as an additional round of pleadings) caused by a petitioner's "attempt to backstop elemental deficiencies in its original" petition to intervene.[35] Our observation in *Louisiana Energy Services* (a non-license transfer case) applies equally to license transfer adjudications:

> As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards . . . [is] paramount. There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new bases or new issues that "simply did not occur to [them] at the outset."[36]

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reconsideration denied, CLI-04-35, 60 NRC 619 (2004). Likewise, in the *Palisades* license renewal proceeding, we held that:

> Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. . . . [I]f the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions.

Palisades, CLI-06-17, 63 NRC at 732. *See generally* Final Rule, "Changes to the Adjudicatory Process," 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) (a reply must be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer").

[33] *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998).

[34] *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 30 (2003); Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,721-22, 66,729 (Dec. 3, 1998).

[35] *Louisiana Energy Services, LP* (National Enrichment Facility), 2004 WL 1505412 (N.R.C.) at n.2 (Licensing Board June 1, 2004) (referring to a petitioner's attempt to use a reply to supplement contentions in the petition to intervene).

[36] CLI-04-25, 60 NRC at 225 (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)).

Finally, to the extent that certain of our past Memoranda and Orders might be read to imply that authorization affidavits may be filed with a reply,[37] we disavow such an interpretation.

iii. Applicability of "Representational Standing" Criteria to Unions.

The Local also asserts in its reply that unions, by their very nature, are entitled to represent their members in our proceedings (apparently regardless of any failure to satisfy our proximity-based standing requirements).[38] This argument does not withstand serious scrutiny.

We have never addressed *directly* the issue whether unions are, by their nature, exempt from our "representational standing" criteria. But both we and one of our Licensing Boards have done so *by implication*. In *FitzPatrick* (a license transfer case), we found that a labor union had satisfied the requirements for representational standing. In so finding, we implied that those requirements do apply to unions.[39] Similarly, the

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[37] *Cf. Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003) ("even after both Fansteel and the NRC Staff pointed out the lack of specificity in Oklahoma's petition [to intervene], Oklahoma made no effort to elaborate or explain its concerns in a Reply Brief"); *Oyster Creek*, CLI-00-6, 51 NRC at 203-04 ("When the [license] transfer Applicants' answer pointed out these defects [immateriality or conclusory presentation], NIRS filed no reply, although Subpart M authorized it to do so"); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000) (where we noted the lack of specificity and documentation in a petition for review and then observed, with disapproval, that "[p]etitioners also did not take advantage of our rule . . . permitting them to reply to the transfer applicants' opposition to standing").

[38] UWUA Reply at 2 n.1.

[39] *FitzPatrick*, CLI-00-22, 52 NRC at 294 (concerning Nuclear Generation Employees Association).

Licensing Board in an early *Palisades* proceeding applied to a union the criteria for representational standing.[40]

Likewise, a number of federal courts have implied that unions are subject to those criteria. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has twice recognized the need to confirm that a union actually has authority to represent the interests of the individual whom the union purports to represent. Most recently, in *International Brotherhood of Teamsters v. Transportation Security Admin.*, the court denied representational standing to a union, in part because it had submitted no proof that the employee it claimed to represent was in fact a union member at the time the case commenced.[41]

Earlier, in *National Maritime Union v. Commander, Military Sealift Command,*[42] the same court considered whether to apply to certain unions the federal courts' own test for representational standing, i.e., whether (i) their members individually would have standing to bring the same claims, (ii) the interests the unions protect by bringing the claims are germane to the unions' purposes, and (iii) neither the claim nor the relief sought requires individual members to participate in the litigation.[43] The court could have determined that the unions were *per se* representatives of their members and therefore entitled to qualify for representational standing. But the court did not do so.

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[40] *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247, 253-55 (1981), *rev'd on other grounds*, ALAB-670, 15 NRC 493 (1982). Licensing Board decisions, however, carry no precedential weight. *Aharon Ben-Haim*, CLI-99-14, 49 NRC 361, 364 (1999); *Sequoyah Fuels Corp.*, CLI-95-2, 41 NRC 179, 190 (1995).

[41] *Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1134-35 & n.4 (D.C. Cir. 2005).

