UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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| In the Matter of: | ) | |
| | ) | |
| GLOBAL LASER ENRICHMENT, LLC | ) | Docket No. 70-7033 LM |
| Paducah Laser Enrichment Facility | ) | |
| | ) | |

# KENTUCKY RESOURCES COUNCIL, INC.'S BRIEF IN SUPPORT OF APPEAL OF *MEMORANDUM AND ORDER* *(Ruling on Hearing Requests)*

Date: August 3, 2026

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that, on August 3, 2026, copies of the foregoing were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

*Signed (electronically) by Tom FitzGerald*
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## INTRODUCTION

Comes the Appellant, Kentucky Resources Council, Inc. ("KRC") by counsel, and pursuant to and in accordance with 10 C.F.R. 2.311, files this brief in support of the appeal to the Nuclear Regulatory Commission ("Commission") from the *Memorandum and Order (Ruling on Hearing Requests)* rendered on July 9, 2026 by an Atomic Safety and Licensing Board Panel, Docket No. 70-7033-ML, ASLBP No. 26-992-01-ML-BD01.[1] The *Memorandum and Order* (hereinafter "*ASLBP Order*") herein appealed from, denied hearing requests that had been filed by Michael McVicker and the Kentucky Resources Council challenging the application of Global Laser Enrichment ("GLE") for a license to possess and use special nuclear material for the purpose of constructing and operating a uranium enrichment facility in McCracken County, Kentucky.

For the reasons outlined herein, and on the basis of the allegations and supporting information and documentation filed in the *Kentucky Resources Council, Inc.'s Request for Hearing* ("Request for Hearing"), Appellant KRC respectfully requests that the Commission reverse the July 9, 2026 decision of the Atomic Safety and Licensing Board Panel ("ASLB Panel") denying KRC's request for hearing, determine that the request for hearing "should have been granted,"[2] and remand the case for hearing on the contentions presented by KRC.

## FACTUAL BACKGROUND

Appellant KRC accepts and adopts as if set forth herein, the "Background" as presented in the July 9, 2026 *ASLBP Order.*

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[1] A copy of the *Memorandum and Order* from which this appeal is taken is attached as Appendix 1 to the Notice of Appeal, is incorporated herein by reference, and is referred to as "*ASLBP Order,* at ____."

[2] 10 C.F.R. § 2.311(c).

On July 9, 2026, the ASLB Panel issued a *Memorandum and Order (Ruling on Hearing Requests)* denying the hearing request by Michael McVicker, denying KRC's hearing request. A motion filed by GLE to strike portions of KRC's reply was denied as moot, with the ASLB Panel explaining that the panel's review of KRC's standing and the admissibility of its contentions was limited to arguments as pled in its hearing request, and that KRC's reply was considered only to the extent it provided clarification of KRC's original claims, so that the panel "need not parse the various arguments that GLE would have us strike from KRC's reply." *Order* at 27.

This appeal, coming on the 25th day after the service of that *Memorandum and Order,* timely followed the decision. 10 C.F.R. § 2.306(a).

## STATEMENT OF APPLICABLE LAW

As recognized in the *ASLBP Order,* any appeal from that *Order* must be filed in accordance with 10 C.F.R. 2.311. *ASLBP Order* at 27. 10 C.F.R. § 2.311 provides for "[i]nterlocutory review of rulings on requests for hearing/petitions to intervene" within "25 days after the service of the order." The appeal "must be initiated by the filing of a notice of appeal and accompanying supporting brief[,]"[3] and the "supporting brief and any answer must conform to the requirements of § 2.341(c)(3)."[4] 10 C.F.R. § 2.311(b). Where, as here, the request for hearing has been denied, the *Order* "is appealable by the requestor/petitioner on the question as to whether the request and/or petition [to intervene] should have been granted." 10 C.F.R. § 2.311(c).

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[3] This brief is the "accompanying supporting brief" filed concurrently with the *Kentucky Resources Council, Inc.'s Notice of Appeal of Memorandum and Order (Ruling on Hearing Requests)* and is incorporated therein by reference.

[4] 10 C.F.R. 2.341(c)(3) limits the briefs on review to 30 pages in length, exclusive of pages containing the table of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations.

The appropriate standard of review where the questions presented are ones of law, such as whether the standing allegations and contentions presented in a request for hearing are sufficient to satisfy the applicable regulatory requirements, is *de novo.*

## SUMMARY OF ARGUMENT

The KRC's *Request for Hearing* should have been granted in this matter since all applicable regulatory requirements to demonstrate standing and to establish the two contentions presented for hearing were satisfied. The ASLB Panel erred as a matter of law in determining that Council member Mark Donham lacked standing to seek a hearing and that therefore KRC lacked associational standing to represent his interests as a member. KRC satisfied all regulatory requirements and also met the threshold constitutional standing requirements that are applied by the Commission in assessing the sufficiency of allegations of standing.

The ASLB Panel erred also in failing to address and resolve the GLE motion to strike. KRC, as Petitioner, was entitled to have both the initial hearing request *and* the reply considered in full, in the Panel's consideration of whether the allegations satisfied standing and contention requirements. It is impossible to determine, from the limited explanation provided in the *ASLBP Order,* what arguments from KRC's Reply were considered, if any. As such, the Petitioner cannot determine whether and how those arguments were addressed and whether consideration of the arguments by the ASLB Panel was in accordance with both law and fact.

