

April 12, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

FIRSTENERGY COMPANIES AND
TMI-2 SOLUTIONS, LLC

(Three Mile Island Nuclear Station, Unit 2)

Docket No. 50-320-LT

NRC STAFF'S ANSWER IN OPPOSITION TO TMIA'S MOTION

As invited by the Order of the Secretary dated March 19, 2021,¹ the U.S. Nuclear Regulatory Commission Staff files this answer in opposition to Three Mile Island Alert, Inc. and Eric Epstein's (together, TMIA) "Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC."² The Commission should deny this motion because it is both procedurally improper and without merit.

By application dated November 12, 2019, GPU Nuclear, Inc.; Metropolitan Edison Company; Jersey Central Power & Light Company; and Pennsylvania Electric Company (collectively, the FirstEnergy Companies) and TMI-2 Solutions, LLC (together with the FirstEnergy Companies, the applicants) requested NRC consent to transfer the possession-only license for Three Mile Island Nuclear Station, Unit 2 (TMI-2) from the FirstEnergy Companies to TMI-2 Solutions.³ The NRC published a notice of opportunity to request a hearing on this

¹ Order (Setting Briefing Schedule) (Mar. 19, 2021) (unpublished) (ML21078A482).

² Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC (Mar. 15, 2021) (ML21075A252) (Motion).

³ Application for Order Approving License Transfer and Conforming License Amendments (Nov. 12, 2019) (ML19325C690) (License Transfer Application).

license transfer application.⁴ In response, TMIA submitted a hearing request and the applicants opposed that request; TMIA replied.⁵ On December 2, 2020, the Staff issued, subject to the resolution of TMIA's then-pending hearing request, an order approving the license transfer application.⁶ On December 18, 2020, the applicants completed the transfer transaction consistent with the Staff's approval.⁷ In CLI-21-2, the Commission held that TMIA had not presented an admissible contention and, therefore, denied its hearing request and terminated the proceeding.⁸ Thereafter, TMIA filed the instant motion, in which it asserts that the Staff's approval of the license transfer application and the Commission's termination of the license transfer proceeding were in error because the NRC, the applicants, the Pennsylvania Department of Environmental Protection, and the Susquehanna River Basin Commission failed to comply with the procedural requirements of 40 C.F.R. Part 121.⁹

As an initial matter, the Commission should deny TMIA's motion because the underlying licensing action is final—"these proceedings are no longer available."¹⁰ Instead, any challenges to the TMI-2 license "must take the form of a petition under 10 C.F.R. § 2.206 for an order under

⁴ Three Mile Island Nuclear Station, Unit No. 2; Consideration of Approval of Transfer of License and Conforming Amendment, 85 Fed. Reg. 17,102, 17,102–04 (Mar. 26, 2020).

⁵ Petition of Eric Joseph Epstein and Three Mile Island Alert, Inc. for Leave to Intervene and for a Hearing (Apr. 15, 2020) (ML20106F216); Applicants' Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by Eric Joseph Epstein and Three Mile Island Alert, Inc. (May 11, 2020) (ML20132A328); Reply of Eric Joseph Epstein and Three Mile Island Alert, Inc. to Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request (May 18, 2020) (ML20139A213).

⁶ See Notification (Dec. 3, 2020) (ML20338A043) (December 3 Notification).

⁷ See Notification (Dec. 18, 2020) (ML20353A415).

⁸ *FirstEnergy Companies and TMI-2 Solutions, LLC* (Three Mile Island Nuclear Station Unit 2), CLI-21-2, 93 NRC __, __ (Jan. 15, 2021) (slip op. at 25).

⁹ Motion at 2–3.

¹⁰ *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992) (explaining that the NRC action on the underlying licensing request had "closed out the Notice of Opportunity for a Hearing" published in the *Federal Register*); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35–36 (2006); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 24 (2006) (providing that the Commission retains jurisdiction to reopen a closed proceeding until the licensing action that is the subject of the proceeding has been taken).

10 C.F.R. § 2.202.”¹¹ And even if the administrative adjudicatory route were available to TMIA at this juncture, its motion does not address, let alone satisfy, the procedural requirements for reopening the adjudicatory record at 10 C.F.R. § 2.326¹² or for late intervention at 10 C.F.R. § 2.309(c).¹³ Finally, to obtain a stay of the effectiveness of a Staff action on a license transfer application, as requested by TMIA, the request must be filed within five days of the issuance of the notice of Staff action,¹⁴ which, for the TMI-2 license transfer application, was on December 3, 2020.¹⁵ Such a request must also reference the factors in 10 C.F.R. § 2.1327(d);¹⁶ TMIA's motion does not do this and is late. For these reasons, TMIA's motion is procedurally improper and the Commission should deny it.

