

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

_____)	
In the Matter of)	
)	
GPU NUCLEAR, INC.)	
METROPOLITAN EDISON CO.)	Docket No. 50-320-LT
JERSEY CENTRAL POWER & LIGHT CO.)	
PENNSYLVANIA ELECTRIC CO.)	April 12, 2021
TMI-2 SOLUTIONS, LLC)	
)	
(Three Mile Island Nuclear Station, Unit 2))	
_____)	

**APPLICANTS’ ANSWER OPPOSING MOTION TO HOLD IN ABEYANCE THE
PROPOSED LICENSE TRANSFER TO TMI-2 SOLUTIONS, LLC**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.326, and the U.S. Nuclear Regulatory Commission (“NRC”) Acting Secretary’s March 19, 2021 Order,¹ GPU Nuclear, Inc., Metropolitan Edison Company, Jersey Central Power & Light Company, Pennsylvania Electric Company (the “FirstEnergy Companies”), and TMI-2 Solutions, LLC (“TMI-2 Solutions,” and collectively with the FirstEnergy Companies, the “Applicants”) submit this Answer opposing the “Motion To Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC” submitted by Three Mile Island Alert, Inc. and Eric Epstein (collectively, “TMIA”) on March 15, 2021,² and as supplemented April 2, 2021 and April 6, 2021 (the “Motion”).³

Although the motion is without merit, it nonetheless should be denied simply on procedural grounds. As a preliminary matter, there is no “proposed” license transfer to hold in

¹ Order (Setting Briefing Schedule) (Mar. 19, 2021) (ADAMS Accession No. ML21078A482).

² *Motion To Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC* (Mar. 15, 2021) (ADAMS Accession No. ML21075A252).

³ The April 2, 2021 and April 6, 2021 supplements were not available on ADAMS at the time of filing of this Answer.

“abeyance.” The subject transfer occurred over three months ago. Apart from that, as explained below, the Motion is untimely and insufficient as an ordinary motion, does not meet the requirements for a stay of effectiveness of the license transfer, and fails to meet the requirements of a motion to reopen. The Motion fundamentally does not provide any grounds to justify its filing three months after closing of the transfer and two months after termination of the proceeding, based on alleged facts well known to TMIA months or even years before the proceeding itself.

II. ABBREVIATED BACKGROUND AND PROCEDURAL HISTORY

On November 12, 2019 the Applicants submitted a license transfer application related to the acquisition of Three Mile Island Nuclear Station, Unit 2 (“TMI-2”) by TMI-2 Solutions from the FirstEnergy Companies.⁴ On December 2, 2020, the NRC staff approved the license transfer.⁵ On December 18, 2020, TMI-2 Solutions notified the NRC that the transaction had closed and TMI-2 Solutions had become the TMI-2 licensee.⁶ The NRC amended the license, on the same day, to reflect the completed transfer.⁷

As part of the license transfer proceeding, TMIA filed a petition to intervene and request for a hearing (“Petition”) on April 15, 2020.⁸ The NRC issued a memorandum and order on

⁴ *Application for Order Approving License Transfer and Conforming License Amendments* (Nov. 12, 2019) (ADAMS Accession No. ML19325C600). The TMI-2 NRC License is Possession-Only License No. DPR-73.

⁵ *TMI-2 License Transfer Order* (Dec. 2, 2020) (ADAMS Accession No. ML20279A369).

⁶ *Notification of Closing of TMI-2 Transaction* (Dec. 18, 2020) (ADAMS Accession No. ML20353A378).

⁷ *Commission Notification re Conforming Amendment* (Dec. 18, 2020) (ADAMS Accession No. ML20353A415).

⁸ *Petition of Eric Joseph Epstein and Three Mile Island Alert, Inc. for Leave to Intervene and for a Hearing* (Apr. 15, 2020) (ADAMS Accession No. ML20106F216).

January 15, 2021 denying the TMIA Petition, after finding that TMIA did not present an admissible contention.⁹ The NRC terminated the proceeding in that same order.

III. THE MOTION MUST BE DISMISSED ON PROCEDURAL GROUNDS

The Motion must be dismissed because it is untimely and insufficient as an ordinary motion, does not meet the requirements for a stay of the effectiveness of the TMI-2 license transfer, and does not meet the requirements for a motion to reopen.