With respect to KRC's contentions, Petitioner satisfied the threshold set by the Commission for an admissible contention, and it was error for the ASLB Panel to engage in a merits determination on the validity of the contention prior to the Petitioner having the ability to engage in discovery and to more fully develop and demonstrate that access to the stock of depleted uranium owned by the Department of Energy (DOE) and located at the Paducah

Gaseous Diffusion Plant (PGDP) site, is fundamental to the GLE project and was central to the selection of the project location and justification for the issuance of the requested license.

At the initial pleadings stage of the administrative proceedings, review of allegations and contentions is not properly a merits determination, as the Commission made clear when the current regulations governing administrative hearings were adopted. The ASLB Panel erred as a matter of law in rejecting allegations and contentions that satisfied the applicable regulatory and constitutional thresholds.

## ARGUMENT[5]

### I. THE ASLB PANEL ERRED IN FAILING TO RULE ON THE GLE MOTION TO STRIKE

In accordance with the procedural orders entered in this matter, KRC filed an initial *Request for Hearing*, and a *Reply* to the responses filed by both GLE and Commission Staff. GLE filed a motion to strike certain portions of KRC's Reply. The Commission Staff took no position with respect to the GLE Motion and declined to join in that motion. In the *ASLBP Order,* the ASLB Panel declined to rule on the GLE Motion, explaining that:

> Our review of KRC's standing and the admissibility of its contentions was limited to KRC's arguments as pled in its hearing request, and we considered the reply only to the extent it provided clarification of KRC's original claims. Therefore, beyond our discussion above, we need not parse the various arguments that GLE would have us strike from KRC's reply. We deny GLE's motion as moot.

*ASLBP Order* at 27. In declining to rule on the motion, the ASLB Panel deprived KRC of the opportunity to have all the arguments contained in the Reply considered, and to know whether

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[5] KRC's arguments concerning standing were presented in the *Request for Hearing, KRC's Reply* (pp. 9-20), and *KRC's Response* to the GLE motion to strike (pp. 2-7) and are properly preserved for Commission review. KRC's arguments concerning the sufficiency of the contentions were presented in the *Request for Hearing, KRC's Reply* (pp. 20-46), and *KRC's Response* to the GLE motion to strike (pp. 7-10) and are properly preserved for review.

and how those issues were resolved by the Panel. Although KRC made clear that the Reply was not intended to, (nor did it), add new contentions or new bases for allegations of standing, the Reply provided important context drawn solely from publicly available documents to further underscore the sufficiency of the standing and contention allegations. The Petitioner is entitled to have both the initial request for hearing and the reply to any responses considered in full by an ASLB Panel in its deliberation on whether the applicable Commission standards for standing and contentions had been satisfied. In the absence of evidence that such consideration occurred, and any discussion by the ASLB Panel *of* how the arguments in the *Reply* were considered and addressed, it is impossible for Petitioner (and for the Commission) to determine what of the Petitioner's Reply **was** considered, and whether the Panel resolution of disputed issues raised in the Reply was arbitrary or in accordance with applicable law.

The Commission is respectfully requested to find that the ASLB Panel erred in failing to consider and render a decision on the merits (or lack thereof) of the GLE Motion to Strike. The Commission is further requested to consider that motion, and the KRC response filed thereto, and to fully all arguments properly presented in the *Reply* as well as the initial Request in order to determine whether, utilizing the appropriate levels of scrutiny at this early stage of the hearing process, the standing allegations and contention requirements meet the minimal thresholds established by Commission regulations.

## II. THE REQUEST FOR HEARING SATISFIED ALL REGULATORY REQUIREMENTS FOR DEMONSTRATING STANDING AND THE ASLB PANEL ERRED IN REQUIRING THAT THE PETITIONER PROVE CONSTITUTIONAL STANDING DURING THE PLEADING STAGE OF THE HEARING PROCESS

10 C.F.R. 2.309(a) provides that "any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing." The

Commission, according to 10 C.F.R. 2.309(a), will grant the request for hearing if it determines that the requestor "has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section." *Id.*

10 C.F.R. 2.309(d) establishes the standing requirements for both a request for hearing and for a petition for leave to intervene. With respect to standing to request a hearing, the request must state:

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

10 C.F.R. 2.309(d)(1)(i)-(iv).

The *Request for Hearing,* at pp. 4-9, numerical paragraphs 7-21, provided all of the information and explanations required by 10 C.F.R. 2.309(d)(1), and included a sworn declaration of Council member Mark Donham as "Exhibit A" to the *Request.*[6]

A petitioner need not prove the contentions at the admissibility stage, and instead the petitioner need only "proffer at least some minimal factual and legal foundation in support of their contentions." *Duke Energy Corp.,* 49 NRC at 334. 10 C.F.R. 2.309(f) does not provide for an adjudication on the merits of the contention at this preliminary stage and is not to be construed rigidly as a barrier to hearing, yet that is what happened in this case. For rather than determining whether the Petitioner Council and member Donham had *alleged* sufficient injury

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[6] The ASLB Panel noted in a procedural *Order* that the use of "exhibits" should be foresworn but did not require KRC to refile and rename the attachments to the request for hearing that were identified as "exhibits."

traceable to the proposed action and redressable by the tribunal that, *if true*, would establish standing, the ASLB Panel engaged in a merits determination on the sufficiency of the allegations at this preliminary stage. In so doing, the ASLB Panel applied the regulations in a manner inconsistent with the Commission's expressed intention.

