

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chairman  
Jeff Baran  
Annie Caputo  
David A. Wright

In the Matter of

FIRSTENERGY COMPANIES  
and  
TMI-2 SOLUTIONS, LLC

(Three Mile Island Nuclear Station  
Unit 2)

Docket No. 50-320-LT

CLI-21-08

**MEMORANDUM AND ORDER**

Today we address a March 15, 2021, motion by Eric Epstein, Chairman of Three Mile Island Alert, to hold in abeyance the license transfer of Three Mile Island Unit 2.<sup>1</sup> For the reasons discussed below, we find that we no longer have jurisdiction over the Motion and we therefore dismiss it.

**I. BACKGROUND**

In November 2019, GPU Nuclear, Inc., Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company (together, the FirstEnergy Companies) and TMI-2 Solutions, LLC (TMI-2 Solutions) (together with the FirstEnergy Companies, Applicants) applied to transfer the possession-only license for Three Mile Island

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<sup>1</sup> *Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC* (Mar. 15, 2021) (Motion).

Nuclear Station, Unit 2 (TMI-2) from the FirstEnergy Companies to TMI-2 Solutions.<sup>2</sup> The NRC published a notice of opportunity to request a hearing on the application in March 2020.<sup>3</sup> Eric Epstein and Three Mile Island Alert, Inc. (together, TMIA) filed a petition to intervene and request for a hearing.<sup>4</sup> In December 2020, the Staff issued an order approving the license transfer, and, after the Applicants completed their transaction, the Staff issued a conforming license amendment.<sup>5</sup> We denied TMIA's petition to intervene and request for hearing and terminated the proceeding in January 2021.<sup>6</sup>

In its Motion, TMIA asks the Commission to hold in abeyance the license transfer until the Applicants "provide and submit proof of adherence to the Clean Water Act (CWA), Section 401, and receive approval from the agencies charged with its implementation."<sup>7</sup> TMIA claims that the Applicants, the NRC, the Pennsylvania Department of Environmental Protection, and the Susquehanna River Basin Commission did not comply with section 401 of the CWA with the

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<sup>2</sup> See Letter from John Sauger, TMI-2 Solutions, LLC and Gregory H. Halnon, GPU Nuclear, Inc., to NRC Document Control Desk (Nov. 12, 2019) (ADAMS accession no. ML19325C690 (package)) (together with attachments and enclosures, License Transfer Application).

<sup>3</sup> 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).

<sup>4</sup> *Petition of Eric Joseph Epstein and Three Mile Island Alert, Inc. for Leave to Intervene and for a Hearing* (Apr. 15, 2020) (TMIA Petition).

<sup>5</sup> Order Approving Transfer of License and Draft Conforming License Amendment (EA-20-136) (Dec. 2, 2020) (ML20279A366) (package); Letter from Theodore B. Smith, NRC, to John Sauger, TMI-2 Solutions, LLC (Dec. 18, 2020) (ML20352A381).

<sup>6</sup> CLI-21-2, 93 NRC \_\_ (Jan. 15, 2021) (slip op.).

<sup>7</sup> Motion at 3.

license transfer of TMI-2 and that those deficiencies should be cured prior to the license transfer.<sup>8</sup> The Staff and Applicants oppose the Motion.<sup>9</sup>

## II. DISCUSSION

Initially, we must determine if we have jurisdiction to consider this Motion in our adjudicatory process. As we have described in previous cases, after the Staff issues the action provided for in the notice of opportunity for hearing and we issue our final adjudicatory decision, we no longer retain jurisdiction to consider further adjudicatory filings.<sup>10</sup> Instead, the available avenue to raise new concerns is through a request for enforcement action under 10 C.F.R. § 2.206.<sup>11</sup> Because the Staff has already issued the license transfer and conforming amendment in this case, and we resolved all pending adjudicatory matters in CLI-21-2, there is no longer an ongoing adjudicatory proceeding. We therefore dismiss the Motion for lack of jurisdiction.

While our lack of jurisdiction is sufficient grounds to deny the Motion, we also note that TMIA's Motion did not address any of our requirements for reopening a closed record or for

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<sup>8</sup> *Id.*

<sup>9</sup> *Applicants' Answer Opposing Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC* (Apr. 12, 2021); *NRC Staff's Answer in Opposition to TMIA's Motion* (Apr. 12, 2021). TMIA replied to the Staff's and Applicant's answers. *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*. (Apr. 19, 2021) (Reply).

<sup>10</sup> *Texas Utilities Electric 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 *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); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35–36 (2006). To be clear, this holding does not foreclose the filing of post-hearing motions within the timeframes provided in 10 C.F.R. Part 2.

<sup>11</sup> *Comanche Peak*, CLI-92-12, 36 NRC at 67.

staying a license transfer. In its Reply, TMIA seeks to hold the proceeding in abeyance rather than attempting to meet the requirements for reopening a closed record or staying a license transfer. TMIA argues that an abeyance motion is appropriate by citing a previous instance where the Licensing Board in *Hydro Resources* granted an abeyance motion.<sup>12</sup>

But the *Hydro Resources* case involved an ongoing adjudication as opposed to the present case, where the adjudication has been terminated. Further, although the *Hydro Resources* Board agreed to hold the proceeding in abeyance because the applicant was no longer pursuing operations at a portion of its site, and concluded it would have been a waste of resources to continue the litigation, we overturned the Board's decision in *Hydro Resources*.<sup>13</sup> After describing why holding a proceeding in abeyance is disfavored in NRC proceedings, we stated that "[o]ur decision furthers the Administrative Procedure Act's directive that an agency 'within a reasonable time, shall set and complete proceedings required to be conducted . . . and shall make its decision.'"<sup>14</sup> Here the decision has been made, the proceeding has been terminated, and the license transfer issued.

