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 11, 2020

APPLICANTS' ANSWER OPPOSING PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR AN EXTENSION OF TIME TO FILE A HEARING REQUEST FILED BY THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

Daniel F. Stenger, Esq.
Sachin Desai, Esq.
HOGAN LOVELLS US LLP

Russell G. Workman, Esq.
TMI-2 SOLUTIONS, LLC

Counsel for TMI-2 Solutions, LLC

Timothy P. Matthews, Esq.
John E. Matthews, Esq.
Grant W. Eskelsen, Esq.
Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP

Karen A. Sealy, Esq.
FIRSTENERGY SERVICE COMPANY

Counsel for GPU Nuclear, Inc., Metropolitan Edison Co., Jersey Central Power & Light Co., and Pennsylvania Electric Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NRC Cases

Federal Court Cases

Statutes

Regulations

Federal Register Publications

Other Authorities

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 11, 2020

APPLICANTS' ANSWER OPPOSING
PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR AN EXTENSION OF TIME TO FILE A HEARING REQUEST FILED BY THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309, GPU Nuclear, Inc. ("GPU Nuclear"), Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company (collectively referred to as the "FirstEnergy Companies") and TMI-2 Solutions, LLC ("TMI-2 Solutions") (together with the FirstEnergy Companies, the "Applicants") submit this Answer opposing the Petition of the Department of Environmental Protection, Commonwealth of Pennsylvania ("DEP" or the "Department") for Leave to Intervene and Request for an Extension of Time to File a Hearing Request ("Petition") filed on April 15, 2020.[1] The DEP seeks to

[1] 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) ("Petition").

intervene in the proceeding associated with Applicant's November 12, 2019 license transfer application ("LTA" or "Application").[2]

In their LTA, Applicants have asked the U.S. Nuclear Regulatory Commission ("NRC") to approve the direct transfer of control of the Possession Only License No. DPR-73 ("License") for Three Mile Island Nuclear Station, Unit 2 ("TMI-2") from the FirstEnergy Companies to TMI-2 Solutions.[3] The Applicants are seeking the NRC's approval of this transfer to effectuate a transaction described in the October 15, 2019 Asset Purchase and Sale Agreement among the Applicants ("Purchase Agreement") enclosed with the Application.[4] Subject to the satisfaction of all closing conditions, including the receipt of all required regulatory approvals, the Applicants are targeting a transaction closing date in the second half of 2020.[5]

TMI-2 Solutions is a special purpose entity formed by Energy*Solutions*, Inc. ("Energy*Solutions*") to decommission TMI-2, manage Debris Material[6] until acceptance by the U.S. Department of Energy ("DOE"), and terminate the NRC license and release the TMI-2 site. Energy*Solutions*' indirectly wholly-owned subsidiary Energy*Solutions*, LLC, will support TMI-2 Solutions in the physical decommissioning of TMI-2. Energy*Solutions* will serve as the counterparty to additional financial assurance mechanisms established for the TMI-2 project.

---

2 *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").

3 *See generally id*. The LTA also asks the NRC to approve conforming administrative amendments to the License to reflect the proposed transfer. *Id.* at 14.

4 *Id.*, Encl. 1A (Proprietary Asset Purchase and Sale Agreement); 1B (Non-Proprietary Asset Purchase and Sale Agreement).

5 *Id*. at 14.

6 "Debris Material" includes "any remaining spent nuclear fuel, damaged core material, high-level waste, and Greater-Than-Class C ("GTCC") waste" at TMI-2. *Id*. at 2.

TMI-2 is a non-operational pressurized water reactor on Three Mile Island in Londonderry Township, Pennsylvania, about ten miles southeast of Harrisburg. TMI-2 is co-located with Three Mile Island Nuclear Station, Unit 1 ("TMI-1"), which is separately owned and operated by Exelon Generation Company, LLC. On March 28, 1979, TMI-2 suffered a loss-of-coolant accident which caused severe damage to the reactor core ("Accident").

During the cleanup following, approximately 99% of the fuel and damaged core material was removed and shipped to DOE's Idaho National Laboratory ("INL") pursuant to a contract with DOE for "Transportation, Storage, and Disposal Services for TMI-2 Reactor Core."[7] DOE now has title to and possession of the removed fuel and damaged core material at the TMI-2 Independent Spent Fuel Storage Installation ("ISFSI") in Idaho (not at the TMI-2 site). DOE is the licensed owner and operator of that ISFSI, and DOE is responsible for maintaining the ISFSI and for the ultimate disposition of the removed fuel and damaged core material.[8] Importantly, neither DOE's ISFSI license nor the material stored there are part of this LTA. Additionally, DOE is obligated to accept and dispose of the remaining Debris Material at TMI-2.[9]

Following completion of the post-Accident cleanup, TMI-2 was placed in a Post-Defueling Monitored Storage ("PDMS") state, and preparations for decontamination and dismantlement were deferred until the license expiration for TMI-1 (so the units could be decommissioned simultaneously).[10] By way of background, licensees typically choose one of

---

7 DOE Contract Nos. DE-SC07-83ID12355 and DE-SC07-84ID12355 ("Reactor Core Contract"); and DE-SC07-85ID12554 ("Abnormal Waste Contract").

8 Facility: Three Mile Island Unit-2 Independent Spent Fuel Storage Installation; Licensee: United States Department of Energy; License No.: SNM-2508; Docket No.: 072-00020: Location: Idaho Operations Office, 1955 Fremont Ave., Idaho Falls, ID 83401.

9 LTA at 12 (referencing Standard Contract DE-CR01-83NE44477).

10 *See* Letter from M. Masnik to R. Long, "Issuance of Amendment No. 45 for Facility Operating License No. DPR-73 to Possession Only License for Three Mile Island Nuclear Station Unit 2 (TAC No. ML69115)" (Sept. 14, 1993) (Legacy ADAMS Nos. 9405190042 (cover letter), 9405190046 (amendment), 9405190048 (safety evaluation)). The license for TMI-1 expires on April 19, 2034, but it was permanently shutdown in September

two decommissioning strategies: DECON or SAFSTOR. DECON is a general strategy in which radioactive contaminants are removed or decontaminated to a level that permits release of the property and termination of the NRC license.[11] SAFSTOR is a strategy in which the facility is maintained during an extended period of safe storage (usually many decades) to allow radioactivity to decay, and afterward, the plant ultimately is dismantled and the property decontaminated.[12] TMI-2's current PDMS status has been analogous to SAFSTOR for several decades.

Now that TMI-1 has permanently ceased operations, TMI-2 Solutions plans to commence the decommissioning for TMI-2 on an accelerated schedule and aims to complete the decommissioning, restoration, and release of the TMI-2 site 16.5 years after the license transfer.[13] This is seventeen years earlier than the previous estimated schedule, which assumed deferral of decommissioning of TMI-2 until after the end of the licensed life of TMI-1.[14]

TMI-2 Solutions plans to divide its decommissioning efforts into two phases. Phase 1 focuses on planning, engineering and licensing activities, and remediation of the areas subject to the Accident.[15] During the first 4-5 years of this phase, TMI-2 will remain primarily in a PDMS

2019. *See* TM-19-095, Letter from M. Gallagher to NRC Document Control Desk, "Certification of Permanent Removal of Fuel from the Reactor Vessel for Three Mile Island Nuclear Station, Unit 1," at 1 (Sept. 26, 2019) (ML19269E480).

11 *See* NRC Backgrounder, "Decommissioning Nuclear Power Plants," at 1 (July 2018) (ML040340625).

12 *Id*.

13 LTA, Encl. 7 at 1; TMI-19-164, Letter from K. Sealy, J. Sauger, and R. Workman, to NRC Document Control Desk, "Notification of 'Amended Post-Shutdown Decommissioning Activities Report' (PSDAR) for Three Mile Island, Unit 2 in Accordance with 10 CFR 50.82(a)(7)" (Dec. 12, 2019), Attach. 1, "Three Mile Island Nuclear Power Station, Unit 2 Post-Shutdown Decommissioning Activities Report, Revision 3," at 4 (Dec. 2019) (ML20013E535) ("PSDAR").