A. The Motion was filed out of time and without consultation

Pursuant to 10 C.F.R § 2.323(a)(2), a motion to the Commission must be made “no later than ten (10) days after the occurrence or circumstance from which the motion arises.” TMIA’s Motion cites to no new facts from even this year. It loosely references the U.S. Environmental Protection Agency’s (“EPA”) Section 401 Certification Final Rule, published July 13, 2020 and made effective September 11, 2020.¹⁰ Thereafter, the Motion and its supplementary filings refer to documents from much earlier periods in time, such as a June 23, 2011 Susquehanna River Basin Commission water use permit granted to Exelon Generation Company, LLC. Indeed, TMIA’s Motion was made a full *two months* after the last NRC order in the proceeding. Therefore, on its face the Motion is untimely as it cites to no recent occurrence.

Furthermore, 10 C.F.R § 2.323(b) requires a certification that the movant has made a “sincere effort” to contact the other parties in the proceeding and resolve any issues raised by the motion. A motion “must be rejected” if it lacks this certification, and TMIA has made no effort to consult regarding the contents of the Motion nor has it included any type of certification that would meet this provision. Therefore, it must be rejected on these grounds.

⁹ *FirstEnergy Companies & TMI-2 Solutions, LLC* (Three Mile Island Nuclear Station Unit 2), CLI-21-02, __NRC__ (2021).

¹⁰ Motion at 4; *Final Rule, Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020).

B. The Motion does not meet the requirements for an application to stay the effectiveness of the NRC staff order approving the TMI-2 license transfer

There is no indication that TMIA has presented its Motion as an application to stay the effectiveness of the NRC staff's December 2, 2020 order approving the TMI-2 license transfer, so the NRC should not treat it as such. Indeed, the Motion does not even directly cite the December 2, 2020 NRC staff order approving the license transfer, and is instead primarily directed towards the Commission's January decision to deny TMIA's petition and terminate the proceeding. However, even if the NRC chooses to do so, the Motion still does not meet the requirements for a stay application under 10 C.F.R. § 2.1327.

An application for a stay of effectiveness must be submitted within five days of issuance of notice of staff action, must be no longer than 10 pages exclusive of affidavits, and must provide a concise statement of the grounds for a stay with reference to the specific factors listed in the regulation.¹¹ Missing any one of these requirements is grounds for dismissing an application for a stay of effectiveness.

The Motion does not meet a single one of these requirements. It was not filed within five days of the issuance of staff action, but instead a full two months after the last NRC order in the proceeding. The Motion is longer than 10 pages, running to 17 pages without accounting for the enclosure or certification of service. Finally, it does not provide a concise statement of the grounds for a stay of effectiveness, nor does it address any of the requisite factors listed under 10 C.F.R. § 2.1327(d).¹² Therefore, the Motion fails for any of these reasons.

¹¹ 10 C.F.R. § 2.1327.

¹² The factors that must be referenced under 10 C.F.R. § 2.1327 are: "(1) Whether the requestor will be irreparably injured unless a stay is granted; (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) Whether the granting of a stay would harm other participants; and (4) Where the public interest lies." The Motion does not explicitly address any of these factors.

C. Even if the NRC considers the Motion a motion to reopen, the Motion must be dismissed because it does not meet the necessary requirements

There is no indication by TMIA that its Motion was introduced as a motion to reopen the terminated proceeding, so the NRC should not consider it as such. However, if the NRC does consider it a motion to reopen, the Motion should still be denied as it does not meet the NRC's requirements under 10 C.F.R. § 2.326.

A motion to reopen will be granted only if it is filed in a timely manner, addresses a significant safety or environmental issue, and demonstrates that a materially different result would have been likely had the new information been considered initially.¹³ The motion must also be accompanied with "affidavits that set forth the factual and/or technical bases" supporting the movant's assertion that these three criteria are met.¹⁴ Moreover, if the motion does not relate to a contention previously in controversy, there are additional requirements that must be met.¹⁵

The Commission considers "reopening the record for any reason to be 'an extraordinary action'" and places an "intentionally heavy burden" on those parties that wish to reopen a record.¹⁶ The standard for admitting a contention after the record has closed for a proceeding is higher than for an "ordinary late-filed contention."¹⁷

With this standard in mind, the Motion clearly fails for the following reasons, any one of which would be sufficient to dismiss the Motion.

