UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
GPU NUCLEAR, INC., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT CO., PENNSYLVANIA ELECTRIC CO., and TMI-2 SOLUTIONS, LLC	)	Docket No. 50-320-LT
(Three Mile Island Nuclear Station, Unit 2)	)	May 26, 2020

APPLICANTS' ANSWER OPPOSING DEP'S AMENDED MOTION FOR AN EXTENSION OF TIME TO FILE A HEARING REQUEST

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1325(b) and (c), GPU Nuclear, Inc., Metropolitan Edison Company, Jersey Central Power & Light Company, Pennsylvania Electric Company and TMI-2 Solutions, LLC (collectively, the "Applicants") submit this Answer opposing the Commonwealth of Pennsylvania, Department of Environmental Protection's ("DEP") Amended Motion for an Extension of Time to File a Hearing Request ("Amended Motion"). The Amended Motion is presented in DEP's May 18, 2020 Reply ("Reply")[1] to Applicant's Answer ("Answer")[2] opposing DEP's original Petition to Intervene ("Petition").[3]

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[1] Reply of the Commonwealth of Pennsylvania, Department of Environmental Protection to Applicants' Answer Opposing Its Petition for Leave to Intervene and Request for an Extension of Time to File a Hearing Request (May 18, 2020) (the specific amendment to the original Motion appears on page 7, with corresponding arguments on pages 6-11).

[2] Applicants' Answer Opposing Petition for Leave to Intervene and Request for an Extension of Time to File a Hearing Request Filed by the Commonwealth (May 11, 2020) (ML20132A329).

[3] Petition of the Commonwealth of Pennsylvania, Department of Environmental Protection for Leave to Intervene and Request for an Extension of Time to File a Hearing Request (Apr. 15, 2020) (ML20106E887).

This Amended Motion must be denied. DEP failed to consult with the parties, as required by Section 2.323(b). Additionally, the Amended Motion fails to satisfy the applicable standard, in Section 2.307(a), for an extension.

II. BACKGROUND AND PROCEDURAL HISTORY

As noted in the Answer, this proceeding is associated with Applicants' November 12, 2019 license transfer application ("LTA").[4] On March 26, 2020, the NRC published a notice in the *Federal Register* informing the public that it is considering the LTA for approval, providing an opportunity for the public to submit written comments on the LTA, and offering an opportunity for persons whose interests may be affected by the approval of the LTA to file (within 20 days of the notice) hearing requests and intervention petitions.[5]

DEP submitted its Petition on April 15, 2020, seeking to participate as a party in this proceeding under the provisions of 10 C.F.R. § 2.309(h). This regulation requires a state entity seeking party status to submit either a "request for hearing" or a "petition to intervene" or both. To be granted, that submission must:

(1) "designate a single representative for the hearing"; and

(2) contain "at least one admissible contention" that satisfies the NRC's "strict-by-design"[6] contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).

Notably, these requirements are *identical* regardless of whether the submission is a request for hearing, a petition to intervene, or a combination of the two.

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4 *See* TMI-19-112, Letter from J. Sauger, TMI-2 Solutions, LLC, and G. Halnon, GPU Nuclear, Inc., to NRC Document Control Desk, "Application for Order Approving License Transfer and Conforming License Amendments," Attach. 1 (Nov. 12, 2019) (ML19325C600) ("LTA").

5 Three Mile Island Nuclear Station, Unit No. 2; Consideration of Approval of Transfer of License and Conforming Amendment, 85 Fed. Reg. 17,102 (Mar. 26, 2020) ("Hearing Opportunity Notice").

6 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

The Petition (i.e., a petition to intervene) designated a single representative and *proposed* a single contention—thereby supplying the *type* of information required by the regulations to be presented in a petition to intervene and/or a hearing request.[7] Applicants thereafter submitted their Answer on May 11, 2020, explaining that the proposed contention is not "admissible" and that the Petition must be denied accordingly.[8]

The Petition also presented a separate and inconsistent request ("Motion") for issuance of an order indefinitely[9] extending the deadline to submit a hearing request. As purported justification, DEP argued primarily that it wanted further time to evaluate the LTA before determining whether it wanted to submit a hearing request.[10] As noted in the Answer, given the identical requirements for hearing requests and petitions to intervene, the only further act DEP needed to take to submit a hearing request was to add the words "hearing request" to the caption of its Petition (which it clearly *was* able to submit before the deadline).[11] Thus, as noted in the Answer, any claim of "impossibility" rings hollow.

