

United States of America  
Nuclear Regulatory Commission  
Before the Commission

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In the Matter of

GPU Nuclear, Inc.	)	Docket No. 50-320-
Metropolitan Edison	)	
Jersey Central Power &	)	April 19, 2021
Light Company	)	
Pennsylvania Electric	)	Three Mile Island
TMI-2 Solutions	)	Nuclear Station, Unit-2

Eric Joseph Epstein and Three Mile Island Alert, Inc.  
Responses to Applicants and Staff's Answer  
Opposing the Motion to Hold in Abeyance the  
Proposed License Transfer to TMI-Solutions, LLC.

**I. Introduction and Procedural History.**

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, Eric Joseph Epstein and Three Mile Island Alert, Inc. (or "Epstein," "Mr. Epstein" or "the Petitioners") contend that the license transfer from 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"), suffers from a timely defect that needs to be remedied prior to the commencement of aggressive decommissioning activities.

Enclosed the Petitioners enter “Eric Joseph Epstein and Three Mile Island Alert, Inc. Responses” to “Applicants and Staff’s Answer Opposing the Motion to Hold in Abeyance the Proposed License Transfer to TMI-Solutions, LLC.” (1) In support of their “Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC” submitted by Petitioners on March 15, 2021, Mr. Epstein and TMI-Alert, Inc. (“TMIA”) filed unopposed supplements on April 2, 2021 and April 6, 2021.

The Applicants and NRC staff intentionally mischaracterized the Petitioners’ Motion as a Motion to Reopen or a Motion to Stay the proceedings. The Motion for Abeyance (“Motion”) is neither. (2) This Motion asks for a pause in the license transfer until and when the emerging challenges that have arisen, are addressed. These exigent circumstances are spelled out throughout this Response. (2)

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1 Please refer to the April 2, 2021 and April 6, 2021 supplements available on this docket at NRC Proceeding "Three Mile Island 50-320 LT. At the time of filing of Applicants and Staff’s “Answer,” both Parties acknowledged they ignored the filings. (Applicants, p.1). These issues raised in this Motion for Abeyance and supplemental filings were formally raised before the Department of Environmental Protection (“DEP”) and the Susquehanna River Basin (“SRBC”), and were filed at the same time with the Applicants, NRC Commission, and NRC staff. The issues were ignored by the state agency and federal compact charged to review the documents.

It is not the Petitioners’ responsibility to direct the Parties to view correspondence they received on this docket. This behavior is ironic for parties that seek strict adherence to the” consultive process.”

2 Motions for Abeyance before the NRC are not novel or without precedence. Motions for Abeyance were granted in the Matter of Hydro Resources, Inc., ASLBP, No. 95-706-01-ML, (October 19, 1999,), and Orange County, North Carolina v. US NRC, No. 01-1073, April 2, 2011 United States Court of Appeals for the District of Columbia Circuit.

An Abeyance Order by the NRC would temporarily place the TMI-2 Solutions plan on hold until matters are resolved. Frankly, the Motion is not prescriptive and not disruptive, and allows the Applicants to redress the omissions of the plan. By its own admission, “licensing” is part of “Phase 1a: Planning and Licensing. “Phase 1b, according to the TMI-2 Solutions “TMI-2 Schedule” presented on April 14, 2021, is when damaged core retrieval begins. This phase does not begin until February, 2029. There is absolutely no hardship created by granting a Motion in Abeyance.

The tripping events for the Motion in Abeyance occurred after the license was transferred. This is not in dispute. (3)Mr. Epstein became aware of the NRC’s licensing action regarding the Point Beach Nuclear Plant relating to the Clean Water Act (“CWA”) posted on January 15, 2021.

NextEra has not provided a Coastal Zone Management Act (CZMA) consistency certification determination from the State of Wisconsin that subsequent license renewal will be compliant with the enforceable provisions of the State coastal zone program. The staff cannot issue the subsequent renewed licenses without this certification. As such, the lack of CZMA certification has the potential to adversely impact the issuance of the subsequent renewed licenses. (4)

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3 Please refer to the April 2, 2021 and April 6, 2021 supplements available on this docket at NRC Proceeding "Three Mile Island 50-320 LT. At the time of filing of Applicants and Staff’s “Answer,” both Parties acknowledged they ignored the filings. (Applicants, p.1). These issues raised in this Motion for Abeyance and supplemental filings, which were formally raised before the DEP and the SRBC, were filed at the same time with the Applicants, NRC Commission, and NRC staff. The issues were ignored by the state agency and federal compact charged to review the documents.