Further, even if TMIA's motion were properly before the Commission, the Commission should deny it because its argument that the procedural requirements of 40 C.F.R. Part 121 were not complied with is without merit. These procedural requirements did not apply to the TMI-2 license transfer application. Part 121 provides that a water quality certification issued “in accordance with Clean Water Act section 401 and this part” is required for any license granted

¹¹ See *Comanche Peak*, CLI-92-12, 36 NRC at 67.

¹² According to 10 C.F.R. § 2.326, a motion to reopen will not be granted unless it is timely, addresses a significant safety or environmental issue, and demonstrates that a materially different result would have been likely had the newly proffered evidence been considered initially. The factual and technical bases for the satisfaction of these criteria must be set forth in accompanying affidavits. The Commission considers reopening to be an extraordinary action. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-7, 90 NRC 1, 9 (2019).

¹³ According to 10 C.F.R. § 2.309(c), new or amended contentions filed after the deadline for initial intervention petitions has passed “will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that: (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.” Nor do TMIA's issues present an admissible contention under 10 C.F.R. § 2.309(f)(1).

¹⁴ 10 C.F.R. § 2.1327(a).

¹⁵ December 3 Notification.

¹⁶ 10 C.F.R. § 2.1327(b). These factors 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.” *Id.* § 2.1327(d).

by a federal agency that authorizes an activity that may result in a discharge from a point source into a water of the United States.¹⁷ These regulations discuss the certification process, which involves a pre-filing meeting between the applicant and the certifying authority, the filing of a certification request by the applicant to the certifying authority and the federal permitting agency, the federal permitting agency providing to the certifying authority the reasonable period of time for the certifying authority to act on the certification request (which cannot exceed one year), and that the certifying authority must either act on the certification request within this period of time or the certification requirement is waived.¹⁸ Importantly, this process consistently discusses as its subject the “proposed project,” which is defined as “the activity or facility for which the project proponent has applied for a license or permit” to conduct an activity that may result in a discharge.¹⁹

The TMI-2 license transfer application was not a “proposed project” within the meaning of 40 C.F.R. Part 121 because the applicants were not applying for a license to conduct an activity that may result in a discharge. A license transfer does not authorize some new activity that may result in a discharge; it simply changes the ownership of an already-licensed activity. Moreover, the TMI-2 license transfer involved no changes to the already-licensed facility operations or processes, including discharges.²⁰ A transfer of an existing license is distinct from

¹⁷ 40 C.F.R. §§ 121.1–121.2.

¹⁸ *Id.* §§ 121.4–121.9.

¹⁹ *Id.* § 121.1.

²⁰ See, e.g., License Transfer Application at Attachment 1, p.14 (“The changes conform the License and technical specifications to reflect the proposed transfer of authority and responsibility for licensed activities under the License to TMI-2 Solutions. The proposed license amendment does not involve any change in the design or licensing basis, plant configuration, the status of TMI-2, or the requirements of the License.”); *id.* (“[T]he proposed transfer will not result in any change in the types, or any increase in the amounts, of any effluents that may be released off-site, and will not cause any increase in individual or cumulative occupational radiation exposure.”); *id.* at Attachment 2, mark-up of technical specifications pages 1-4 and 6-15 (not proposing any changes to existing technical specifications 1.19 and 6.13.2 related to discharges); Safety Evaluation by the Office of Nuclear Material Safety and Safeguards Related to the Direct Transfer of Possession Only License No. DPR-73 for Three Mile Island Nuclear Station, Unit No. 2 from the FirstEnergy Companies to TMI-2 Solutions, 15 (Nov. 30, 2020) (ML20279A373) (“The proposed

the issuance of a new license, where the NRC would follow (and, as identified by TMIA, has followed)²¹ the 40 C.F.R. Part 121 process. To the extent that TMIA is concerned with the existing permitting of TMI-2's discharges (which have not changed), those concerns are not relevant to the license transfer proceeding.

For these two, independent reasons, the Commission should deny TMIA's motion.

/Signed (electronically) by/

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conforming amendment does not involve any change in the design or licensing basis, plant configuration, the status of TMI-2, or the requirements of the TMI-2 [possession-only license].”).

²¹ Motion at 14 (citing Clean Water Act Section 401 Reasonable Period of Time Concerning the Point Beach Nuclear Plant Units 1 and 2 Subsequent License Renewal Application (Feb. 8, 2021) (ML21033B090) (complying with 40 C.F.R. § 121.6 in support of an application for a new subsequent renewed license)).

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Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER IN OPPOSITION TO TMIA'S MOTION," dated April 12, 2021, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 12th day of April 2021.

/Signed (electronically) by/

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Dated this 12th day of April 2021