14 *See* TMI-15-093, Letter from G. Halnon to NRC Document Control Desk, "Three Mile Island Nuclear Station, Unit 2, Docket No. 50-320, Possession Only License No. DPR-73, Revision to Post-Shutdown Decommissioning Activities Report" (Dec. 4, 2015) (ML15338A222).

15 LTA, Encl. 7 at 1.

or analogous state (*i.e.*, SAFSTOR).[16] Thereafter, TMI-2 will move out of PDMS into active decommissioning (*i.e.*, DECON) to perform a focused remediation of the remaining areas of the facility impacted by the Accident.[17] The end goal of Phase 1 will be to remediate the reactor building and package the Debris Material, leaving TMI-2 in a similar position to a typical reactor at the end of its operating life.[18] The goal of Phase 2 is the active decommissioning of the TMI-2 site to a level that permits the release of the site, other than an area that may be set aside for secure storage of the limited Debris Material until acceptance by the DOE.[19]

DEP proposes one contention. The Proposed Contention claims that "the record" lacks "the necessary information to determine the 'financial qualification of the applicant.'"[20] DEP then lists several reasons why it believes the record is incomplete. DEP's reasons include that TMI-2 Solutions' assumptions about the growth of the TMI-2 nuclear decommissioning trust ("NDT") are unsupported, cost contingency assumptions are unexplained, the information on financial assurances is insufficient, and alleged inconsistencies between the LTA and various historical decommissioning cost estimates.[21]

As explained in this Answer, DEP's arguments lack merit, and its Proposed Contention falls far short of the admissibility requirements in 10 C.F.R. § 2.309(f)(1). Thus, the Petition must be denied. In brief, the Petition does not demonstrate that the information provided in the Application fails to meet the requirements set forth in NRC regulations; a generalized conclusory opinion that information is "inadequate" is not sufficient to support the admission of a

---

16 *Id.*

17 *Id*.

18 *Id.* at 10.

19 *Id.*

20 Petition at 4.

21 *Id*. at 4-10.

contention. Moreover, the Proposed Contention is neither supported by references to specific portions of the Application, nor by any fact or expert opinion to support the Proposed Contention's claims. Second, a review of the Application indicates that it contains much of the exact information DEP claims is "missing." Further, the Proposed Contention appears to challenge NRC regulations, which is prohibited by 10 C.F.R. § 2.335. Thus, the Proposed Contention is out-of-scope, immaterial, unsupported, and fails to identify a genuine dispute with the LTA, contrary to the individually disqualifying requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

The Applicants understand and appreciate DEP's interest in the safe decommissioning of TMI-2. Like DEP, the Applicants also believe it is necessary and preferable for "the full Commission and NRC staff to ensure that the record demonstrates that there is adequate protection for the citizens of Pennsylvania as is required by the Atomic Energy Act."[22] Nonetheless, DEP's general desire for more information, or input into the NRC Staff's review, is best addressed outside the hearing process, which is geared towards the adjudication of specific technical or legal disputes. As described below, the NRC's consultation process—which proceeds in *parallel* with any potential adjudicatory hearing—is far more suited for DEP's objectives. The Applicants are interested and ready to engage with the DEP to discuss the future plans for TMI-2,[23] and believe these consultations will present a more productive forum.[24]

Finally, the Petition includes a request for an extension of time to request a hearing.[25] The Commission should deny this request for three independent reasons. First, DEP asks that

---

22 Petition at 3.

23 *Id.*, Exh. B at 2.

24 *Id.* at 16.

25 *Id.* at 10-11.

the Commission "postpone making a determination on the Applicants' license transfer Application until all parties have had a chance to discuss the issues raised by the Department."[26] As noted above, and explained in further detail below, the Staff's consultation process proceeds *in parallel* with the adjudicatory process. Thus, there is no need to hold the hearing process in abeyance to ensure consultations continue (which is the relief DEP seeks). Second, in issuing 10 C.F.R. Part 2, Subpart M, the Commission purposefully provided an *expedited* hearing process that should not be extended absent compelling demonstration of good cause, which DEP has failed to provide.[27] Third, DEP identifies no "unavoidable and extreme circumstances" that prevented it from submitting a timely hearing request. Indeed, the instant Petition *already* contains the type of information required by 10 C.F.R. § 2.309 to be included in a hearing request—except the actual request for a hearing. DEP's purposeful decision to withhold the actual request, seeking indefinite delay of the hearing process, does not remotely constitute good cause for an extension. Accordingly, it should be rejected.

For the reasons below, the Commission should deny the Petition in whole for failing to proffer an admissible contention and should reject DEP's request for an extension of time as unnecessary and unsupported.

II. PROCEDURAL HISTORY

The Applicants filed the Application on November 12, 2019.[28] 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

---

[26] *Id.* at 14.

[27] *See* 10 C.F.R. §§ 2.307(a), 2.334(b).

[28] *See* LTA (cover letter at 1). On December 12, 2019, the Applicants filed with the NRC a revised PSDAR including an updated DCE. *See* PSDAR (cover letter at 1).

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 ("Hearing Opportunity Notice").[29] The Hearing Opportunity Notice also contemplated that potential parties may need access to the Sensitive Unclassified Non-Safeguards Information ("SUNSI")[30] in the LTA for contention drafting purposes. Thus, it directed those potential parties to request access from the Applicants or file a motion with the Commission.[31] Applicants, Mr. Epstein, TMIA, and DEP jointly filed a motion with the Commission for entry of an amended protective order to govern the disclosure of, access to, and use of SUNSI by DEP in this proceeding on April 18, 2020.[32] The Secretary of the Commission granted the request on April 24, 2020.[33] Applicants timely file this Answer opposing the Petition according to the provision of 10 C.F.R. § 2.309(i)(1).

III. LEGAL AND REGULATORY FRAMEWORK

A. Reactor Decommissioning

Under NRC regulations, "decommissioning" a nuclear reactor means to safely remove the facility from service, reduce residual radioactivity to a level that allows releasing the property for unrestricted use (or restricted use subject to conditions, not proposed here) in accordance with NRC regulations in 10 C.F.R. Part 20, Subpart E, and terminate the license.[34] NRC regulations require that applicants and licensees provide "reasonable assurance" that funds will

---

29 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").

30 SUNSI in this context includes any proprietary commercial information that an applicant requests to be withheld from public disclosure.

31 *Id.* at 17,104.

32 Joint Motion for Entry of Amended Protective Order (Apr. 18, 2020) (ML20109A009).

33 Amended Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information) (Apr. 24, 2020) (ML20115E256) ("Amended Protective Order").

34 10 C.F.R. § 50.2.

be available for the decommissioning process.[35] The primary methods of providing financial assurance for decommissioning permitted by the NRC are through: (1) prepayment; (2) an external sinking fund; (3) a surety, insurance, or another guarantee; or (4) a combination of these or equivalent mechanisms.[36]

NRC regulations impose additional requirements that govern three sequential phases for decommissioning activities: (1) initial activities, (2) major decommissioning and storage activities, and (3) license termination activities.[37] NRC regulations require a licensee to submit a PSDAR prior to or within two years following the permanent cessation of operations.[38] The Staff notices its receipt of the PSDAR, makes the PSDAR available for public comment, and holds a public meeting on its contents.[39] The PSDAR serves to inform the public and NRC Staff of the licensee's proposed activities, but approval is not required under the NRC rules.[40]

Thus, without objections from the NRC Staff, the licensee may begin "major decommissioning activities" ninety days after the Staff receives the PSDAR.[41] Under NRC

---

35 *Id.* § 50.75(a). The NRC requires nuclear power plant licensees to report to the agency the status of their decommissioning funds at least once every two years, annually within five years of the planned shutdown, and annually once the plant ceases operation. *Id.* § 50.75(f)(2).

36 *Id.* § 50.75(e)(1)(i)-(iii), (vi).

37 *See generally id.* § 50.82(a).

38 *Id.* § 50.82(a)(4)(i).

39 *Id.* § 50.82(a)(4)(ii). The Staff presents comments received at the public meeting held on the PSDAR and makes available to the public a written transcript of the meeting. *See* NRC, Regulatory Guide 1.185, "Standard Format and Content for Post-Shutdown Decommissioning Activities Report," Rev. 1 at 4 (June 2013) (ML13140A038) ("RG 1.185"). As discussed below, the PSDAR process does not create a hearing opportunity.