[42] 824 F.2d 1228 (D.C. Cir. 1987).

[43] *Id.* at 1231.

Several United States District Courts have taken the same approach as the D.C. Circuit.[44] Moreover, the United States Supreme Court and other federal courts have applied to unions this same three-pronged test, *supra*, for what they call "associational standing"[45] – a subcategory of representational standing.[46]

Although this test for representational standing does not contain our own "authorization" requirement, we believe that the principle underlying those courts' rulings is equally applicable here – that not even *inherently* representative organizations qualify for automatic standing, but that they must instead satisfy certain requirements before being permitted to represent others.[47] This principle is also consistent with our own

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[44] *See Construction & Gen. Laborers' Union No. 230 v. City of Hartford*, 153 F. Supp.2d 156, 163 (D. Conn. 2001); *Cohen v. Rice*, 800 F.Supp. 999, 1003 n.2 (D. Me. 1992); *National Treasury Employees Union v. Seidman*, 786 F. Supp. 1041, 1045 (D.D.C. 1992).

[45] *See*, *e.g.*, *Automobile Workers v. Brock*, 477 U.S. 274, 282 (1986), quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). *See also United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996).

[46] *See Brown Group*, 517 U.S. at 557 ("the notion of associational standing is only one strand" of the doctrine of representational standing).

[47] The unspoken reason underlying our own and the courts' refusal to grant automatic standing to unions may lie in the fact that unions are formed to represent their members in collective bargaining and other employment-related negotiations, not in administrative or judicial litigation. *See*, *e.g.*, 2 U.S.C. § 441b(b)(1):

> For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

See also Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 723 (1965) (opinion of Goldberg, J., concurring in part and dissenting in part) ("The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment").

jurisprudence regarding the standing of public interest groups – who also, in significant part, exist to represent the interests of their members.[48]

Finally, the fact that the test above for representational or associational standing omits our additional requirement of written authorization does not undermine our own right to impose that requirement. Although we generally follow federal practice when addressing issues of standing,[49] we are not bound to do so.[50] Federal courts have long recognized the right of agencies to tailor their own standing requirements to fit their specific needs.[51] As Judge (later Chief Justice) Burger stated:

> The [Federal Communications] Commission should be accorded broad discretion in establishing and applying rules for . . . public participation,

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[48] *See*, *e.g.*, *Palisades*, CLI-07-18, 65 NRC at 409-10, *reconsid'n denied*, CLI-07-22, 65 NRC 525, 527-28 (2007) (applying standards for representational standing to two public interest groups – Michigan Environmental Council and the Public Interest Research Group in Michigan); *Consumers Energy Co.* (Big Rock Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, *reconsid'n denied*, CLI-07-21, 65 NRC 519 (2007) (applying the same to two public interest groups – Don't Waste Michigan and Nuclear Information and Resource Service); *FitzPatrick*, CLI-00-22, 52 NRC at 293-94 (applying the same to Citizens Awareness Network).

The federal courts likewise apply the same standing criteria to unions as they do to public interest groups, trade associations, and other groups. *See*, *e.g.*, *Brock*, *supra* (labor union); *Hunt*, *supra* (a state agency acting as a *de facto* trade association by representing its regulated entities; also *dictum* regarding bar associations); *United States v. AVX Corp*, 962 F.2d 108, *passim* (1st Cir. 1992) (an environmental organization); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1276-80 (5th Cir. 1981) (a church); *Associated Gen. Contractors of ND v. Otter Tail Power Co.*, 611 F.2d 684, 688-90 (8th Cir. 1079) (a trade association).

[49] The Commission has long looked for guidance to judicial concepts of standing. *See*, *e.g.*, *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005), and cited authority.

[50] *Envirocare of Utah, Inc. v. NRC*, 193 F.3d 72, *passim* (D.C. Cir. 1999). *See also Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976) ("Standing requirements in the federal courts need not be the exclusive model for those applicable to administrative proceedings").

[51] *See Pebble Springs*, CLI-76-27, 4 NRC at 614-15.

> including rules for determining which community representatives are to be allowed to participate. . . .[52]

iv. Remaining Flaws.