4 “Point Beach Subsequent License Renewal Acceptance Letter,” Letter, Schedule and Calendars Document, Date: January 15, 2021.

Prior to the NRC announcement on the Point Beach Nuclear Plant, Mr. Epstein and discovered the NRC's license transfer action did not account for water use and notified the and the of the Pennsylvania Department of Environmental Protection and the Susquehanna Basin Commission. Mr. Epstein raised the issues in a correspondence that was copied and sent to the Applicants and the Nuclear Regulatory Commission on January 27, 2021.

The Applicants and the NRC remained silent. The SRBC explicitly stated that there is no contract for TMI-2 to withdraw water, no plan for radioactive water testing, and the Applicants failed to separate decontamination and decommissioning activities between TMI-1 and TMI-2. (5)

Mr. Epstein and TMIA did not file a Motion to Deny the Transfer of License, Motion to Reopen or a Motion for Stay. These are false narratives created by the Applicant and the NRC Staff.

On February 16, 2021, Three Mile Island Alert, Inc. notified the Department of Environmental Protection, the Nuclear Regulatory Commission and the Susquehanna River Basin Commission that the Three Mile Island Unit-2 ("TMI-2") license transfer from FirstEnergy to TMI-2 Solutions violated the Environmental Protection Agency's, Clean Water Act Section, 401 Certification Rule.

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<sup>5</sup> Please refer to the April 2, 2021 and April 6, 2021 supplements filed by the Petitioners. These documents were available and time stamped on the NRC's official docket at "Three Mile Island 50-320 LT" at the same time the Applicants and Staff's filed their Answers. By their own admission, the Applicants and the NRC ignored the supplemental filings.

The 13 page letter - similar to the document submitted to the NRC - pointed out that the license transfer failed to satisfy EPA requirements. (6) TMI-Alert referred the DEP and the SRBC to a ruling last month at the Point Beach Nuclear Plant. The NRC told NextEra that they were required to obtain a Certification from the updated Clean Water Act to implement license modifications.

Once again, both the Applicants and the state and federal;regulatory agencies failed to respond. Mr. Epstein then filed a follow up Reply to the SRBC- copied the DEP- and notified the Applicants and the NRC on the same day: February 28, 2021. Once again all the parties were served and time stamped. (6)

Mr. Epstein provided Testimony on this matter before the SRBC during the Business meeting Agenda on March 12, 2021.

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6 If the Petitioners were asking to Reopen the Proceeding or file a Motion to Stay, the filing,t would have to be filed with ten days (10 C.F.R § 2.323(a)(2)) they would have be restricted to ten pages or less (10 C.F.R § 2.1327). Neither the terms Motion to Stay or Motion to Reopen are used in the Petitioners' Motion for Abeyance .

7 Please refer to the April 2, 2021 and April 6, 2021 supplements available on this docket at NRC Proceeding "Three Mile Island 50-320 LT. At the time of filing of Applicants and Staff's "Answer," both Parties acknowledged they ignored the filings. (Applicants, p.1). These issues raised in this Motion for Abeyance and supplemental filings which were formally raised before the Department of Environmental Protection and the Susquehanna River Basin, were also filed at the same with the Applicants, NRC Commission, and NRC staff. The issues were ignored by the state agency and federal compact charged to review the documents.

All of the federal and state agencies failed to address or respond to the issues raised in the Petitioners' Motion for Abeyance. However, on April 2, 2021, in a letter to Mr. Epstein, the SRBC confirmed that TMI-2 does not have water to water from the Susquehanna River. Furthermore, the agency stated they would not monitor radioactive charges discharges directly into the river. "The SRBC does not have a docket approval for TMI-2. The SRBC has no information from the NRC at this time concerning the amount of water required for decommissioning..." (8)

The SRBC, which does not test effluent or water discharges from TMI, admitted that the "SRBC staff [does not] have not [sic] specific information at this time to answer your other questions regarding disposal of any radioactive wastewater. The SRBC will continue to coordinate with agencies of its member jurisdictions about all of the issues related to this project." Moreover, discharges are tied to an antiquated, interim agreement that was found to be in violation of the CWA in 1980. (9)

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8 Paula Ballaron, P.G, Manager, Policy Implementation & Outreach Susquehanna River Basin Commission, April 2, 2021.