The determination of the sufficiency of the standing allegations of KRC member Mark Donham (and the associational standing of KRC) should be guided by the language and intent of the rules of practice as codified in 10 C.F.R. Part 2. As noted by the Commission in the basis and purpose statement (preamble) to the final rule *Changes to Adjudicatory Process*:

> Among the very first actions taken by the Nuclear Regulatory Commission (NRC) following its creation in 1975 was an affirmation of the fundamental importance it attributes to public participation in the Commission's adjudicatory processes. **Public participation, the Commission said, "is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence** in the sound discharge of the important duties which have been entrusted to us.'' N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI–75–1, 1 NRC 1, 2 (1975).

69 Fed. Reg. 2182 (January 14, 2004) (Emphasis added).

Consistent with the Commission's avowal that public participation is a vital ingredient to consideration of licensing issues, in promulgating current 10 C.F.R. 2.309(d), the Commission explained in response to a comment suggesting that "the rules for standing should be liberalized" that:

> Members of the public who have an interest that will be affected by a proposed action should be **readily** able to establish their standing under the standards in the final rule.

*Id.* at 2189 (Emphasis added).[7]

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[7] To encourage participation by "persons who do not have a direct interest and cannot demonstrate standing nevertheless are able to make a substantial contribution to the development of the record in the proceeding," the Commission codified the six criteria for discretionary intervention which were first articulated in *Portland General Electric Co.* (Pebble Springs

With respect to whether the petitioner for a hearing is a "person whose interest may be affected by a proceeding," the Commission discussed the role of Article III standing jurisprudence in the Commission's determination of standing:

> While Article III of the Constitution does not constrain the NRC hearing process, our hearings therefore, are not governed by judicially-created standing doctrine, see *Envirocare of Utah, Inc.* v. *NRC,* 194 F.3d 72 (D.C. Cir. 1999), the Commission nonetheless has generally looked to judicial concepts of standing where appropriate to determine those interests affected within the meaning of Section 189.a. of the AEA. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI–99–04, 49 NRC 185, 188 (1999), citing Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI–76–27, 4 NRC 610, 613–14 (1976). The Commission contemplates no change in this practice. Accordingly, no change to the rule has been made in this regard.

69 Fed. Reg. at 2200.

In reviewing the sworn standing declaration of Mark Donham, and the standing allegations contained in the *Petition for Hearing*, the Panel failed to bear in mind that the Subpart C rules of practice are <u>not</u> designed to be exclusionary, but should be applied in light of the Commission's recognition of "the fundamental importance of meaningful public participation in [its] adjudicatory process[ ],"[8] to help develop as complete a record as possible to determine wherein lies the public interest with respect to nuclear facility licensing.

Under Section 189a of the Atomic Energy Act (AEA), the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). To determine whether a petitioner has alleged a sufficient interest to intervene, the Commission has long applied judicial concepts of standing. *Cleveland Electric Illuminating*

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Nuclear Plant, Units 1 and 2), CLI–76–27, 4 NRC 610, 617 (1976), requiring however that "at least one other petitioner has established standing and at least one admissible contention[.]" 69 Federal Register 2189 (January 14, 2004).

[8] *See* N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI–75–1, 1 NRC 1, 2 (1975).

*Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

For standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. *See generally, Lujan v. Defenders of Wildlife,* 504 U.S. 555, 590 (1992); *Perry,* 38 NRC at 92. Injury may be actual or threatened. *Kelley v. Selin,* 42 F.3d 1501, 1508 (6th Cir. 1995); *Wilderness Society v. Griles,* 824 F.2d 4, 11 (D.C. Cir. 1987). **To evaluate a petitioner's standing, we construe the petition in favor of the petitioner.** *See Kelley v. Selin,* 42 F.3d at 1508; *In the Matter of Georgia Institute of Technology (Georgia Tech Research Reactor),* 1995 NRC LEXIS 56 (Nuclear Regulatory Commission October 12, 1995)(Emphasis added); *see also: In re Usec, Inc.*, 61 NRC 309, 311 (Nuclear Regulatory Commission May 12, 2005).

A petitioner must have a "real stake" in the outcome of the proceeding to establish injury in fact for standing, and while this stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *In the Matter of Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2),* 2003 NRC Lexis 26, 57 NRC 45, quoting *Houston Lighting and Power*, LBP-79-10, 9 NRC 439 at 447-48. Donham alleged such a real stake, arising from health, economic, use, and property interests that were arguably affected by the proposed project. He was entitled to engage in discovery and hearing in order to *prove* the allegations, but was denied that opportunity through unduly rigid consideration of the *merits* of the allegations rather than their sufficiency to meet the “minimal” threshold at the pleading stage as contemplated by the Commission regulations.