In essence, DEP was not *unable* to request a hearing; rather it was seeking an opportunity to continue discussing (with the Applicants and NRC) certain of its questions and comments

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7 DEP claims that a similar statement in the Answer (regarding the "type" of information submitted in the Petition) constitutes an "acknowledge[ment]" that the proposed contention is admissible. Reply at 7-8. As should be readily apparent from the more than 14 pages Applicants dedicated to arguing the *exact opposite*, Answer at 18-32, DEP's claim is both incorrect and disingenuous.

8 Answer at 18-32.

9 Petition at 10 (seeking an extension until "one month after" some unspecified future date when "DEP's physical offices reopen").

10 *Id*. at 13-14. DEP claimed that remote working issues related to COVID-19 also necessitated a delay of the hearing request deadline. *Id*. As noted in the Answer, these alleged issues have not prevented DEP from drafting a proposed contention, filing a timely Petition, submitting a detailed technical letter to the NRC, drafting formal comments regarding the LTA, or engaging in further consultations with the Applicants. Answer at 38-39. It also did not prevent DEP from drafting and filing a timely Reply, which is not surprising given that DEP has had the LTA since November 2019. *See* LTA (cover letter at 6) (showing DEP was copied on the LTA transmittal).

11 Answer at 38-39.

regarding the LTA before *deciding whether* to request a hearing.[12] As noted in the Answer, the Applicants understand and appreciate DEP's interest in the safe decommissioning of TMI-2, fully share their goal of adequately protecting the citizens of Pennsylvania, and are eager to continue engaging with DEP to discuss future plans for TMI-2.[13] However, as further noted in the Answer, these objectives are best addressed outside the hearing process, which is geared towards the adjudication of specific technical or legal disputes.[14]

Notwithstanding Applicants' willingness to continue consulting with DEP, the Answer explained that the Motion must be denied for many reasons.[15] As a general matter, indecision does not constitute "good cause" for an extension.[16] Nor is "good cause" shown by a general desire to pause the NRC's review (conducted pursuant to its exclusive radiological safety jurisdiction) so that another entity can "pre-adjudicate" the LTA—particularly in light of the Commission's *codified* policy of expedited review for license transfer applications.[17] But, more importantly, the Answer noted that an extension simply is not necessary to accomplish DEP's requested relief (i.e. further discussions) because the consultation process proceeds in parallel with the NRC's adjudicatory process.[18] Notwithstanding all of these many fundamental reasons to reject the Motion, the Answer also explained that the Motion must be denied, as a matter of black letter law, because DEP failed to consult with the parties before filing the request.[19]

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12 *See, e.g.*, *id*. at 35; Petition at 13-14 (arguing it needs more time to "review" the LTA).

13 Petition at 3; Answer at 6.

14 Answer at 6.

15 *Id*. at 32-39.

16 *Id*.

17 *Id*.

18 *Id*.

19 *Id*. at 33.

DEP filed its Reply to Applicants' Answer on May 18, 2020. Therein, DEP attempts to recharacterize its Motion (which clearly sought an indefinite suspension of the NRC adjudicatory proceedings)[20] as a mere request for a "limited extension."[21] The Reply also includes a further request to "amend" its earlier Motion such that it would only seek an extension to a specific date ("Amended Motion"). Applicants hereby file this opposition to, thus completing the briefing sequence on, the Amended Motion.[22]

III. THE AMENDED MOTION MUST BE DENIED AS A MATTER OF LAW

The NRC's rules require a movant to consult with the other parties before filing any motion, including an extension request, and to include a corresponding certification in the motion.[23] Failure to do so requires, as a matter of black letter law, that the request be denied. The regulations make clear that denial is mandatory, not discretionary. More specifically, the Commission's codified requirement is that a motion "*must* be rejected" if these requirements are not satisfied.[24] The fundamental precept of judicial economy is well served by this common sense requirement that parties discuss issues and seek consensus *before* presenting a matter to the presiding officer; and by the further stipulation that, if a party cannot be bothered to consult on the matter, then the presiding officer need not expend its resources to adjudicate it.

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[20] DEP also requested "that the Commission postpone making a determination on the Applicants' license transfer Application until all parties have had a chance to further discuss the issues raised by the Department." Petition at 14. To the extent DEP truly seeks postponement, writ large, of the NRC Staff's review (as opposed to just an unnecessary extension of the hearing request deadline), it must be denied for the additional reason that it requests a "stay" without even acknowledging, addressing, or remotely satisfying the high standards applicable to such requests (e.g., irreparable injury and strong likelihood of success on the merits).