¹³ 10 C.F.R. § 2.326(a).

¹⁴ 10 C.F.R. § 2.326(b).

¹⁵ 10 C.F.R. § 2.326(d).

¹⁶ See *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-21-02, __NRC__ (2021); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 155-56 (2015) (quoting Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

¹⁷ *Interim Storage Partners, LLC*, LBP-21-02 (citing *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005)).

- i. The Motion is not timely.¹⁸ As discussed above, TMIA’s Motion is clearly not timely, as it was filed many months and years after the facts TMIA cites to were made public (such as the June 2020 EPA rule). It was also filed two months after the proceeding was terminated by the NRC. There is a possible timeliness exception for motions that present an “exceptionally grave issue,” but the Commission considers this exception a narrow one, to be granted rarely and only in extraordinary circumstances not present here.¹⁹ Not only does TMIA’s Motion not meet this threshold, TMIA does not even argue this point.
- ii. The Motion does not demonstrate a materially different result would have occurred.²⁰ TMIA’s Motion does not appear to provide any evidence meeting the requirements of 10 C.F.R. § 2.326(b), much less sufficient evidence, to impact the outcome of the license transfer proceeding if the record were to be reopened for consideration of the issues raised by TMIA in its Motion. TMIA’s vague references to recent EPA rules and decade-old Susquehanna River Basin Commission documents do not indicate any deficiency in TMI-2 Solutions’ compliance with NRC requirements or the license transfer application.
- iii. The Motion provides no supporting affidavits. A third and separate reason that the Motion must be denied is that it provides no affidavits to support the factual and technical bases upon which an argument for reopening rests.²¹ The Motion provides no supporting affidavits, much less any “by competent individuals with knowledge of the facts alleged,

¹⁸ 10 C.F.R. § 2.326(a)(1).

¹⁹ See *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500-01 (2012); *Interim Storage Partners, LLC*, LBP-21-02.

²⁰ 10 C.F.R. § 2.326(a)(3).

²¹ 10 C.F.R. § 2.326(b).

or by experts in the disciplines appropriate to the issues raised.”²² This alone is sufficient to deny the Motion under the NRC regulations.

- iv. *The Motion fails to meet the additional requirements for new contentions that are filed in an untimely manner.* This Motion’s false assertions related to Section 401 of the Clean Water Act are new statements, unrelated to any proposed contention or argument raised by TMIA in its prior Petition. Any late-filed motion to reopen related to a new contention not previously in controversy among the parties must meet additional requirements under Section 2.309(c).²³ These requirements include: “(i) The information upon which the filing is based was not previously available; (ii) The information upon which the filing is based is materially different from information previously available; and (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.”²⁴

Although failure on any one of these requirements is grounds for denying a motion to reopen, TMIA’s Motion falls short on all three grounds. First, the information on the EPA rulemaking and Section 401 of the Clean Water Act has been available throughout the proceeding. Second, the information raised by the Motion is also not materially different from previously-available information. Third, the filing was submitted two months after termination of the proceeding despite the underlying information being available throughout the proceeding.

²² *Id.* There are additional requirements regarding the affidavits, including that they meet the admissibility standards of this part and that they address each of the criteria under 10 C.F.R. § 2.326(a) separately. The Motion provides no such supporting affidavits.

²³ 10 C.F.R. § 2.326(d).

²⁴ 10 C.F.R. § 2.309(c) (i)-(iii).

IV. CONCLUSION

The Motion must be denied. It is untimely and insufficient as an ordinary motion, fails in various ways to meet NRC requirements for an application to stay the NRC staff order on the TMI-2 license transfer, and likewise fails to meet NRC requirements for a motion to reopen.

Respectfully Submitted,

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

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Dated in Washington, D.C.
this 12th day of April 2021

April 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021 copies of the above **Applicants' Answer Opposing Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC** have been served through the U.S. Nuclear Regulatory Commission E-Filing system on the participants of the above-captioned proceeding.

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