As to KRC’s standing, it is well-recognized that an organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members. *Warth v. Seldin,* 422 U.S. 490, 511 (1975); *Houston Lighting and Power*

*Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979). To derive standing from a member, the organization must demonstrate that the individual member has standing to participate and has authorized the organization to represent his or her interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979). Both the Courts, and the Commission, recognize the principle of "associational standing." *In the Matter of Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2),* 57 NRC 45, 2003 NRC Lexis 26, at 8 (2003). KRC alleged sufficient facts to support associational standing. *Request for Hearing,* Num. Para. 8. Member Donham "joined the Kentucky Resources Council because I support its mission to protect Kentucky's land, air, water, and communities from pollution and environmental contamination, including its work to address the environmental impacts of nuclear and sites such as GLE." *Declaration of Mark Donham,* Para. 3.

While the petitioner has the burden to allege facts sufficient to establish standing, and "conclusory allegations about potential radiological harm" are insufficient for this showing, the Commission will "construe the petition in favor of the petitioner" when making a standing determination. *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995), citing *Kelley v. Selin,* 42 F.3d at 1508.

Respectfully, the ASLB Panel decision failed to construe the petition in favor of the petitioner but instead rendered merits determinations on the allegations without allowing for discovery. Donham's standing allegations from the *Petition for Hearing* and the attested *Declaration of Mark Donham* that was attached to the *Petition* as Exhibit A, were not "conclusory," but instead specifically and amply demonstrated his interests and the threatened

harm. To summarize those allegations, which were entitled to be taken as true for purposes of testing their sufficiency at this early stage of the process, Donham:

- Is a 45-year resident of property located at 365 Azotus Road, Brookport, Il, 62910, approximately seventeen (17) miles northeast of the site of the former Paducah Gaseous Diffusion Plant ("PGDP") and the two proposed new uranium enrichment plants, including the GLE facility; *Petition for Hearing,* Num. Paras. 10-11; *Declaration* Para. 2;

- Owns a home and property in the direction of the prevailing winds from the proposed GLE facility; *Id.* Num. Para. 12, *Declaration* Para. 5;

- Was an 8-year member of, and 6-year chair of, a US Dept. of Energy ("DOE") Citizens' Advisory Board ("CAB"), chartered to receive information and to provide recommendations to the DOE about their cleanup activities at the PGDP site, and as such is aware of the environmental impacts from the gaseous diffusion uranium enrichment process; *Id.,* Num Para. 14-15; *Declaration* Para. 13;

- Has numerous interests that will be adversely affected by the issuance of this license, including adverse impacts to his property, use and enjoyment of his property, aesthetic and recreation interests in the natural resources of his community and surrounding communities, my personal health, and wellbeing of his community; *Declaration* Para. 4;

- Has a health concern that illness (including cancer and respiratory illness) could be developed or exacerbated by exposure to emissions, including criteria pollutants and other contaminants such as radionuclides, from the proposed plant will adversely affect my personal health; *Declaration* Paras. 10-12;

- Believes that his interests may be adversely affected by a failure of containment or any environmental releases occurring due to accidents, including accidents associated with earthquake activity releases from the GLE Facility; *Id.* Num. Para. 16;

- Understands that the GLE facility is located in a major seismic activity zone and based on his discussion with an environmental expert associated with the proposed facility at a recent public information meeting that GLE does not yet have the design completed on how to build the plant to withstand such an event;

- Is concerned that the movement of old cylinders of depleted uranium, heating them, transferring the gas to facilities that will separate the hydrogen fluoride from the uranium, transporting the uranium to the separation facility, handling the wastes from the process, and malfunction of the new isotope separation process, present risks of releases that may adversely affect his above-noted interests and the community's well-being. The DEIS acknowledges that except for the actual isotope separation process, the rest of the enrichment process will be similar to that of the gaseous diffusion process, and he is concerned that all of those processes have historically resulted in releases to the environment of pollutants, and that such releases may adversely affect his interests; *Id.* Num Paras. 17-18, *Declaration* Para. 15;

- Is concerned with the potential for air emissions from the proposed facility and the lack of information concerning the composition, fate, and transport of the emissions, and the potential for adverse effect on his interests from any releases; *Id.* Num. Paras. 16, 19;

- Works as the Produce Manager of Midtown Market in Paducah, Kentucky, which during the growing season, carries significant locally grown produce, including some from the West Paducah area; *Id.,* Num. Para. 20;

- Remembers while chair of the CAB, that Kentucky state environmental agency did a survey of garden produce from gardens very close to the PGDP site and found detectable levels of radionuclides; *Id.*

- Grows and sells produce on his own property for consumption and for sale to local restaurants and individuals and is concerned that airborne routine or accidental releases of radionuclides from the facility processes and activities may adversely affect public health,[9] as well as affect his income, employment, and health; *Id.*

- Has informational interests in ensuring that the licensing process is transparent and information is accessible to the public, and that impacts of the proposed facility are fully considered; *Declaration,* Para. 17.