[21] Reply at 2. DEP also illogically claims that its Motion asked for "a precise amount of time." *Id*. at 7. However, one month after an unspecified date is nothing more than another unspecified date. This hardly qualifies as a "precise" point in, or amount of, time. Indeed, in the very next paragraph, DEP fully acknowledges the "uncertainty" of its request. *Id*.

[22] 10 C.F.R. § 2.323(c) ("The moving party has no right to reply.") (emphasis added).

[23] 10 C.F.R. § 2.323(b). Even though not styled as one, DEP's extension request is, in fact, a motion. *See Motion*, Black's Law Dictionary (11th ed. 2019) ("A written or oral application requesting a court to make a specified ruling or order.").

[24] 10 C.F.R. § 2.323(b) (emphasis added).

As noted in Applicants' original Answer, DEP neither consulted nor included the required certification in its Motion.[25] Thus, the Motion "must" be denied as a matter of black letter law.[26] Notwithstanding the fact that Applicants pointed out this *exact and dispositive* procedural flaw in the Motion, DEP *again* declined either to consult or include the required certification in its Amended Motion. Accordingly, the Amended Motion "must" be denied for precisely the same reason.

In its Reply, DEP presents a strained and counterfactual defense of its failure to consult, essentially arguing that the consultation requirement in 10 C.F.R. § 2.323(b) is inapplicable to its Motion (or, apparently, to its Amended Motion).[27] More precisely, DEP argues that "Section 2.323(a) specifically excludes motions filed under 10 CFR 2.309(c)."[28] This is a correct statement of the law. But, neither DEP's Petition nor the Motion embedded therein is a "motion[] filed under Section 2.309(c)." Section 2.309(c) pertains solely to "[f]ilings after the deadline," and governs motions for leave to submit *late-filed* contentions. Clearly, that is not the governing regulation. In fact, the Petition itself states that it was filed "pursuant to 10 CFR § 2.309(h)(2),"[29]—which is *not* Section 2.309(c). As noted in the plain text of Section 2.323, the consultation requirement pertains to *all* other motions.[30] Thus, it is applicable to both the Motion and the Amended Motion.

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25 Answer at 33.

26 10 C.F.R. § 2.323(b).

27 Reply at 8.

28 *Id*.

29 Petition at 1; *see also id*. at 4

30 10 C.F.R. § 2.323(a) and (b).

At bottom—even after being placed *on notice* of its earlier non-compliance—DEP chose not to consult, contrary to the Commission's clear and common sense requirement. Accordingly, the Amended Motion must be rejected as a matter of law.

IV. THE AMENDED MOTION MUST BE DENIED BECAUSE IT FAILS TO DEMONSTRATE "GOOD CAUSE"

Under the NRC's Rules of Practice and Procedure, extension requests are subject to the rigorous "good cause" standard in 10 C.F.R. § 2.307(a). In this context, an extension may only be granted when warranted by "unavoidable and extreme circumstances"—and even then, only to the extent necessary to overcome the unavoidable delay.[31] Moreover, this standard must be applied even more stringently here because of the Commission's legal obligation to render a prompt decision on license transfer applications. The Department has not satisfied the applicable standard here.

The Amended Motion presents three arguments for why DEP believes "good cause" exists for its extension request. First, the Department appears to acknowledge that the NRC's codified policy of expedited license transfer proceedings, and codified No Significant Hazards Consideration determination, apply to the instant proceeding.[32] But, it argues that the Commission should *disregard* those regulations here.[33] Because this demand directly contradicts NRC regulations, it is prohibited. As explained in 10 C.F.R. § 2.335(a), "no rule or regulation of the Commission, or any provision thereof . . . is subject to attack by way of discovery, proof,

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[31] *Hydro Res., Inc.* (Albuquerque, NM), CLI-99-1, 49 NRC 1, 3 n.2 (1999) (quoting Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998))) ("We caution all parties . . . to pay heed to the guidance in our policy statement that ordinarily only 'unavoidable and extreme circumstances' provide sufficient cause to extend filing deadlines").

[32] Petition at 8-10.

[33] *E.g.*, *id*. at 10 (arguing TMI-2 "should not fall under the 'generic finding'" codified in NRC regulations).

argument, or other means in *any adjudicatory proceeding*."[34] DEP's desire to present prohibited arguments clearly does not satisfy the "unavoidable and extreme circumstances" standard.