Local 590's arguments on standing fail for two final reasons. First, the Local's assertion of threatened injury – that the "proposed transfer may have a negative impact on the safe operations of [Pilgrim]" – is both cursory and factually unsupported.[53]

Second, damage to Pilgrim's reputation does not constitute a threatened injury to the interests of the Local's members. The Local's argument contravenes Commission precedent. In *North Anna*, the Appeal Board correctly ruled:

> [Petitioner's] asserted 'concern' for the safety of the facility stems entirely from its interest in protecting its business reputation and avoiding possible damage claims. But we have been pointed to nothing in the terms or legislative history of the Atomic Energy Act which might provide even a wobbly underpinning for a suggestion that the statutory health and safety provisions had – even as a secondary purpose – the furtherance of an interest of that character. Nor do we perceive any basis for presuming the existence of such a legislative design.[54]
>
> * * * *
>
> [T]here is no relationship at all between the legislative purpose underlying the safety provisions of the Atomic Energy Act and [Petitioner's] interest in protecting its reputation and avoiding damage suits.[55]

For all the reasons stated above, we conclude that Local 590 is not entitled to claim representational standing on behalf of its members.[56]

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[52] *United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966).

[53] The Commission, in its license transfer jurisprudence, has repeatedly stated that it will not accept cursory arguments regarding standing. *See*, *e.g.*, *FirstEnergy Nuclear Operating Co.* (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 16 (2006); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002); *Millstone*, CLI-00-18, 52 NRC at 132-33.

[54] *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976).

[55] *Id.*, ALAB-342, 4 NRC at 107.

b. Organizational Standing

In addition to claiming representational standing, Local 590 also claims standing on its own behalf regarding the Pilgrim facility.[57] It argues that, as a representative of many Pilgrim employees, Local 590 has an organizational interest in protecting its members' safety, i.e., that "[its] representational standing . . . falls within [its] organizational purposes."[58] This is merely the Local's "representational standing" argument dressed up in different clothes. We reject it on the same grounds as set forth above.

Re-raising another of its arguments regarding representational standing, Local 590 claims that a risk to the reputation of Pilgrim would qualify as a threatened injury to the Local's own organizational interests.[59] We likewise reject that argument on the same grounds as set forth above.

c. Claim of Standing in Proceedings Not Involving Pilgrim

Local 590 claims standing to participate in not only the Pilgrim license transfer proceeding but also the parallel proceedings involving the indirect transfers of the licenses for the Palisades, FitzPatrick, Vermont Yankee, Indian Point, and Big Rock Point facilities. The Local explains that it seeks such standing "out of an abundance of caution and because [it] do[es] not know how the Commission's review processes will proceed."[60] Yet the Local presents no reasons, other than those already proffered

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[56] For the same reasons, we conclude that Local 590 lacks representational standing on behalf of the community.

[57] UWUA Petition at 4, 7.

[58] *Id.* at 8.

[59] *Id.* at 7.

[60] *Id.* at 4-5 n.5.

regarding the Pilgrim facility, as to why it qualifies for standing in these other five proceedings. We believe that the reasons set forth above for denying the Local's claim of standing apply in even stronger terms to its similar claim regarding these other five facilities. This conclusion is consistent with our finding in *Florida Power & Light Co.*, where we concluded that a union in one facility lacked standing to participate in seven other interrelated license transfer proceedings – given (as here) that the union did not represent employees at the other facilities.[61]

d. Discretionary Intervention

Local 590 argues that, even if we find a lack of standing, we should nevertheless grant it discretionary intervention based upon its "unique perspective and unique experiences," which will allow it to "assist in developing a sound record."[62] Our regulations provide that we "may consider a request for discretionary intervention 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."[63] Because we find today that no petitioner has demonstrated standing, these prerequisites are not present in this proceeding. We therefore deny the Local's request for discretionary intervention.[64]

3. Standing of the Members of Petitioners' Group

a. Mr. Richard Brodsky

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[61] *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, *et al.*), CLI-06-21, 64 NRC 30, 34-35 (2006).

[62] UWUA Petition at 8, quoting 10 C.F.R. 2.309(e)(1)(i).

[63] 10 C.F.R. § 2.309(e).