40 Decommissioning of Nuclear Power Reactors; Final Rule, 61 Fed. Reg. 39,278, 39,281 (July 29, 1996) ("1996 Decommissioning Rule"). In establishing the current process governing decommissioning, the NRC "eliminate[d] the need for an approved decommissioning plan before major decommissioning activities can be performed." *Id.*

41 10 C.F.R. § 50.82(a)(5). A "major decommissioning activity" for a nuclear power plant is defined as "any activity that results in permanent removal of major radioactive components, permanently modifies the structure of the containment, or results in dismantling components for shipment containing greater than class C waste in accordance with [10 C.F.R.] § 61.55." *Id.* § 50.2.

regulations, a licensee may not perform decommissioning activities that would "[f]oreclose release of the site for possible unrestricted use; [r]esult in significant environmental impacts not previously reviewed; or [r]esult in there no longer being reasonable assurance that adequate funds will be available for decommissioning."[42]

The PSDAR must include a site-specific DCE.[43] Once a licensee submits its DCE, it generally is allowed access to the balance of the NDT fund monies for the remaining decommissioning activities with "broad flexibility."[44] The use of the NDT fund is limited in three important respects. First, withdrawals from the fund must be "for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in [10 C.F.R.] § 50.2" or "for payments of ordinary administrative costs (including taxes) and other incidental expenses of the fund (including legal, accounting, actuarial, and trustee expenses)."[45] Second, the expenditure must not reduce the value of the NDT "below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise."[46] Finally, the withdrawals must not "inhibit the ability of the licensee to complete funding of any shortfalls in the decommissioning trust needed to ensure the availability of funds to ultimately release the site and terminate the license."[47]

The Staff also monitors the licensee's use of the NDT through its review of the licensee's annual financial assurance status reports.[48] Those reports must include, among other

---

42 *Id.* § 50.82 (a)(6).

43 *Id.* § 50.82 (a)(4)(i).

44 *See* 1996 Decommissioning Rule, 61 Fed. Reg. at 39,285.

45 10 C.F.R. § 50.82(a)(8)(i)(A); *id*. § 50.75(h)(2).

46 *Id.* § 50.82(a)(8)(i)(B).

47 *Id.* § 50.82(a)(8)(i)(C).

48 *Id.* § 50.82(a)(8)(v).

information, the amount spent on decommissioning activities, the amount remaining in the fund, and an updated estimate of the costs required to complete decommissioning.[49] If the licensee or NRC identifies a shortfall between the remaining funds and the updated cost to complete decommissioning (as a result of these annual status reports or otherwise), then the licensee must provide additional financial assurance.[50]

Unless otherwise authorized, the site must be decommissioned within 60 years of the plant shutting down.[51] The licensee remains subject to NRC oversight until the decommissioning is completed and the license is terminated. The licensee must submit a license termination plan ("LTP") at least two years before the planned license termination date.[52] The NRC, in turn, must notice receipt of the LTP in the *Federal Register*, make the plan available to the public for comment, schedule a public meeting near the facility to discuss the plan's contents, and offer an opportunity for a public hearing on the license amendment associated with the LTP.[53] The Commission may not approve the LTP (by license amendment) and terminate the license until it makes specific findings set forth in the regulations.[54]

As part of the license termination process, the licensee conducts a sequence of site surveys consistent with the approach in the Multi-Agency Radiation Survey and Site Investigation Manual ("MARSSIM").[55] The first step is a Historical Site Assessment ("HSA").

---

[49] *Id.* § 50.82(a)(8)(v)(A)-(B).

[50] *Id.* § 50.82(a)(8)(vi). The determination whether a shortfall exists takes into account a two percent annual real rate of return.

[51] *Id.* § 50.82(a)(3).

[52] *Id.* § 50.82(a)(9)(i).

[53] *Id.* § 50.82(a)(9)(iii).

[54] *Id.* § 50.82(a)(10)-(11).

[55] NUREG-1575, "Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM)," Rev. 1 (Aug. 2000) (ML003761445) ("NUREG-1575").

An HSA is an investigation to collect existing information describing a site's history related to potential, likely, or known sources of radioactive and other site contamination.[56] The HSA is followed by a site characterization survey later in the decommissioning process (to determine the nature and extent of contamination) and, eventually, a final status survey (to demonstrate satisfaction of the applicable release criteria).[57]

NRC regulations also address the need to ensure adequate funds for the management of spent nuclear fuel ("SNF").[58] As noted above, DOE has already removed (and possesses title to) approximately 99% of the fuel and damaged core material. Because the Accident occurred within the first few months of reactor operation, no SNF was otherwise stored at the TMI-2 site. Even so, the remaining approximately 1% of the Debris Material will be packaged and stored until DOE acceptance. The requirement to ensure adequate funding for the management of SNF also applies to the cost of managing the Debris Material.[59]

Thus, the DCE must include the projected costs of managing the Debris Material until the Debris Material is assumed to be removed from the site.[60] The licensee must report annually to the NRC on the status of its funding to manage the Debris Material, including the amount of funds available, the projected cost of managing the Debris Material until DOE removes it, and if there is a funding shortfall, a plan to obtain additional funds to cover the cost.[61]

---

56 *See generally id*. at 2-22, 3-1.

57 *Id*. at 2-23, 2-24.

58 *See* 10 C.F.R. §§ 50.54(bb); 50.82(a)(8)(vii).

59 *See id.* § 50.82(a)(8)(vii); LTA at 12 ("[P]ursuant to 10 CFR 50.33(k) and 50.54(bb), funds must be set aside for long-term storage of the Debris Material."). However, the requirement in Section 50.54(bb) to submit a formal plan for the management of such material is inapplicable to TMI-2. *See* TMI-2 Post-Defueling Monitored Storage Safety Analysis Report, Update 10 (Aug. 2013) (ML13238A221) (noting the requirements of Section 50.54(bb) and stating that, "[a]s the irradiated fuel which comprised the TMI-2 reactor core has been transferred to the possession of the Department of Energy no funding plan is required for TMI-2.").

60 10 C.F.R. § 50.82(a)(4)(i).

61 *Id.* § 50.82(a)(8)(vii).

B. Reactor License Transfers

Under Section 184 of the Atomic Energy Act of 1954, as amended ("AEA"),[62] an NRC reactor license, or any right under it, may not be "transferred, assigned[,] or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of [the] license to any person," unless the NRC first gives its consent in writing.[63] This statutory requirement is codified in 10 C.F.R. § 50.80 and applies to both direct and indirect license transfers.[64] Transferring control may involve either the licensed operator or any individual licensed owner of the facility.[65] Before approving a license transfer, the NRC reviews, among other things, the technical and financial qualifications of the proposed transferees.[66] The transfer review, in other words, focuses on the "potential impact on the licensee's ability both to maintain adequate technical qualifications and organizational control and authority over the facility[,] and to provide adequate funds for safe operation and decommissioning."[67]

To grant a license transfer application, the NRC must find a "reasonable assurance" of financial qualifications.[68] License transfer applicants for reactors that will be permanently shutdown at the time of the transfer may rely *solely* on the adequacy of the NDT to demonstrate

---

62 Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011, *et seq*.).

63 *Id.* § 184 (codified as amended at 42 U.S.C. § 2234).

64 *See* NRC Backgrounder, "Reactor License Transfers," at 1-2 (Jan. 2020) (ML040160803). A direct license transfer occurs when an entity seeks to transfer a license it holds to a different entity (*e.g*., when a plant is to be sold or transferred to a new licensee in whole or part). *See id*. An indirect license transfer takes place when there is a transfer of "control" of the license or of a license holder (*e.g.*, as a result of a merger or acquisition at high levels within or among corporations. *See id.*

65 *See id.* at 2.

66 *See* 10 C.F.R. §§ 50.80(b)(1)(i), (c)(1); *see also* NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," Rev. 1 (Feb. 1999) (ML013330264) ("NUREG-1577").

67 Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071, 44,077 (Aug. 19, 1997).