The allegations in the *Donham Declaration* and the *Request for Hearing* easily clear the bar set by the Commission and the courts, and at this preliminary stage of the administrative review process, the Petitioner is not required to *prove* each allegation. Yet the *ASLBP Order*

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[9] One example of why the ASLB Panel should have ruled on the GLE Motion to Strike was that GLE complained that the KRC *Reply* misstated Mr. Donham's concern that accidental releases of radionuclides may adversely affect "public health[,]" claiming that the phrase "appears nowhere in the Petition and should be struck[.]" *GLE Motion* at 5. In truth, the *Declaration of Mark Donham* which was made a part of the *Petition for Hearing,* plainly referenced a concern with the public's health wherein he noted that "[t]o my full faith and knowledge, *community members face elevated rates of cancer* in the area. And, while this could be the result of a number of factors, I am concerned that the risk of *radioactive pollution* from the GLE facility *will exacerbate that problem*. *Declaration of Mark Donham,* at 4 (Emphasis added).

It is obvious that "elevated rates of cancer" affecting community members is a "public health" concern, and that in expressing concern that "the risk of radioactive pollution from the GLE facility will exacerbate that problem" Donham was expressed a concern with the health of the public (i.e. public health) that radioactive pollution from the GLE facility will exacerbate that existing illness suffered by community members.

failed to apply the appropriate standard to test the sufficiency of the allegations. Instead it rendered a merits determination on matters of causation and harm without giving the Petitioner the opportunity to engage in discovery in order to *prove* those allegations at hearing.

Donham, and KRC, satisfied the regulatory criteria and provided specific allegations of harm, causation, and redressability to satisfy the threshold established by the Commission and the courts with respect to standing. The ASLB Panel therefore erred as a matter of law in determining that Council member Mark Donham lacked standing to seek a hearing and that KRC lacked associational standing to represent his interests as a member.

## III. THE "PROXIMITY-PLUS" PRESUMPTION MAY BE APPLIED REGARDLESS OF WHETHER IT WAS PLED IN A REQUEST FOR HEARING, AND DONHAM'S ALLEGATIONS SATISFY THE TEST

With respect to the "proximity-plus" presumption discussed in the *ASLBP Order*, Donham and KRC did not plead, in the *Request for Hearing,* for or against the application of the presumption, since the allegations in the *Donham Declaration* and *Request for Hearing* were sufficient to satisfy both the regulation and constitutional standing principles. Accordingly, there was no need to rely on such presumptions. When both the Commission Staff and GLE in their respective responses, raised the question of whether the presumption application criteria had been satisfied, KRC replied to such arguments, disagreeing with both respondents. For this, KRC's reply was the subject of a motion to strike by GLE, (which the Commission Staff did not join in or take a position on).

In its motion to strike, GLE complained that "the Council neglected to assert 'proximity-plus' standing for Mr. Donham and suggested traditional standing through unsupported, hypothetical scenarios regarding potential radiological impacts to Mr. Donham and his property" and that KRC cited to the GLE PLEF Environmental Report and draft Environmental Impact

Statement in order to "remedy this shortcoming." GLE appeared to believe that the application of the "proximity-plus" presumption must be pled to be considered or applied by the Commission, when it is not the case. The "proximity-plus" presumption was created by the Commission for its own use in determining under what circumstances the regulatory or constitutional criteria for standing would be *presumed.* The requirements for "standing" are set forth in 10 C.F.R. 2.309(d)(1) and were fully satisfied here. Nowhere is it required that a petition for hearing to expressly state an applicant's request to have the Commission apply the "proximity-plus" standard, as a prerequisite to the Commission considering whether the facts justify the application of the presumption concerning the standing of the petitioner. Nor does "constitutional standing" require a petitioner to plead entitlement to the application of the presumption.

The *KRC Reply* discussed the application of that doctrine in this instance because it had been raised both by NRC Staff and GLE:

> NRC staff and GLE argue that Donham has not satisfied the "Proximity +" standard for presumed standing. KRC disagrees and believes that application of the presumption is appropriate in this case. However, even without application of the presumption, Donham (and by association KRC) have demonstrated constitutional standing.

*KRC Reply* at 10.

Both NRC Staff and GLE placed into contention the question of the application of the presumption to the facts of this case, and KRC simply responded to those arguments. The *Reply* arguments fell squarely within what the Commission recognized in *In re Nuclear Management Co. LLC,* 63 NRC 727 (2006) to be allowable - that "[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition **or raised in the answers to it**." *In re Nuclear Mgmt. Co., LLC* , 63 N.R.C. 727, 732 (2006)(Emphasis added).

The *KRC Reply* was focused entirely on the legal and factual arguments "raised in the answers to" the original petition. The Answers filed by NRC Staff and GLE placed in dispute the applicability of and KRC's entitlement to the "proximity-plus" presumption to the facts of the petition. KRC responded to those arguments "raised in the answers" to the original petition. Having placed in issue the question of KRC's entitlement to the "proximity-plus" presumption, no party should be heard to complain when KRC disputes the argument so joined.