After an adjudication has been terminated, but before a final decision is rendered on the underlying licensing request, our regulations provide that petitioners may raise new issues through a motion to reopen. A motion to reopen will be granted only if it is timely filed, 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.<sup>15</sup> The

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<sup>12</sup> Reply at 2 (citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-40, 50 NRC 273 (1999), *rev'd sub nom. Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31 (2001)).

<sup>13</sup> See *Hydro Resources*, LBP-99-40, 50 NRC at 275; *Hydro Resources*, CLI-01-4, 53 NRC at 38.

<sup>14</sup> *Id.* at 43 (quoting 5 U.S.C. § 558(c)).

<sup>15</sup> *Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-21-6, 93 NRC \_\_, \_\_ (Mar. 15, 2021) (slip op. at 4) (citing 10 C.F.R. § 2.326(a)). An exceptionally grave

motion must also be accompanied by an affidavit, which sets forth the factual or technical bases for the claim that these criteria have been met.<sup>16</sup> Our regulations also provide the opportunity to stay a license transfer. An application to stay a license transfer must be filed within five days of the notice of the Staff action and must meet the remaining requirements in 10 C.F.R. § 2.1327.<sup>17</sup>

Because TMIA's Motion did not address the requirements for a motion to reopen or for a stay application, we would deny the Motion even if we retained jurisdiction over the matter. In its Reply, TMIA addresses some of the factors for a motion to reopen.<sup>18</sup> However, TMIA also asserts that applying the Commission's standards for a motion to reopen "would distort the intent and substance" of the Motion and TMIA does not "raise or ask for the admittance of a contention after the record has closed for a proceeding."<sup>19</sup> Our rules do not allow for a motion to hold a closed proceeding in abeyance. Further, TMIA does not meet the requirements for a motion to reopen the record or for a stay application.

Finally, TMIA's argument that the Applicants and NRC did not comply with the CWA does not provide a basis to hold this proceeding in abeyance. The Environmental Protection

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issue may be considered in the discretion of the presiding officer even if the motion is untimely. 10 C.F.R. § 2.326(a)(1).

<sup>16</sup> 10 C.F.R. § 2.326(b).

<sup>17</sup> A stay application must contain: "(1) A concise summary of the action which is requested to be stayed; and (2) A concise statement of the grounds for a stay, with reference to the factors specified in paragraph (d) of this section." 10 C.F.R. § 2.1327(b). Paragraph (d) states that

"[i]n determining whether to grant or deny an application for a stay, the Commission will consider: (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).

<sup>18</sup> Reply at 12-16.

<sup>19</sup> *Id.* at 12.

Agency regulations implementing the CWA state that a certification under section 401 “is required for any license or permit that authorizes an activity that may result in a discharge.”<sup>20</sup> And “discharge” in this part of the regulations means “a discharge from a point source into a water of the United States.”<sup>21</sup> The License Transfer Application did not request any new discharges or changes to any existing discharges; it changed the ownership of licensed activities but made no changes to operations or processes.<sup>22</sup> Because this license transfer does not authorize an activity that could result in a new discharge, the CWA does not require a certification under section 401.

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<sup>20</sup> 40 C.F.R. § 121.2.

<sup>21</sup> *Id.* § 121.1(f).

<sup>22</sup> *See, e.g.*, License Transfer Application, Attach. 1 at 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.”)

### III. CONCLUSION

We deny the Motion because the Commission no longer retains jurisdiction in this matter. The Motion also does not meet the requirements to reopen the record or to stay the license transfer. Further, the NRC is not required by the CWA to receive a certification under section 401 for this action. As the record for this adjudication is now closed, and the license transfer has been issued, the available avenue to raise new concerns is through a request for enforcement action under 10 C.F.R § 2.206.

IT IS SO ORDERED.

For the Commission



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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 22<sup>nd</sup> day of June 2021.

### **Additional Views of Commissioner Baran**

I agree with my colleagues that Three Mile Island Alert's motion to hold in abeyance the license transfer of Three Mile Island Unit 2 should be denied because (1) it does not meet the requirements to reopen the record or to stay the license transfer and (2) the license transfer does not authorize an activity that could result in a new discharge under the Clean Water Act requiring a certification under section 401. I write separately because I do not join my colleagues in denying the motion on the basis of a lack of Commission jurisdiction to reopen the case. A finding that the Commission lacks jurisdiction to consider the motion implies that the Commission lacks adjudicatory authority to do so. Although the Commission has established specific avenues for reopening an adjudication in regulation, I do not believe that the Commission lacks authority to hear a motion that does not follow the specific paths laid out in the regulation. The Commission has broad authority in Atomic Energy Act adjudications. In exercising this authority, the Commission has decided that it will generally not entertain motions that do not meet the requirements established in Part 2. However, in my view, this is not a jurisdictional limitation.



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(Three Mile Island Nuclear Station, )  
Unit 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commission Memorandum and Order (CLI-21-08)** have been served upon the following persons by Electronic Information Exchange.

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Three Mile Island Nuclear Station, Unit 2, Docket No. 50-320 LT  
**Commission Memorandum and Order (CLI-21-08)**

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 22<sup>nd</sup> day of June 2021.