68 10 C.F.R. § 50.33(f)(2).

reasonable assurance.[69] Longstanding Commission precedent makes clear that the reasonable assurance standard does not require an applicant to meet an "absolute" or "beyond a reasonable doubt" standard.[70] In other words, "reasonable assurance" is not synonymous with "absolute assurance." The NRC has historically interpreted "reasonable assurance" with the understanding that "some risks may be tolerated and something less than absolute protection is required."[71] As particularly relevant here, "the mere casting of doubt" on some aspect of an application is legally insufficient "to defeat a finding of reasonable assurance."[72]

The AEA requires that the NRC offer an opportunity for hearing on a license transfer.[73] In 1998, the NRC adopted Subpart M of 10 C.F.R. Part 2 (10 C.F.R. §§ 2.1300 to 2.1331), authorizing the use of a streamlined license transfer process with informal legislative-type hearings, rather than formal adjudicatory hearings.[74] These rules cover any direct or indirect license transfer for which NRC approval is required, including those transfers that require license

---

69 *See, e.g.*, Oyster Creek License Transfer Safety Evaluation Report (June 20, 2019) (ML19095A457) ("Oyster Creek License Transfer SER"); Pilgrim License Transfer Safety Evaluation Report (Aug. 23, 2019) (ML19235A300) ("Pilgrim License Transfer SER").

70 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 262 n.142 (2009); *Commonwealth Edison Co.* (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 421 (1980); *N. Anna Envtl. Coal. v. NRC*, 533 F.2d 655, 667-68 (D.C. Cir. 1976) (rejecting the argument that reasonable assurance requires proof beyond a reasonable doubt and noting that the licensing board equated "reasonable assurance" with the preponderance standard).

71 Memorandum from F. Brown, Director, Office of New Reactors to New Reactor Business Line, "Expectations for New Reactor Reviews," at 4 (Aug. 29, 2018) (ML18240A410).

72 *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 31 (2000) (citing *La. Energy Servs.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 297 (1997); *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)).

73 AEA § 189.a(1)(A) (codified as amended at 42 U.S.C. § 2239(a)(1)(A)) ("In any proceeding under this chapter, for . . . application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.").

74 *See* Streamlined Hearing Process for NRC Approval of License Transfers; Final Rule, 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998) ("Subpart M Rule"); *see also* Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182, 2,214 (Jan. 14, 2004) ("Changes to the Adjudicatory Process") (retaining streamlined process under Subpart M for license transfers without substantive changes).

amendments and those that do not.[75] Section 2.1315 codifies the Commission's generic determination that any conforming amendment to an operating license that only reflects the license transfer action involves a "no significant hazards consideration."[76] That same regulation provides that "[a]ny challenge to the administrative license amendment is limited to the question of whether the license amendment accurately reflects the approved transfer."[77]

As part of the same rulemaking to streamline license transfer proceedings, the Commission also promulgated 10 C.F.R. § 51.22(c)(21). That regulation categorically excludes from environmental review "[a]pprovals of direct or indirect transfers of any license issued by [the] NRC and any associated amendments of license required to reflect the approval of a direct or indirect transfer of an NRC license." This regulation reflects the NRC's finding that this category of action does not "individually or cumulatively have a significant effect on the human environment."[78]

C. Contention Admissibility Standards

Petitions to intervene must "set forth with particularity" the contentions a petitioner seeks to have litigated in a hearing.[79] The requirements for an admissible contention are set forth in 10 C.F.R. § 2.309 (f)(1)(i)-(vi) and also described in the Hearing Opportunity Notice.[80] The Commission's contention admissibility requirements are "strict by design."[81] They seek "to

---

75 *See* Subpart M Rule, 63 Fed. Reg. at 66,727.

76 10 C.F.R. § 2.1315(a).

77 *Id* § 2.1315(b).

78 *See* Subpart M Rule, 63 Fed. Reg. at 66,728.

79 *PPL Susquehanna, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-15-8, 81 NRC 500, 503-04 (2015) (quoting 10 C.F.R. § 2.309(f)(1)); *Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-17-4, 85 NRC 59, 74 (2017).

80 *See* Hearing Opportunity Notice, 85 Fed. Reg. at 17,103.

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

ensure that NRC hearings 'serve the purpose for which they are intended: to adjudicate *genuine, substantive safety and environmental issues* placed in contention by qualified intervenors.'"[82] The requirements thus reflect a "deliberate effort to prevent the major adjudicatory delays caused in the past by ill-defined or poorly-supported contentions that were admitted for hearing although 'based on little more than speculation.'"[83] To warrant an adjudicatory hearing, the NRC requires proposed contentions to have "some reasonably specific factual or legal basis."[84] The petitioner alone bears the burden to meet the standards of contention admissibility.[85]

Under 10 C.F.R. § 2.309(f)(1), a petitioner must explain the basis for each proffered contention by stating alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely in litigating the contention at the hearing.[86] To be admissible, the issue raised must fall within the scope of the proceeding and be material to the findings that the NRC must make with respect to the Application.[87] Contentions that challenge NRC regulations,[88] seek to impose requirements stricter than those imposed by the agency,[89] or opine on how Staff should conduct its review[90] are all outside the scope of NRC adjudicatory

---

82 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)) (emphasis added) (internal citation omitted).

83 *Susquehanna*, CLI-15-8, 81 NRC at 504 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

84 *Id.* (quoting *Millstone*, CLI-03-14, 58 NRC at 213).

85 *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 325, 329 (2015) ("[I]t is Petitioners' responsibility . . . to formulate contentions and to provide 'the necessary information to satisfy the basis requirement' for admission") (internal citation omitted).

86 10 C.F.R. § 2.309(f)(1)(ii), (v).

87 *Id*. § 2.309 (f)(1)(iii)-(iv); *Susquehanna*, CLI-17-4, 85 NRC at 74.

88 10 C.F.R. § 2.335(a).

89 *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-15-4, 81 NRC 156, 167 (2015); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000); *Curators of the Univ. of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 170 (1995).

90 *See, e.g.*, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 25 (2001) (quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48

proceedings. A contention also must provide sufficient information to show a genuine dispute with the applicant on a material issue of law or fact.[91] The contention must refer to the "specific portions of the Application. . . that the petitioner disputes," along with the "supporting reasons for each dispute; or, if the petitioner believes that an application fails altogether to contain information required by law, the petitioner must identify each failure, and provide supporting reasons for the petitioner's belief."[92]

Petitioners may not incorporate by reference voluminous documents or affidavits with conclusory assertions to support a contention. As the Commission explained:

> Commission practice is clear that a petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions. . . . Such a wholesale incorporation by reference does not serve the purposes of a pleading. . . . The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point. The Commission cannot be faulted for not having searched for a needle that may be in a haystack.[93]

In short, the Commission has refused to "sift through the parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves."[94]

NRC 325, 350 (1998), *aff'd sub nom Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied,* 531 U.S. 1070 (2001)) ("'[I]t is the license application, not the NRC Staff review, that is at issue in our adjudications.'").

91 10 C.F.R. § 2.309(f)(1)(vi); *Susquehanna*, CLI-17-4, 85 NRC at 74.

92 *Susquehanna*, CLI-17-4, 85 NRC at 74 (citing 10 C.F.R. § 2.309 (f)(1)(vi)).

93 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989) (citations omitted).

94 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 337 (2002) (quoting *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 194 (1999)).

IV. THE PROPOSED CONTENTION (ADEQUACY OF FINANCIAL ASSURANCE INFORMATION) IS INADMISSIBLE

In the Proposed Contention, DEP alleges[95] that the LTA does not contain sufficient information for the NRC to determine that TMI-2 Solutions is financially qualified under NRC regulations. More specifically, the Department asserts:

> After reviewing the material contained in the Application, the Department does not believe the record contains the necessary information to determine the "financial qualifications of the applicant" and for the Commission to find, as it must, that the license transfer application would, if approved, provide "adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a).[96]

The Department then asserts a number of reasons why the information provided in the Application is deficient, including that the Applicants allegedly fail to explain their assumptions for why $200 million will accrue in the NDT over the 16.5 year anticipated decommissioning process; the Applicants' alleged failure to "fully justify" the amounts of money that GPU Nuclear is authorized to withdraw from the NDT prior to the closing; that Applicants' cost estimates and associated cost contingencies and assumptions are unclear, allegedly preventing a determination that TMI-2 Solutions is financially qualified; and that there is insufficient information in the Application to "fully evaluate the validity of funding through financial assurance instruments and the parent guarantee" proposed by Applicants.[97]

None of the Department's arguments are sufficient grounds to admit the Proposed Contention. Most importantly, the Department's claims must fail because, in contrast to

---

[95] Across many years of interactions with the FirstEnergy Companies, the Department has not raised concerns regarding alleged deficiencies in the cost estimates or NDT fund value. Only now, in the context of a proposed change of licensee, has the Department suddenly "discovered" these concerns.