9 The Department of Environmental Resources and Metropolitan Edison, the original licensee, negotiated a limited, "interim" Settlement on November 9, 1977 relating to the Clean Water Act. The "documentation" did not provide in perpetuity environmental relief for CWA Certifications, Section 401.

In June 1980, the Susquehanna Valley Alliance filed a Complaint and Injunction with the Middle District Court in Harrisburg, Pennsylvania against the Nuclear Regulatory Commission and Metropolitan Edison. The Injunction sought to prevent the owner and operator of Three Mile Island from dumping 700,000 gallons of radioactive water into the Susquehanna River. The Injunction was granted, and the NRC was found to be in violation of the National Environmental Policy Act.

The defueling process at TMI-2 generated 2.3 million gallons of radioactive water that was evaporated. TMI-2 Solutions failed to provide a plan that comports with the CWA, Section 401. There are significant costs to remove dissolved and suspended impurities for purposes of radiological protection and water clarity. These systems will likely include modifications of more conventional systems used during defueling, decontamination, and decommissioning; including, but not limited to the ion exchange resins, Submerged Demineralizer Systems, and processing and disposal of water and water filters and treatment media.

The estimates - which need to be part of the CWA Certification - need to include provisions for temporary on-site storage of radioactive waste materials. There is no provision for permanent on-site storage of waste materials. All waste material generated in the decontamination and decommissioning program, including processed solids and liquids, as well as contaminated material and equipment removed from the plant, will be shipped from the site for permanent disposal.

The core issue in this Motion for Abeyance, is the disposition of radioactive water that will be temporarily stored on-site, recycled or reused for decontamination to the greatest extent possible. The estimate should include allowances for these activities, including the provision of expanded on-site storage (tank) capacity. A disposal method has not been selected.

In fact, neither the Applicants or Staff have responded to the issues raised in the Petitioners' Motion for Abeyance: 1) The Applicants failed to file documentation stating why the CWA Certification is unnecessary for making material changes to TMI-2; 2) The Applicants do not have authority to remove water from the Susquehanna River for decommissioning and decontamination purposes; 3) Despite historic legal precedent at Three Mile Island Unit-2, the Applicants do not have a plan to dispose of contaminated water, which falls outside the purview of a limited temporary settlement negotiated between the original license Metropolitan Edison and the Pennsylvania Department of Environmental Resources.

Apart from that, as explained below, the Motion for Abeyance is timely and sufficient. The Motion is not asking to Reopen the Proceeding or requesting a Stay or even raising new contentions. The Motion seeks to rectify the omission and oversight by the Applicants, the DEP, the NRC, and the SRBC. The Motion fundamentally provides grounds to justify its filing, and clearly cites the negligence of state and federal agencies to protect the health and safety of the Commonwealth of Pennsylvania. (10)

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<sup>10</sup> The initial and only National Pollutant Discharge Elimination System ("NPDES") permit issued in 1977 was explicitly referred to as an "interim agreement. Based on publicly available submissions, TMI-2 did not submit Clean Water Act, Section 401 Certification documents.

This document was not submitted as part of the Application from EnergySolutions and GPU Nuclear, Order Approving and Conforming License Amendments, Three Mile Island Unit, NRC Docket, 50-320, November 12, 2019. Those documents were also addressed and shared with the DEP. The TMI-2 license transfer application purportedly covered environmental compliance under "Environmental Laws" and "Environmental Matters under 4.9." In addition, under Schedule 4.19.1, there was no discussion of the Clean Water Act, Section 401.



Please refer to the April 2, 2021 and April 6, 2021 supplements available on the NRC's "Three Mile Island 50-320 LT" docket at the time of filing of this Answer which the Applicants, the NRC and TMI-2 Solutions, Inc. ignored. These issues identified in this Motion were also raised before the DEP and SRBC, and ignored by the state agency and federal compact charged to review the documents after they were submitted to the NRC. The NRC was also copied on all correspondence between the SRBC and TMIA.

The Petitioners are asking the agencies to be true to the oath they took to enforce and implement regulations and statutes mandated by the United States Congress. Moreover, withdrawing water without a permit violates the Susquehanna River Basin Commission's regulations. The Applicants and federal agencies were given fair warning, and were provided ample time to rectify the current violations. However, they have choreographed a chorus of silence, and must be compelled to correct their silent malfeasance. (11)

### **III. The Motion for Abeyance Must Be Granted.**

This Motion is essential to reconciling a regulation gap that creates a clear and present danger. The Motion for Abeyance is timely and sufficient to demonstrate a material defect in the license transfer than can be ameliorated by implementing the V. Proposed Remedies on p.16.