[64] Moreover, the Local's justification for discretionary standing is merely a cursory paraphrase of our own regulatory litmus test for discretionary intervention. *See* UWUA Petition at 8-9, citing 10 C.F.R. §§ 2.309(e)(1)(i)-(iii), 2.309(e)(2), & 2.309(e)(2)(iii). The Local provides no supporting details. As we observed in note 52 above, we do not consider cursory arguments regarding standing.

The Petitioners' Group presents no arguments or affidavits supporting Mr. Brodsky's standing. We therefore find that he has not met his burden under 10 C.F.R. § 2.309(d) to demonstrate standing.

b. Representational Standing

As noted above, an organization seeking representational standing must provide proof that one of its members has actually authorized the organization to represent his or her interests in this proceeding. None of the four organizations comprising the remainder of the Petitioners' Group has done so. Therefore, none has demonstrated representational standing.

Moreover, all organizational members of the Petitioners' Group except Sierra Club base their claims of representational standing upon their own members' proximity to the Indian Point facility[65] despite the fact that their specified proximities fall *far* outside any that we have ruled would justify standing in indirect (or even direct) license transfer adjudications. We explained in the *Peach Bottom* decision how we consider proximity-based standing in license transfer cases:

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

[65] In *Three Mile Island*, we offered the following description of the basis for "proximity-based standing:"

> [It] differs from traditional standing in that the petitioner claiming it need not make an express showing of harm. Rather, proximity standing rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working, living or regularly engaging in activities offsite but within a certain distance of that facility.

Three Mile Island, CLI-05-25, 62 NRC at 574-75.

> The initial question we need to address is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action could plausibly lead to the offsite release of radioactive fission products from the reactors. The burden falls on the petitioner to demonstrate this. If the petitioner fails to show that a particular licensing action raises an *obvious potential for offsite consequences*, then our standing inquiry reverts to a traditional standing analysis of whether the petitioner has made a specific showing of injury, causation and redressability.[66]

ENO's proposed license transfer is an *indirect* one in that it does not involve transfer of either ownership or operating rights to the subject facilities.[67] Nor does it entail any changes in the facilities themselves or in their operation. Given these facts, we can see no "obvious potential for offsite consequences" stemming from this *indirect* license transfer. And without such potential consequences, proximity-based standing cannot be demonstrated. Indeed, to date, we have never granted proximity-based standing to a petitioner in an indirect license transfer adjudication.[68]

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[66] *Peach Bottom*, CLI-05-26, 62 NRC at 580-81 (emphasis added; footnotes, quotation marks and ellipses omitted).

[67] *See*, *e.g.*, 73 Fed. Reg. 2951, 2951-52 (Jan. 16, 2008) (Pilgrim).

[68] In the *Millstone* indirect license transfer adjudication (involving no change in the facility, its operation, licensees, personnel or financing), we concluded that petitioners living within 5-10 miles of the plant *did not qualify* for proximity-based standing. *Millstone*, CLI-00-18, 52 NRC 129. Similarly, in the *Three Mile Island* indirect license transfer case (involving no change in operating or possession authority), we denied proximity-based standing to a petitioner living and working 12 miles from the facility. *Three Mile Island*, CLI-05-25, 62 NRC at 574-76. If the petitioners in those cases do not qualify for proximity-based standing in indirect license transfer cases, then *a fortiori*, RCCA (who claims to have members within a 20-mile radius), PHASE (30-mile radius) and WestCAN (50-mile radius) do not qualify in this indirect licensing case. *See* Petition of Petitioners' Group at 4. *Cf. Peach Bottom*, CLI-05-26, 62 NRC at 580-83 (a direct license transfer adjudication in which we denied proximity-based standing to a petitioner who lived and worked 40 miles from the Oyster Creek facility).

Moreover, with the exception of one case which is quite different from ours, even the petitioners in *direct* license transfer cases where we found proximity-based standing lived within a much smaller radius of their plants – i.e., 6 to 6½ miles (*Vermont Yankee*, CLI-00-20, 52 NRC at 163-64.), 5½ miles (*FitzPatrick*, CLI-00-22, 52 NRC at 293; *Indian Point*, CLI-01-19, 54 NRC at 133), and 1 to 2 miles (*Oyster Creek*, CLI-00-6, 51 NRC at (continued. . .)