[96] Petition at 4.

[97] *Id.* at 5.

well-established Commission case law, the Department provides no facts or expert opinions to support the Proposed Contention's admission. As the Commission has repeatedly held, a petition must point to particular facts or evidence in an application or provide expert information to demonstrate why the provided information is insufficient; mere claims that an application "is unclear" or "the Department is uncertain," as appear in Petitioner's brief,[98] are not grounds to admit a contention.[99] Despite this longstanding requirement, DEP provides neither references to challenged portions of the application nor factual or expert support for its arguments, instead repeating only its conclusory assertion that the record must be supplemented.

The Department's unsupported conclusion that the record is insufficient is not surprising, given that it had not even requested, much less reviewed, the proprietary version of the LTA before submitting its contention. Much of the exact information it claims is missing in the Application is, in fact, provided in the proprietary portions thereof, to which the Department now has access. Further, the Proposed Contention appears to challenge NRC regulations and the Staff's review, or is based on a misreading of NRC regulations; to the extent the Proposed Contention challenges NRC regulations, it violates 10 C.F.R. § 2.335. As a result, the Proposed Contention is inadmissible, because it fails to demonstrate that it falls within the scope of the proceeding, is material to the findings the NRC must make, is unsupported by fact or law, and fails to demonstrate a genuine dispute with the Application as required by 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

---

98 Pet. at 8-9.

99 *See Susquehanna*, CLI-17-4, 85 NRC at 74 (citing 10 C.F.R. § 2.309 (f)(1)(vi)).

A. The Department Does Not Support with Facts or Expert Opinion Its Assertion that the Application Fails to Provide the Required Information

The Proposed Contention claims that the Application does not contain "the necessary information to determine the 'financial qualifications of' [TMI-2 Solutions]."[100] The Department's support for this statement consists solely of allegations that certain information is insufficiently explained, not included, or unclear. For example, the Department claims that the "Application does not explain the basis for the Applicants' assumption that $200 Million [sic] would accrue in the NDT over the 16-year anticipated decommissioning process."[101] Likewise, the Department claims that "[t]he current public record does not provide the Commission with the information necessary to fully evaluate the validity of funding through financial assurance instruments and the parent guarantee being available when necessary to support the decommissioning by TMI-2 Solutions."[102] Furthermore, the Petition claims that the "Applicants did not include in the Application a description of expenses necessitating the withdrawals by GPU Nuclear from the NDT prior to the Closing."[103] However, nowhere in the Petition does the Department *explain* why the information allegedly is insufficient.

To be admissible, a contention must refer to the "specific portions of the Application . . . that the petitioner disputes," along with the "supporting reasons for each dispute; or, if the petitioner believes that an application fails altogether to contain information required by law, the petitioner must identify each failure, and provide supporting reasons for the petitioner's belief."[104] The Department does none of these things. The Petition noticeably lacks specificity

---

100 *See e.g.*, Pet. at 4.

101 *Id.*

102 *Id.* at 5.

103 *Id.*

104 *Susquehanna*, CLI-17-4, 85 NRC at 74 (quoting 10 C.F.R. § 2.309 (f)(1)(vi)).

on why the information presented in the Application is insufficient. In fact, the Department's alleged support for its Proposed Contention boils down to a single conclusory assertion that "the current public record does not provide . . . the information necessary to fully evaluate" the LTA.[105] To the contrary, the Commission has repeatedly reminded petitioners that "[c]ontentions cannot be based on speculation but must have 'some reasonably specific factual or legal basis.'"[106] The Proposed Contention provides neither. This alone is enough to reject the Proposed Contention for failure to demonstrate that it meets the requirements for admission pursuant to 10 C.F.R. § 2.309(f)(1)(iii)-(vi). The Applicants remain ready to discuss their decommissioning plans with the DEP, but the NRC hearing process is not an appropriate forum for such consultations.

B. The Application Includes the Information the Department Claims Is Not Contained in the Record

As explained more fully below, much of the information that the Department claims is not included in the Application actually is included. At bottom, the Department simply misreads the relevant documents and regulations. Thus, the Proposed Contention is inadequate,[107] and should be rejected for falling short of satisfying the requirements of 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

---

[105] Pet. at 5, 9.

[106] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 6 & 7), CLI-17-12, 86 NRC 215, 220 (2017) (quoting *Millstone*, CLI-03-14, 58 NRC at 213).

[107] *Seabrook,* CLI-12-5, 75 NRC at 312 (noting a petitioner's "'ironclad obligation' to review the Application *thoroughly"*) (italics added); *Ga. Inst. of Tech.* (Ga. Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (holding that a petitioner's "imprecise reading" of the application and alleged support "cannot serve to generate an issue suitable for litigation").

1. The Application Contains the Necessary Information on the Scope of the Financial Assurances that Demonstrate that TMI-2 Solutions Is Financially Qualified

The Department repeatedly expresses concerns about the financial assurances to complete decommissioning of TMI-2, both in the amount of the NDT and the additional assurances provided by TMI-2 Solutions and Energy*Solutions*. The crux of the Department's argument is that:

> [T]he obvious risk of a funding shortfall and the attendant significant health, safety, environmental, financial, and economic risks to the Commonwealth [of Pennsylvania] and its citizens raise serious questions. . . . If the Applicants' financial assurances and agreements with third parties are insufficient or lacking to cover all of TMI-2 Solutions costs for dismantlement and waste disposal, the Department is concerned that Pennsylvania citizens will become the payers of last resort.[108]

All of the Department's claims in its Petition focus on this supposed lack of support for the financial assurances. However, as explained below, the financial methods presented in the Application are fully explained therein. The NRC's decommissioning funding requirements also are clearly presented in NRC regulations, including 10 C.F.R. §§ 50.75 and 50.82, and other agency precedent. Because the Proposed Contention does not address, much less challenge, this information, the Contention is inadmissible for lack of support and for failure to raise a genuine dispute with the Application pursuant to 10 C.F.R. § 2.309(f)(1)(v) & (vi).

As the Petition itself admits, the "Department recognizes that the Applicants have given assurances in their Application that the TMI-2 [NDT] will be sufficient to complete decommissioning of TMI-2 under its proposed accelerated schedule, as combined with TMI-2 Solutions' financial assurance of an additional $100 million and the limited guarantee of

[108] Petition at 3-4.

payment and performance from its parent company Energy*Solutions*, Inc."[109] As explained below, the Application fully complies with the NRC requirements to provide financial assurance for decommissioning. To the extent the Department is challenging the sufficiency of the NRC regulations, such a challenge is prohibited by 10 C.F.R. § 2.335(a).

As a preliminary matter, NRC regulations provide for multiple layers of protection against potential negative impacts to NDTs from potential unexpected costs to ensure that there are adequate funds available to complete decommissioning. First, the NRC recognizes that cost estimates are precisely that—*estimates*. Indeed, the Commission imposes a standard of "reasonable assurance" on cost predictions different than it does on safety issues.[110] "The Commission will accept financial assurances based on *plausible assumptions and forecasts*, even though the possibility is not insignificant that things will turn out less favorably than expected."[111] In other words, the NRC's requirements for decommissioning financial assurance explicitly contemplate the possibility of unforeseen costs. Accordingly, the broader framework for decommissioning financial assurance contemplates *multiple layers* of protection that safeguard against negative impacts to NDTs from potential future cost adjustments that could materialize as a decommissioning project progresses ("Layers of NDT Protection"—a concept akin to "defense in depth").