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<sup>11</sup> Please refer to the April 2, 2021 and April 6, 2021 supplements filed by the Petitioners. These documents were available and time stamped on the NRC's official docket at "Three Mile Island 50-320 LT" at the time the Applicants and Staff's filed their Answers. In fact, the Applicants and the NRC submitted their Answers on the very same docket. By their own admission, the Applicants, and the NRC ignored the supplemental filings.

The irony of the Applicant and Staff's admission, is their conspiracy of silence, and failure to comply with their obligations to provide justification for ignoring the CWA. They also failed to provide a plan to treat and dispose of radioactive water during the decontamination and decommissioning process of Three Mile Island Unit-2. (10)

**A. The Motion was timely.**

TMIA's Motion cites new facts from events this year, and actions taken by the Nuclear Regulatory Commission at the Point Beach Nuclear Power Plant on January 15, 2021. The U.S. Environmental Protection Agency's ("EPA") Section 401 Certification Final Rule, was published July 13, 2020 and made effective September 11, 2020. The advertisement in the federal register and subsequent promulgation (a process that is identical to that of the NRC) of the rule were made three months prior to the NRC's approval of the license transfer. However, the Applicant was silent on the rule change, made no provisions to secure water for the decommissioning or decontamination of TMI-2, and failed to submit a radioactive water disposal plan.

The NRC license approval was made a full *two months* after the EPA CWA Section 401 became law. The Applicants and the NRC can not pick and chose what environmental regulations they choose to implement. TMI-2 Solutions must be compelled to file for a Certification, or the NRC will create a precedent of flouting the EPA's mandate.

On its face the Motion is timely as it cites recent occurrences and exigent circumstances that create a real present material danger to the surrounding TMI communities. Moreover, the Motion for Abeyance is not creating new law. The Motion for Abeyance simply asks the NRC to implement the current law.

The Applicants and the NRC waived their right to consultation when they negotiated a settlement agreement with DEP and excluded Mr. Epstein from settlement negotiations. (12)

Although 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 proceedings, and resolve any issues raised by the motion. This requirement was rendered moot when the Applicants, the DEP, and the NRC staff negotiated a settlement agreement without consulting Mr. Epstein in the summer of 2020.

TMIA has made numerous good faith efforts to enlist the assistance of the Applicants, the DEP, the NRC, and the SRBC regarding the contents of the Motion, which are attested to by the time stamp and supplemental pleadings on the NRC docket. The sincere effort for collaboration has been met with silence for 18 months. In fact, by their own admission, the Applicants ignored the Petitioners’ supplemental filings. Therefore, the Applicants and NRC staff’s sudden desire for a collaborative effort is hypocritical and insincere. However, the Petitioners will certainly welcome a détente by any of the Answering Parties.

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12 Settlement Agreement, August 10, 2020.

**C. The Motion does not seek to stay the effectiveness of the NRC staff order approving the TMI-2 license transfer.**

The Motion does not 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 as a means of identifying the timeline relating to the Point Beach announcement by the NRC on January 15, 2021. That action was published shortly after "the Commission's January decision."  
(14)

Only the Applicants and Staff are arguing that Mr. Epstein Motion for Abeyance is a Motion to Stay. Even if the NRC considers the Motion a motion to reopen, the Motion must be dismissed because it does not meet the necessary requirements met.

The Petitioners have not asked the Commission to consider "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. Nor does this Motion raise or ask for the admittance of a contention after the record has closed for a proceeding.

Applying these standards would distort the intent and substance of the Petitioners' Motion for Abeyance. Sadly, the Applicants and NRC staff and their legal army refuse to address the content or merits of the Motion for Abeyance.

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14 Answer, Applicants, B. page 4.

#### **D. This Motion is timely**

This Motion is timely, as it was filed after the Petitioners' discovered the DEP, the NRC and the SRBC were derelict in their duties to provide a CWA, 401 Certification, contract and approve water withdrawals from the Susquehanna River, approve a plan for the disposal of radioactive water. The Applicants and Staff do not argue this point.