The Commission is requested to clarify that a petitioner is not obligated to plead the applicability of the "promixity +" presumption in order for the Commission or an ASLB Panel to apply it in appropriate circumstances, and that where a respondent disputes the applicability of the presumption, that a petitioner's reply may address the applicability and satisfaction of the presumption without being subject to motions seeking to disqualify replies where such replies "focus narrowly on the legal or factual arguments … raised in the answers to [the original petition.]" *Id.*

## IV. THE ASLB PANEL ERRED IN REJECTING KRC'S CONTENTIONS

10 C.F.R. 2.309(a) requires that a requestor seeking a hearing must file a written request and a "specification of contentions[.]" With respect to the specification of contentions "which the person seeks to have litigated in the hearing[,]" 10 C.F.R. 2.309(f)(1) requires that such contentions be set forth with particularity and address the six criteria for "admissible" contentions:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted…
> (ii) Provide a brief explanation of the basis for the contention;
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
> (vi) [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief[.]

10 C.F.R. 2.309(f)(1).

Contentions are required to be based on "documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner." 10 C.F.R. 2.309(f)(2). Petitioners need not prove their contentions at the admissibility stage, and instead the contention admissibility standards require only petitioners to "proffer at least some **minimal** factual and legal foundation in support of their contentions." *Duke Energy Corp., supra,* 49 NRC at 334. (Emphasis added).

The contention criteria are not meant to impose an insurmountable barrier to obtaining a hearing. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), 49 NRC 328, 335 (1999) (explaining that the rule should not be used as a "fortress to deny intervention") (internal quotation marks and citation omitted); *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant and Big Rock Point Site), 96 NRC 1, 104-05 (2022) (admitting for hearing portions of a contention that raised a genuine material dispute with the application). The rule is intended to allow assessment of the scope, materiality, and support provided for a proposed contention, to ensure that the hearing process is "properly reserve[d] . . . for genuine, material controversies between knowledgeable litigants." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear

Power Station, Unit 1), 75 NRC 393, 396 (2012) (internal quotation marks omitted). Contentions need only have "some reasonably specific factual or legal basis." *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 82 NRC 211, 221 (2015) (internal quotation marks omitted); see also *Entergy Nuclear Operations,* 96 NRC at 45 (rejecting argument that did not "establish a supported genuine dispute with the application").

After rejecting KRC's standing, the *ASLB Order* proceeded to adjudicate the merits of KRC's contentions, rather than applying the more liberal standard intended by the Commission. The *ASLB Panel* rigid application of the standards of 10 C.F.R. 2.309(f) acted as a barrier to hearing, in a manner fundamentally inconsistent with the representations of the Commission at the time the criteria were codified in 1989 and recodified in 2004.

The current contention admissibility standards were originally promulgated in 1989 out of concern that the previously existing standards allowed intervention for petitioners who had no real basis for their contentions. 54 Fed. Reg. 33,168 (1989). The NRC's *Federal Register* basis and purpose statement (preamble) to the 1989 procedural regulations noted that the new contention rule, codified as 10 C.F.R. § 2.309(f)(1), was not intended to require a petitioner to make its substantive case at the contention admissibility stage and prior to discovery, and that a petitioner need only include some alleged facts in support of its position sufficient to indicate that a genuine issue of material fact or law exists.

> Admitted intervenors will continue to be able to use discovery to develop the facts necessary to support its case. However, the rule will require that before a contention is admitted the intervenor have some factual basis for its position and that there exists a genuine dispute between it and the applicant. It is true that this will preclude a contention from being admitted where an intervenor has **no** facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts. The Commission does not believe this is an appropriate use of discovery or cross-

> examination. BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (DC Cir. 1974). The Commission believes it is a reasonable requirement that an intervenor be able to identify **some** facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue. This screens out a contention where the petitioner has **no** facts to support its position and where the intervenor wants to use discovery or cross-examination as a fishing expedition.

54 Fed. Reg. at 33171 (emphasis added).

Shortly after the 1989 amendments to the contention admissibility criteria, the Commission had occasion to address the intent and purpose of the rule in one of its rulings:

> The 1989 revisions to the contention rule thus insist upon ‘‘some factual basis’’ for an admitted contention. 54 Fed. Reg. at 33,171. The intervenor must ‘‘be able to identify some facts at the time it proposes a contention to indicate that a dispute exists 11 *Id*. at 33171. 10 54 Fed. Reg. 33,168 (1989) between it and the applicant on a material issue.’’ *Id.* These requirements are intended to ‘‘preclude a contention from being admitted where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.’’ *Id.* Although in quasi-formal adjudications like license renewal an intervenor may still use the discovery process to develop his case and help prove an admitted contention, contentions shall not be admitted if at the outset they are not described with reasonable specificity or are not supported by ‘‘some alleged fact or facts’’ demonstrating a genuine material dispute. *Id.* at 33,170.

*Duke Energy Corp., supra,* 49 NRC at 335.

Finally, the Commission noted that:

> [A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.

54 Fed. Reg. 33168, 33171 (1989).

In the 2004 rulemaking *Changes to Adjudicatory Process,* the Commission revised previous regulations concerning the identification of contentions to extend them to all proceedings and incorporated “the longstanding contention support requirements of former § 2.714[.]” 69 Fed. Reg. 2221 (2004).