Second, the Department points to an April 6, 2020 letter it sent to Chairman Svinicki ("DEP Letter"), and suggests that it is dissatisfied with the response it received from the NRC.[35] In the DEP Letter, it asked the Chairman to answer a number of technical questions regarding the LTA and the TMI-2 decommissioning process. However, the DEP Letter violated the NRC's prohibition on *ex parte* communications.[36] Accordingly, on April 23, 2020, the NRC Secretary "promptly served on the parties and placed in the public record of the proceeding" DEP's letter, as required by 10 C.F.R. § 2.347(c), along with a letter to DEP explaining the impropriety of the submission.[37] A supplemental response from the NRC Staff explicitly offered to convene a meeting to consult with DEP on topics *other* than "disputed issues" (which are subject to the *ex parte* prohibition), and to further explain the NRC's license transfer process.[38]

Ultimately, DEP does not offer any explanation as to how its dissatisfaction with the NRC's codified prohibition on *ex parte* communications (which is not subject to challenge here)[39] somehow could be remedied by an extension of the hearing request deadline. And in practical terms, Applicants provided a fulsome response to the DEP Letter,[40] and will continue to

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34 Subject to certain limited exceptions not applicable here.

35 Petition at 10 (citing Exh. A).

36 *See* 10 C.F.R. § 2.347(a)(1) ("[i]nterested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding"); 10 C.F.R. § 2.4 (defining "Commission adjudicatory employee" to include the Commissioners). Once DEP submitted its proposed contention challenging the sufficiency of the LTA, that topic became a "disputed issue," as defined in 10 C.F.R. § 2.347(a)(2)(i).

37 Reply, Exh. A.

38 *Id*.

39 10 C.F.R. § 2.335(a).

40 Petition, Exh. B.

engage with DEP on matters related to the future of TMI-2. Thus, the NRC's *ex parte* rules do not present "unavoidable and extreme circumstances" warranting an extension.

Finally, DEP claims dissatisfaction with the possibility of participating as an interested governmental entity (pursuant to 10 C.F.R. § 2.315(c)) rather than as a party (under Section 2.309(h)).[41] Applicants' Answer had identified this option for DEP's consideration as an alternative way to participate in any hearing that may be convened.[42] But, DEP says this alternative is unacceptable because it "would only allow the Department to have one representative at the hearing."[43] DEP appears unaware that the same limitation applies to *both* Section 2.315(c) and Section 2.309(h). Indeed, the Petition *already* designated a "single representative."[44] Ultimately, DEP's status preference does not identify any "unavoidable and extreme circumstances" warranting an unnecessary delay of the proceeding.

At the same time, the NRC's evaluation of "good cause" must consider the harms to the Applicants and public from granting the extension. As stated in our Answer, the Applicants are ready and willing to engage with DEP on their core concerns, which lie outside the scope of the NRC's tailored hearing process. However, permitting a blanket delay until August to file requests for a hearing would greatly complicate an already multi-faceted transaction by pushing out Commission resolution of the NRC hearing process by many months, potentially well after the planned conclusion of the NRC Staff's review in July,[45] and even the transaction closing

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41 Reply at 10-11.

42 Answer at 36.

43 Reply at 10-11.

44 Petition at 2 ("David J. Allard . . . is the Department's representative in this proceeding.").

45 *See* Email from K. Conway to G. Halnon, "Acceptance Review Determination: Three Mile Island Unit 2 License Transfer Application (L-2019-LLA-0257)" (Feb. 4, 2020, 3:31 PM) (ML20054A270) ("the NRC staff expects to complete this review by July 2020.").

date.[46] Completing the decommissioning of TMI-2 represents a major milestone for the nuclear industry and the public. The practical harm and uncertainty introduced by such a lengthy delay—not to mention the complexity and cost it introduces into the decommissioning process—must be weighed against the largely unclear need for an extension. On balance, DEP simply has not demonstrated "good cause" for any extension, much less the lengthy extension requested in the Amended Motion.

V. CONCLUSION

The Amended Motion must be denied either because DEP failed to consult, or because it fails to satisfy the applicable "good cause" standard, or for both of these reasons.

[46] *See* LTA (cover letter at 3) (requesting the NRC's decision on the LTA by July 31, 2020, to support the transaction closing date).

Respectfully submitted,

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Dated in Washington, DC
this 26th day of May 2020

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NUCLEAR REGULATORY COMMISSION

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(Three Mile Island Nuclear Station, Unit 2)	)	May 26, 2020

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Applicants' Answer Opposing DEP's Amended Motion for an Extension of Time to File a Hearing Request" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

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