In the context of contention admissibility, this means that allegations of underestimated costs must demonstrate (with adequate support) two things: (1) that the cost estimate is premised on *implausible* assumptions; and (2) that the postulated underestimation will defeat *all* of the Layers of NDT Protection. Both are necessary. The second demonstration is required because,

---

[109] Petition at 3.

[110] *Seabrook*, CLI-99-6, 49 NRC at 221-22.

[111] *Id*. at 222.

otherwise, there would be no material impact on the NDT.[112] The various Layers of NDT Protection are briefly described below.

1. Contingency: The first Layer of NDT Protection is the contingency allowance in the estimate itself. In fact, NRC guidance explicitly describes this as an "allowance for unexpected costs."[113] Here, the DCE includes robust contingencies, including approximately 25% for Phase 1 and approximately 18% for Phase 2, commensurate with the uncertainty of each phase.[114] These values were calculated using risk modeling software to quantitatively evaluate the integrated impact of uncertainty and discrete risk events on the project objectives, baseline schedule, and costs, as well as Energy*Solutions*' own significant experience decommissioning commercial and other reactors and facilities—all of which were reviewed in detail as part of the acquisition discussions between TMI-2 Solutions and the FirstEnergy Companies. (In other words, more than a "plausible assumption.") This contingency value is explicitly intended to account for "unknown or uncertain conditions."[115]

2. NDT Surplus: Another Layer of NDT Protection is provided by any surplus in the NDT *above and beyond* the collective sum of the estimated costs (based on plausible assumptions) plus the contingency margin (calculated using risk-modeling software).[116] Here, TMI-2 Solutions' DCE shows that over $20 million is expected to remain in the NDT fund after the completion of decommissioning at TMI-2.[117]

3. Licensee Reporting: A further Layer of NDT Protection is found in the licensee's obligation to submit annual reports. More specifically, licensees in decommissioning are obligated by law to submit to the NRC, every year, an *updated* estimate of the costs to complete decommissioning and to manage SNF until DOE takes title and possession of it.[118] To the extent any unexpected costs might materially alter original cost estimates, those changes would be captured in these mandatory reports. Licensees also are required to notify the NRC in

---

[112] *See Oconee*, CLI-99-11, 49 NRC at 333-34 (quoting Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989)) (To be material, a contention must raise an issue that could "make a difference in the outcome of the licensing proceeding.").

[113] NRC, Regulatory Guide 1.202, "Standard Format and Content of Decommissioning Cost Estimates for Nuclear Power Reactors" at 10 (Feb. 2005) (ML050230008) ("RG 1.202").

[114] PSDAR at 10, tbl.1.

[115] *Id.* at 9.

[116] *See also Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-19-11, 91 NRC __, __ (Dec. 17, 2019) (slip op. at 27-28) (noting the safeguarding effect of a surplus, albeit in the context of a motion to stay).

[117] PSDAR, Encl. 1B, tbl.1B-3.

[118] *See* 10 C.F.R. § 50.82(a)(8)(v), (vii).

writing, with a copy to the affected state, of any changes to any actions in the PSDAR "that significantly increase the decommissioning cost."[119]

4. Alternate Funding Mechanism: Yet another Layer of NDT Protection is provided in this particular case. As noted in the DCE, "[i]n the event that future estimated costs or funding levels change significantly, TMI-2 Solutions will make the necessary adjustments to ensure that sufficient funds remain available for decommissioning."[120]

5. Supplemental Financial Instruments: Furthermore, as noted in the LTA, TMI-2 Solutions will have access to several different *supplemental* financial instruments for additional decommissioning funds, if needed, including: (i) a Back-Up & Provisional Nuclear Decommissioning Trust, segmented into a Back-Up Trust Account and a Provisional Trust Account; (ii) an Irrevocable Letter of Credit; (iii) an Irrevocable Disposal Capacity Easement; (iv) a Financial Support Agreement; and (v) a Parent Guarantee.[121] These are anticipated to provide up to $100 million in financial support at critical stages of the project.

6. Ongoing NRC Oversight & Regulatory Requirements: Finally, the NRC's ongoing regulatory oversight is an additional Layer of NDT Protection capable of ensuring transparent and adequate funding throughout the duration of the decommissioning project.[122] Indeed, the NRC has a rigorous and comprehensive regulatory regime for that very purpose. The NRC can mandate that the licensee provide "additional financial assurance to cover the estimated cost of completion."[123] In fact, NRC's regulations prohibit any withdrawals from the NDT that could reduce it "below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise,"[124] or inhibit the licensee's ability to "ultimately release the site and terminate the license."[125] As the Commission has held, these strict requirements "provide reasonable assurance that adequate funds will remain to complete decommissioning by requiring [the licensee] and the Staff to monitor the projected cost of decommissioning and available funding and ensure more funding is available as needed."[126]

---

[119] 10 C.F.R. § 50.82(a)(7).

[120] PSDAR at 10. *Accord Pilgrim*, CLI-19-11, 91 NRC at __ (slip op. at 28 & n.87).

[121] LTA at 11.

[122] *See generally* 10 C.F.R. §§ 50.82(a). *See also Pilgrim*, CLI-19-11, 91 NRC __ (slip op. at 27-28) (describing the NRC's oversight process and noting its ability to safeguard against negative impacts from unforeseen circumstances).

[123] 10 C.F.R. § 50.82(a)(8)(vi).

[124] 10 C.F.R. § 50.82(a)(8)(i)(B).

[125] 10 C.F.R. § 50.82(a)(8)(i)(C).

[126] *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 118 (2016); *see also Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 90 NRC __, __ (June

Applicants have presented *all* of this information in the Application. To the extent the Department appears to disagree that the Layers of NDT Protection are insufficient, it is an impermissible attack on NRC regulations and the NRC Staff's review of the Application. Pursuant to 10 C.F.R. § 2.335(a), absent a waiver, "no rule or regulation of the Commission, or any provision thereof, . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding." The Department has not petitioned for (and could not prove even if it had), that a waiver is necessary under 10 C.F.R. § 2.335(b), because the "special circumstances" with respect to the subject matter of *this* proceeding "would not serve the purposes for which the rule or regulation was adopted." Therefore the Proposed Contention should be rejected as outside the scope of the proceeding, pursuant to 10 C.F.R. § 2.309(f)(1)(iii), and for failure to raise a genuine dispute with the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi).

2. The Application Provides the Basis for the Assumption that $200 Million Will Accrue in the NDT Over the Term of the Decommissioning

The Department claims that "the Application does not explain the basis for Applicants' assumption that $200 Million would accrue in the NDT over the 16-year anticipated decommissioning process."[127] Notwithstanding, the LTA and DCE clearly explain the rationale behind TMI-2 Solutions' assumptions, based on NRC regulations. Accordingly, DEP's claim is meritless, unsupported, and fails to demonstrate a genuine dispute with the Application.

Under 10 C.F.R. § 50.75(e)(1)(i), a site-specific decommissioning estimate "may take credit for projected earnings on the prepaid decommissioning trust funds, using up to a [two]

18, 2019) (slip op. at 13) ("If new developments point to a projected funding shortfall, the NRC requires additional financial assurance to cover the estimated cost to complete the decommissioning.") (citation omitted).

[127] Petition at 4.

percent annual real rate of return from the time of future funds' collection through the projected decommissioning period, provided that the site-specific estimate is based on a period of safe storage that is specifically described in the estimate." The Statement of Considerations for a 2002 rulemaking to amend 10 C.F.R § 50.75 provides that licensees providing funding for decommissioning using a DECON method for decommissioning, and certifying to a site-specific DCE, may assume up to a two percent real rate of return.[128] Furthermore, the propriety of this interpretation of 10 C.F.R. § 50.75(e)(1)(i) is demonstrated by longstanding agency precedent. Multiple NRC safety evaluations of various licensing actions have approved the use of a 2% real rate of return in site-specific cost estimates for applicants and licensees using the DECON method.[129]

Notably, the public version of the PSDAR (which the Department received in December 2019) specifically notes that it assumes a real rate of return of 2% during DECON activities.[130] Furthermore, the Application and the PSDAR both note that TMI-2 Solutions plans to conduct active decommissioning.[131] DEP's claim that the Application, as supplemented by the PSDAR, does not explain the basis for funds to accrue is not supported and fails to raise a genuine dispute with the Application and should be rejected for failure to meet 10 C.F.R. § 2.309(f)(1)(v) & (vi).