Attempting to assuage concerns from commenters, the Commission noted that satisfying the requirement would not prove an obstacle:

> In the final rule, well-supported, specific contentions will be required in all proceedings, just as they are now required under the Commission's formal hearing procedures. See § 2.309(f). Petitioners generally have been able to meet the current specific contention requirements and the Commission would not expect the application of those requirements to informal proceedings to adversely affect public participation. Indeed, by focusing litigation efforts on specific and well defined issues, all parties will be relieved of the burden of having to develop evidence and prepare a case to address possibly wide-ranging, vague, undefined issues.

*Id.* at 2188 (2004).

As noted, KRC is not required to *prove* the merits of the contentions at this early juncture, but only to demonstrate that the issues are genuine and pertinent issues of concern and are framed and supported concisely enough to assure that the proceedings are "effective and focused on real, concrete issues." *Id.* at 2189. In response to the concern of citizen group representatives that under the contention standards in effect since 1989, an intervenor "often has to prove its case in order to have a contention admitted" and that the current contention standard "has a chilling effect on citizen group participation[,]" the Commission responded that the threshold contention standard did **not** "contemplate a determination of the merits of a proffered contention[.]" Instead, the Commission explained, it was intended to "ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." 69 *Fed. Reg.* 2189 (2004). In rejecting the suggestion that the petitioner be required to demonstrate *entitlement* to relief as part of a contention, the Commission further clarified that the "contention requirement is intended to support an early NRC determination whether there are issues that are appropriate for and susceptible to NRC resolution with respect to an NRC regulatory/licensing action." *Id.* at 2202.

To interpret and apply the requirements of 10 C.F.R. 2.309(f) as anything other than threshold considerations intended to frame and support "concisely enough at the outset" "genuine and pertinent issues of concern," is to wield the criteria in a manner inconsistent with the expressed direction and commitment of the Commission in the manner of application of the criteria.

KRC anticipates that respondents will argue that the contention rule is "strict by design." The "strict by design" quote needs context to understand that the Commission did **not** intend the contention criteria to be used rigidly to exclude legitimate issues from consideration at hearing. In *Duke Energy Corporation,* 55 NRC 49 (2002), the Commission explained the 1989 contention rule in this way. It is quoted at length because context is important on such a threshold question:

> The Commission has recently noted that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation'." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 1 and 3), CLI-01-24, 54 NRC, (slip op. at 13) (Dec. 5, 2001) (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)). The Commission observed in *Millstone* that "[s]erious hearing delays -- of months or years -- occurred, as Licensing Boards admitted and then sifted through poorly defined or supported contentions," which resulted in Congress "call[ing] upon the Commission to make 'fundamental changes' in the public hearing process." *Millstone*, CLI-01-24, 54 NRC at , (slip op. at 13) (citing *Oconee*, CLI-99-11, 49 NRC at 334; "Proposed Rule, Contentions," 51 Fed. Reg. 24,365, 24,366 (July 3, 1986); H.R. Rep. No. 97-177, at 151 (1981)). The rule provisions quoted above incorporate the changes the Commission made in 1989 with regard to the admission of contentions. **There are various sources that provide some elucidation in interpreting and applying these provisions**. The Statement of Considerations (SOC) for the final 1989 rule amendments, 54 Fed. Reg. 33,168 (Aug. 11, 1989), provides guidance that is entitled to "special weight" under the authority of *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-291 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988). In the SOC, the Commission noted that the requirement at section 2.714(b)(2)(ii) "does not call upon the intervenor to make its case at this stage of the proceeding," but does require a petitioner "to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention," 54 Fed. Reg. at 33,170.

*Duke, supra,* 2002 Lexis 4, 4* (Emphasis added). The basis and purpose statement required by 5 U.S.C. 553 that accompanied the 1989 and 2004 regulations, referred to by the Commission as the "Statement of Considerations" in the above quote, makes clear that the 1989 criteria were "strict" compared with the previous practice of admitting and litigating contentions "based on little more than speculation." *Id.* But as the regulatory history from the 1989 and 2004 basis and purpose statements that accompanied the final rules reflects, the bar was being raised from **no** facts to "some facts," and not from no facts to requiring that the petition for hearing prove the case as if a dispositive brief. The *ASLBP Order* imposed a burden on Petitioners not consistent with the factual showing intended by the Commission in codifying the 1989 rules and recodifying them in 2004.

With respect to the first contention, KRC was entitled to the opportunity to engage in discovery and to put on evidence to *prove* the contention allegation of the materiality of lack of DOE authority to transfer the ownership of the depleted uranium hexafluoride stockpiles to the requested license. Yet that opportunity was improperly abridged by the ASLB Panel summary adjudication of the merits, denying KRC the opportunity to engage in discovery and to adduce and proffer evidence at hearing concerning the question of legal access to that DOE stockpile and its importance to the viability of the GLE PLEF Project.