Petitioners' Group offers no reason for us to depart from this line of adjudicatory precedent. Nor can we think of any.

c. Organizational Standing

WestCAN claims organizational standing based on its assertions that it is an advocate for a nuclear-free Northeast, that it keeps the public informed of events at Indian Point, and that its own office is only three miles from the Indian Point facility and also within the "peak fatality zone" or "Plume Exposure Pathway."[69] As noted above, we see no obvious potential for offsite consequences stemming from this indirect license transfer. We therefore conclude that the three-mile distance between WestCAN's office and the Indian Point facility does not qualify WestCAN for organizational standing here.

Nor does WestCAN's status as an anti-nuclear advocate and a source of information for its community qualify it for organizational standing. Mere involvement in such issues is insufficient to merit intervenor status. Rather, a petitioner must show some risk of "discrete institutional injury to itself, other than the general environmental and policy interests of the sort we repeatedly have found insufficient for organizational standing."[70] This kind of role as a "private attorney general" is not contemplated under Section 189a of the Atomic Energy Act.[71]

The remaining three organizational members of the Petitioners' Group proffer similar arguments to those of WestCAN. RCCA claims organizational standing on its

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193) – than the members of RCCA, PHASE and WestCAN live, work or engage in recreation.

[69] Petition of Petitioners' Group at 3.

[70] *Palisades*, CLI-07-18, 65 NRC at 411-12, citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001) (emphasis added).

[71] *Palisades*, CLI-07-22, 65 NRC at 526, 529, citing 42 U.S.C. § 2239(a); *Palisades*, CLI-07-18, 65 NRC at 411-12, citing same.

own behalf because it has been active since 1936 in environmental issues and because its central office is within nine miles of the facility and also within the Plume Exposure Pathway.[72] PHASE claims standing on its own behalf because of its advocacy for sustainable energy as a means to protect both the environment and the public health and safety, and also because its central office is within eleven miles of the Indian Point facility and also within the Plume Exposure Pathway.[73] And Sierra Club claims standing in its own right based on its longstanding involvement in environmental conservation, in New York State and elsewhere in the country, and also based on the assertion that one of its regional offices lies within the "peak ingestion zone."[74] We reject all these arguments on the same grounds as we rejected those of WestCAN.

d. Petitioners' Group's Request for Discretionary Intervention

All members of the Petitioners' Group request discretionary standing under 10 C.F.R. § 2.309(e), but they do not address the six factors set forth in that regulation.[75] Nor is there a hearing in which the Petitioners' Group could participate.[76] We therefore deny their request for discretionary intervention.

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[72] Petition of Petitioners' Group at 4.

[73] *Id.*

[74] *Id.* at 4-5.

[75] *Id.* at 6.

[76] *See* section A.2.d, above.

III. CONCLUSION

We *deny* the two petitions to intervene and their associated requests, and we *terminate* this adjudication.

IT IS SO ORDERED.

For the Commission

/RA/

_____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of August, 2008.

Commissioner Jaczko Concurring In Part and Respectfully Dissenting In Part

While I concur in most of the Commission's Memorandum and Order, I respectfully dissent to section II.A.2.a, which discusses the standing of Union Local 590 of the Utility Workers of America, AFL-CIO (UWUA Local, or Local) to intervene with respect to the indirect transfer of the license for the Pilgrim Nuclear Power Station.

While I acknowledge that the affidavit submitted by the Local is technically deficient for the reasons detailed in the Order, I believe it would be a minor procedural matter well within the authority of the Commission to allow the intevernor an opportunity to provide the missing information. Such a step would certainly serve the larger Atomic Energy Act goal of encouraging public participation in the NRC's licensing process, while causing only minor delay in the proceeding. Displaying this flexibility would be consistent with the approach we have taken to allow licensees to correct, modify, and update license applications.

We should, therefore, give the Local an opportunity to establish that Mr. Williams has standing in his own right, and that the Local, as authorized by Mr. Williams, also has standing as his representative in this proceeding. If that threshold can not be met, then I would support proceeding as detailed in the Majority's Order.