---

[128] Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,338 (Dec. 24, 2002).

[129] *See, e.g.*, Pilgrim License Transfer SER; Oyster Creek Exemption Issuance (June 20, 2019) (ML19112A318); Zion License Amendment Safety Evaluation Report (May 4, 2009) (ML090930063) ("Zion License Amendment SER").

[130] PSDAR, Encl. 1B, tbl.1B-3.

[131] LTA at 2 ("After taking the necessary engineering and licensing actions, TMI-2 Solutions will commence Decommissioning of TMI-2 and will complete all activities necessary to terminate the License and release the TMI-2 site.").

3. The PSDAR Contains Ample Basis to Explain the Contingencies in the Application.

The Petition also alleges that "[i]t is unclear how the Applicants' contingencies for cost estimates are formulated and whether they meet the NRC requirements."[132] As explained above in Section IV.B.1, TMI-2 Solutions' DCE includes robust contingencies, including approximately 25% for Phase 1 and approximately 18% for Phase 2, commensurate with the uncertainty of each phase.[133] These values were calculated using risk modeling software to quantitatively evaluate the integrated impact of uncertainty and discrete risk events on the project objectives, baseline schedule, and costs, as well as Energy*Solutions'* own significant experience decommissioning commercial and other reactors and facilities—all of which were reviewed in detail as part of the acquisition discussions between TMI-2 Solutions and the FirstEnergy Companies. Moreover, many of the contingencies are the same[134] as those contained in the 2018 site-specific decommissioning cost estimate ("2018 DCE").[135] The 2018 DCE was prepared by Energy*Solutions*, LLC and explains that the contingencies in the 2018 cost estimate are based on information in the DOE Cost Estimating Guide, DOE G 430.1-1.[136] "The DOE has established a recommended range of contingencies as a function of completeness of program design," and Energy*Solutions*, LLC then determines site-specific contingency factors to each estimate.[137] In

---

132 Petition at 5.

133 PSDAR at 10, tbl.1.

134 *See* PSDAR at 9.

135 Letter from G. Halnon to NRC Document Control Desk, "Three Mile Island Nuclear Station, Unit 2, Docket No. 50-320, License No. DPR-73, Decommissioning Funding Status Report for the Three Mile Island Nuclear Station, Unit 2," Attach. 2 (March 28, 2019) (ML19087A153).

136 *Id.* at 18 (citing DOE, Cost Estimating Guide G 430.1-1 (Mar. 28, 1997), *available at* https://www.directives.doe.gov/directives-documents/400-series/0430.01-EGuide-1).

137 *Id.*

not addressing these contingencies, the Petition does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi); therefore, this argument is inadmissible.

4. The Application and NRC Regulations Describe the Expenses that May Be Withdrawn from the NDT Prior to Closing under the Purchase Agreement

The Petition also claims that "Applicants did not include in the Application a description of expenses necessitating the withdrawals by GPU Nuclear from the NDT prior to the Closing. . . . The Applicants need to fully justify any withdrawal amount from the NDT prior to the license transfer so that the NRC can determine if the funds are withdrawn for appropriate purposes as per the regulations."[138] However, the Department's claim of omission is factually incorrect. The LTA clearly states that such withdrawals would be for "accrued but unpaid Decommissioning expenses."[139] "Decommissioning" is a term of art clearly defined in NRC regulations.[140] Additionally, both NRC regulations and the Purchase Agreement, which was attached to the Application, further describe the expenses that may be withdrawn from the NDT.

As a matter of law, a licensee may withdraw the trust funds only if the "withdrawals are for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in [10 C.F.R.] § 50.2"[141] or "for payments of ordinary administrative costs (including taxes) or other incidental expenses of the fund (including legal, accounting, actuarial, and trustee expenses)."[142] Additionally, 10 C.F.R. § 50.2 defines decommissioning as "to remove a facility or site safely from service and reduce residual radioactivity to a level that

---

138 Petition at 5.

139 LTA at 11.

140 10 C.F.R. § 50.2 (defining "decommissioning").

141 10 C.F.R. § 50.82(a)(8)(i)(A)

142 *Id.* § 50.75(h)(2).

permits" release of the property for unrestricted or restricted use and termination of the NRC license. Thus, the Department's claim that the LTA did not include a "description" of the pre-closure withdrawals is simply mistaken.

Additionally, any withdrawal from the NDT that is not for radiological decommissioning expenses or administrative costs is therefore prohibited, and the NRC has authority under its enforcement power to levy penalties against any licensee that withdraws money from an NDT for an impermissible purpose.[143] Further, as explained above in Section IV.B.1, the NRC regulations already restrict withdrawals from the nuclear trust fund. To the extent the Department suggests that GPU Nuclear may violate these restrictions and withdraw funds for something other than "decommissioning" expenses, its suggestion is both baseless and improper.[144]

The Application also contains the information that explains the expenses that GPU Nuclear may withdraw from the trust fund. Section 6.11.3 of the Purchase Agreement authorizes the FirstEnergy Companies to pay any income taxes due on the NDT prior to the closing.[145] Similarly, Section 6.14.2 provides that the FirstEnergy Companies shall cause the trustee of the NDT "to pay final expenses for trustee and investment management fees and other administrative expenses of the [NDT] relating to transactions on or prior to the Closing."[146] Thus, the Application also includes this *further* description of the anticipated pre-closure

---

[143] *See e.g.*, *id.* § 50.5(b) (Any person who deliberately engages in misconduct that causes a licensee to be in violation of any rule may be subject to enforcement actions pursuant to 10 C.F.R. Part 2, Subpart B). A withdrawal for a purpose other than decommissioning may also disqualify a qualified decommissioning trust fund such as the TMI-2 NDT from receiving preferential tax treatment under the provisions of Internal Revenue Code 468A.

[144] *Oyster Creek*, CLI-00-6, 51 NRC at 207 (explaining that applicants and licensees are entitled to a presumption of compliance with the Commission's regulations).

[145] *Id.*, Encl. 1A at 48 (Section 6.11.3); Encl. 1B at 48 (Section 6.11.3).

[146] *Id.*, Encl. 1A at 51 (Section 6.14.2); Encl. 1B at 51 (Section 6.14.2).

withdrawals. In other words, withdrawals from the NDT prior to the closing are restricted to costs for radiological decommissioning or investment management fees and other administrative expenses. The Department identifies no unmet requirement to provide something more—nor does such a requirement exist.

Finally, the Department claims that a "minimum value of $800 million [is] required in the NDT at the time of license transfer," and suggests that, based on the current NDT fund value, the pre-closure withdrawals could be problematic because they purportedly "could potentially approach $100 million."[147] First, DEP appears to misunderstand the reference to the $800 million in the Application. That amount is simply a commercial precondition to closing in the Purchase Agreement.[148] Second, DEP provides no support—whatsoever—for its claim that pre-closure withdrawals could approach or exceed $100 million. This assertion is particularly dubious in light of the strict limitations on the permitted uses of NDT funds discussed above. Third, even assuming *arguendo* that this purely speculative amount was accurate, DEP also provides no demonstration that such withdrawals somehow could be material to the NRC's review of the LTA, especially given the additional financial assurance instruments described in the Application.