With respect to the second contention, the ASLB Panel erred in rejecting the contention that raised and sought to defer the merits hearing on the adequacy of the NEPA documentation until the completion of the Environmental Impact Statement. The timing of the right to request a contested adjudicatory hearing concerning the sufficiency of the Commission's compliance with the environmental documentation requirements of NEPA and of its Part 51 regulations, and the development of that documentation, creates a difficult "Catch-22" situation for petitioners

seeking to assure that the NEPA analysis is sufficient in scope and robust in analysis and consideration of site-specific issues and environmental consequences. Ideally, any challenge to the sufficiency of the environmental analysis conducted by the Commission would await finalization of that analysis, yet Commission Order CLI-26-3 triggered an obligation to file any contentions within a set period of time after the *Federal Register* notice and long before the issuance of the final EIS and record of decision under NEPA.

KRC filed Contention II based on the existing documents, and as directed by Commission regulation, sought to raise the concerns at the earliest possible time. Yet Petitioners sought to defer litigating those issues in the hope that the NRC process would self-correct and that prior to issuance of the final EIS, the deficiencies identified would be resolved. KRC made clear in its request for hearing that it did not "seek a hearing on the adequacy of the dEIS *at this time,* but reserves these Contentions and will submit comments in response to the public notice published at 91 *Federal Register* 14882 in order to allow the NRC to adequately address prior to the completion of the NEPA review process, those specific concerns identified in the Requestor's scoping comments and as will be further discussed in the comments to be submitted prior to the May 11, 2026 close of the public comment period on the DEIS." KRC did request a hearing but sought to "defer" the hearing in order to allow the EIS to be finalized. KRC reserved that "the right to be heard on those inadequacies and failures" of the draft EIS to have failed to broaden the scope of the dEIS and to engage in the analyses identified in the scoping comments. *Petition for Hearing* Para. 50, p. 22.

KRC explained that deferral of hearing at this juncture is intended to allow the NRC to correct any failures and to broaden the scope and analyses to include all issues identified in the scoping comments in Exhibits E and F of the *Petition for Hearing* and cautioned that "[t]o the

extent that the FEIS fails to broaden the scope and engage in analyses as identified in the scoping comments, requestor specifically reserves the right to be heard on those inadequacies and failures." The *Petition for Hearing* also sought to reserve the right to supplement the Petition for Hearing to include new contentions arising from issues and concerns raised during the comment period on the draft EIS.

Nothing in the Commission regulations prohibits the filing of a Contention in order to assure timely preservation of the right to be heard on the issue at a later date, and deferring the hearing in order to allow the process to self-correct or for the agency to reconsider the issue in the subsequent analysis based on the objection. The sole authority for the contention supplied by NRC Staff is the case of *Crow Butte Resources* (Marsland Expansion Area), CLI-20-1, 91 NRC 79, 97-98 (2020). *Crow Butte Resources* fully supports the KRC approach, since the Commission there affirmed a Board ruling that late-filed contentions on a final environmental assessment (EA) were untimely because the information in the final EA upon which each contention was based was not materially different from that available in the draft EA. Preserving the objections on the draft EIS by timely filing as was done here is the only way to avoid that outcome, and deferring the actual hearing is the only sensible approach to resolving the objections.

*Crow Butte Resources* instructs that "[a] contention must be filed at its earliest opportunity [and] a petitioner who waits until the issuance of a final document to raise a contention risks the possibility that there will not be a material difference between the draft and final document. *In re Crow Butte Res., Inc.*, 91 N.R.C. 79, 97 (Nuclear Regulatory Commission April 13, 2020). KRC is ready, willing, and able to litigate the failure of the draft Environmental Impact Statement and Environmental Report to properly address the specific issues identified by

McVicker and incorporated by Petitioners (of which there are 6, referred to as such by KRC) into their Petition for Hearing, and the failure of the dEIS to have addressed and included in the analysis of alternatives and effects the scoping comments of Petitioners and Herrick (which provide ample specificity as to the deficiencies). However, the courts have made clear that challenges to the adequacy of environmental documentation under NEPA should await final action by the agency for obvious reasons related to concepts of primary jurisdiction. KRC's Contention II met the standards for a contention, and the proposal to defer the hearing on the contentions until the EIS is finalized was reasonable and is not prohibited by Commission regulations or precedent.

The contentions identified in the *Petition for Hearing* satisfied the applicable standards and should have been deemed sufficient.

## CONCLUSION AND PRAYER FOR RELIEF

For the reasons presented above, and on the basis of the allegations and contentions presented in the *Request for Hearing* as further explained in the *Reply,* Appellant Kentucky Resources Council, Inc. respectfully requests that the Commission:

(1) Assume jurisdiction over this appeal;

(2) Enter an Order finding and determining that Petitioner Kentucky Resources Council, Inc. satisfied the applicable standing requirements and that the *Request for Hearing* should have been granted as to both contentions;

(3) Enter an Order finding and determining that the ASLB Panel erred as a matter of law in failing to rule on the merits of the GLE Motion to Strike;

(4) Remand this matter with instructions to grant the request for hearing and to schedule further proceedings in accordance with Commission regulations; and

(5) For any and all other relief to which Petitioner/Appellant may appear entitled.

Dated: August 3, 2026

Respectfully submitted,

*Signed (electronically) by Tom FitzGerald*
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**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I hereby certify that, on August 3, 2026, copies of the foregoing were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

*Signed (electronically) by Tom FitzGerald*
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