#### **E. The Motion demonstrates that a materially different result would have occurred.**

TMIA's Motion provides evidence meeting the requirements of 10 C.F.R. § 2.326(b) benchmarks. The Motion demonstrates that material conditions now exist that will impact and interfere with the ability of TMI-2 Solutions to complete the decontaminating and decommissioning TMI-2. TMIA's references to recent EPA rule changes, and regulatory failures by the DEP and the SRBC, can not be ignored. The absence of CWA Certification is a material defect in the license transfer application.

There is no contract in place for TMI-2 Solutions to use water from the Susquehanna River during the decontamination and decommissioning of TMI-2. There is no plan to fund and dispose of the radioactive water generated by the cleanup. These deficiencies - individually and collectively - create material defects and hazards that will derail the decontamination and decommissioning process if they are not corrected.

The Motion points to the absence of a CWA certification, absence of water for a cleanup, and the refusal regulatory agencies to monitor radioactive discharges, as issues that need to be rectified.

A third and separate reason that the Motion must be granted is that it provides supportive legislation, precedent, and federal compacts declarations that provide clear cut factual and technical basis upon which an argument for Abeyance rests.

The Petitioners' posit that the Motion provides supporting evidence, "by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised."

This alone is sufficient to grant the Motion under the NRC regulations.

**F. The Motion for Abeyance meets the additional requirements for emerging issues that are filed in a timely manner.**

This Motion correctly and crisply requests that the license transfer comply with Section 401 of the Clean Water Act, secure water rights, and present a plan to dispose of radioactive water.

TMIA's Motion for Abeyance also clears the additional requirements under Section 2.309(c). These requirements include:

(i) The information upon which the filing is based was not previously available. Mr. Epstein became aware after the license was transferred that water rights' contract for TMI-2 did not exist. This revelation was not disclosed by the Applicant or regulatory agencies, and was not confirmed until April 2, 2021 in a correspondence from the SRBC to Mr. Epstein.

(ii) The information upon which the filing is based is materially different from information previously available. Without contracted water rights from the Susquehanna River Basin, TMI- 2 can not decontaminated or decommissioned. This is a significant and emerging development that undermines TMI-2 Solutions' cleanup plan.

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information. The agencies which had access to this information did not disclose that TMI-2 has no access to water or a plan for disposal, and that the DEP and SRBC failed to require the Applicants to produce a certification for the CWA, Section, 401. As soon as the Petitioners were made aware of this defect, they began to petition the appropriate regulatory agencies for relief.

TMIA's Motion meets the criteria on all three grounds. First, Section 401 of the Clean Water Act requires a certification. It recently came to light the license transfer ignored the CWA Act Section 401 almost three months after it was promulgated. The NRC either ignored the certification or actively refused to make the Applicants comply.

Second, the absence of water rights for TMI-2 was only recently disclosed by the SRBC. TMI-1 and TMI-2 are separate plants owned by different cooperate entities.

Third, the lack of a radioactive disposal plan also emerged as Mr. Epstein pressed the DEP and the SRBC to produce the waste management plan.

The information raised by the Motion is also materially different from previously available information.

#### **IV. Remedies.**

- 1) Consistent with the NRC's previous rulings, TMI-2 Solutions avowed commitment to implement a "Planning & Listening" phase through 2029, and in so much that the Motion for Abeyance does not seek to reverse the earlier NRC decision, the Petitioners respectfully requests the following remedies while the license transfer is held in Abeyance until:
- 2) TMI-2 Solutions submits a 401 CWA Certification for Section 401;
- 3) TMI-2 Solutions submits and receives approval from the SRBC to use water from the Susquehanna River for the decontamination and decommissioning processes; and,
- 4) TMI-2 Solutions submits and receives approval from the NRC for a plan to dispose of radioactive water generated by the decontamination and decommissioning processes.

#### **V. Conclusion.**

Silence on the part of the sponsor and regulator was a driving force behind the enactment of the Clean Water Act, Section 401. This was the very tool designed to defeat "fait accompli pollution."

The Motion for Abeyance should be granted. It is timely and sufficient., and meets NRC requirements to compel the Applicant to reconcile significant defects in the TMI-2 license transfer.



Respectfully submitted,

Eric Joseph Epstein, Chairman  
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Certificate of Service

I certify that I served through the U.S. Nuclear Regulatory  
Commission E-Filing system on the participants of the above-captioned  
proceeding.

Respectfully Submitted,

Eric Joseph Epstein

April 19, 2021