Contrary to the Department's claim, the Application and the Purchase Agreement specify what can be withdrawn from the NDT prior to closing. Thus, the Department's concern is unsupported, immaterial, and fails to raise a genuine dispute with the Application pursuant to 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

* * *

147 Petition at 5.

148 LTA at 11.

In summary, the Proposed Contention is inadmissible, because it fails to demonstrate that it is within the scope of the proceeding, is immaterial to the findings the NRC must make, is unsupported by fact or law, and fails to demonstrate a genuine dispute with the Application as required by 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

V. DEP'S REQUEST FOR AN EXTENSION OF TIME TO FILE A HEARING REQUEST IS UNNECESSARY AND SHOULD BE DENIED

Having failed to submit an admissible contention, the Department nevertheless asks the NRC to delay the deadline to request a hearing. Specifically:

> the Department is requesting an extension of time of at least one month after DEP's physical offices reopen, following the COVID-19 pandemic, to request a hearing to review with the FirstEnergy Companies, TMI-2 Solutions, Energy*Solutions*, and the Nuclear Regulatory Commission staff whether adequate financial assurances exist to complete the proposed TMI-2 decommissioning project.[149]

The Department claims that this unbounded extension of time to submit a hearing request is necessary to allow the Department and the NRC Staff to fully effectuate the *state consultation requirements* in the AEA and NRC regulations. However, an extension is neither required nor necessary to effectuate consultations. DEP simply appears to conflate the consultation process (which is part of the NRC Staff's review) with the NRC's formal hearing process (which is entirely separate).[150]

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

---

[149] Petition at 10-11.

[150] As an additional matter, it is unclear why DEP believes an extension of time to request a hearing is necessary, at all. By submitting its Petition containing the Proposed Contention, DEP has already submitted the type of information necessary to request a hearing. *See* 10 C.F.R. § 2.309 (containing identical requirements for hearing requests and petitions to intervene). Alternatively, to the extent the Petition is interpreted as a *de facto* hearing request, DEP clearly would not need the requested extension.

be granted when warranted by "unavoidable and extreme circumstances"—and even then, only to the extent necessary to overcome the unavoidable delay.[151] 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 remotely satisfied the applicable standard here. Furthermore, the NRC's rules require that movants consult with the other parties before filing extension requests, and to include a corresponding certification in its filing.[152] Failure to do so *requires* that the request be denied—and the regulations are clear that the denial is *not* discretionary.[153] Here, DEP neither consulted nor included the required certification in its pleading. Thus, its request must be denied on this ground alone.

Even assuming DEP had consulted and included the required certification, the Commission should reject the Department's request for three additional reasons. First, the requested extension would be contrary to the Commission's codified policy of "expeditious decisionmaking" for license transfer applications. In the Commission's own words, "timely" resolution is "essential."[154] Second, the Department's requested relief (*i.e.*, further consultations with the Applicants and NRC Staff) will occur—and are currently ongoing—as part of the separate Staff review process *regardless* of whether a formal evidentiary hearing is convened.

---

[151] *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").

[152] 10 C.F.R. § 2.323(b). DEP's extension request is a written application for an order (beyond its petition to intervene), and therefore is properly viewed as a motion. *See also Motion*, Black's Law Dictionary (11th ed. 2019) ("A written or oral application requesting a court to make a specified ruling or order.").

[153] 10 C.F.R. § 2.323(b) ("A motion *must* be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.") (emphasis added).

[154] *See* Subpart M Rule, 63 Fed. Reg. at 66,721 ("") ("Because of the need for expeditious decisionmaking from all agencies, including the Commission, for these kinds of transactions, timely and effective resolution of requests for transfers on the part of the Commission is *essential*." (emphasis added)).

An extension of time to submit a hearing request is plainly unnecessary for the Department to continue its consultations. Third, the Department provides no rationale for why it could not have requested a hearing (in the separate adjudicatory process) in a timely manner. Indeed, by submitting the Proposed Contention, DEP has already submitted the type of information included in a hearing request.

At bottom, DEP simply has not *decided* whether it *wishes* to request a hearing. Whereas, mere participant indecision does not remotely satisfy the "good cause" standard. Thus, the extension request should be denied.

A. Subpart M Mandates Rapid License Transfer Proceedings

In issuing 10 C.F.R. Part 2, Subpart M, the Commission provided an expedited hearing process. In the context of an extension request in a license transfer proceeding, any purported demonstration of good cause must be weighed against the Commission's codified policy of timely and efficient license transfer proceedings. On balance, DEP's indecision does not outweigh the Commission's well-reasoned policy.

In 1998, the NRC adopted Subpart M of 10 C.F.R. Part 2 (10 C.F.R. §§ 2.1300 to 2.1331), authorizing the use of a streamlined license transfer process with informal legislative-type hearings, rather than formal adjudicatory hearings.[155] These rules cover any direct or indirect license transfer for which NRC approval is required, including those transfers that require license amendments and those that do not.[156] In so doing, the Commission noted that "timely and effective resolution of requests for transfers on the part of the Commission is

[155] *Id.*; *see also* Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,214 (Jan. 14, 2004) (retaining streamlined process under Subpart M for license transfers without substantive changes).

[156] *See* Subpart M Rule, 63 Fed. Reg. at 66,727.

essential."[157] "The procedures [in Subpart M] are designed to provide for public participation in the event of request for a hearing under these provisions, while at the same time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases."[158]

Here, the Department seeks an open-ended extension of time to request a hearing on the Application (*i.e.*, until "at least one month after DEP's physical offices reopen").[159] However, granting an indefinite extension of the proceeding would be contrary to the Commission-recognized "time-sensitivity" of license transfer proceedings. Given the policy considerations that led the Commission to issue Subpart M in the first place—*i.e.*, the need for rapid resolution—the Department's request for more time to *decide* whether to request a hearing (even though it has had the application materials for many months)—is simply not enough.

Moreover, the Commission, by regulation, requires that the NRC staff make a prompt determination to approve or deny a license transfer application (even if a hearing is pending). Specifically, 10 C.F.R. § 2.1316 requires that "[d]uring the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its Safety Evaluation Report (SER), the staff is expected to promptly issue approval or denial of license transfer requests." The Department's corollary request 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 Parties"[160] would violate 10 C.F.R. § 2.1316(a). Thus, it should be summarily rejected.

---

[157] *Id.* at 66,721 (emphasis added).

[158] *Id.* at 66,722.

[159] Petition at 10-11.

[160] *Id*. at 14.

B. Extension of the Deadline to Request a Hearing Is Unnecessary for Effective Consultation

The Department points to "several federal statutory and regulatory provisions" that require the NRC to consult (on a proposed licensing action) with the state in which a facility is located.[161] DEP alleges the requested extension is necessary to allow the required consultations to occur because the COVID-19 pandemic has impeded its ability to conduct consultations.[162] However, DEP conflates the NRC Staff's application review process with the separate pathway for evidentiary hearings. More importantly, it misunderstands that state consultations proceed independent of—and in *parallel* with—any evidentiary hearing. Thus, the Department's desire for ongoing *consultation* is not impeded by the existing *hearing* deadline; and its consultation-related concerns are unfounded and fail to demonstrate good cause for an extension.

First, the request for an extension points to 42 U.S.C. § 2021(l), a provision that requires the NRC to "afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application."[163] Notwithstanding, the Department fails to recognize that the NRC has already promulgated regulations that effectuate this requirement in 10 C.F.R. § 2.315(c). Section 2.315(c) grants "an interested State . . . that has not been admitted as a party under [10 C.F.R.] § 2.309, a reasonable opportunity to participate in a hearing."[164] Notably, this provision does not require a state to become a party (or even request a hearing) under 10 C.F.R. § 2.309. Therefore, nothing in 42 U.S.C. § 2021(l) or 10 C.F.R. § 2.315(c) supports DEP's demand for an extension.

---

[161] *Id.* at 11-13.

[162] *E.g.*, *id.* at 12-13 (alleging cancellation of meetings due to office closures, travel restrictions, etc.).

[163] *Id.* at 11 (quoting 42 U.S.C. § 2021(l)).

[164] *See also* Changes to Adjudicatory Process, 69 Fed. Reg. at 2,223.

Second, the Department posits that its request for an extension of time should be granted before the NRC makes a "no significant hazards consideration" ("NSHC") determination on the proposed amendment to the TMI-2 license to allow the NRC to develop a complete record of radiological characterization.[165] However, the license amendment sought in the Application is only for conforming amendments to reflect the planned transfer.[166] As explained in the Application,[167] the NRC has already made —and *codified*—a generic NSHC determination for this type of limited license amendment.[168] Thus, even with the requested delay, DEP would be prohibited by law from challenging the NSHC determination in an evidentiary hearing.[169] As the Department admits, the required state consultations on the NSHC determination "do not give the State a right 'to a hearing on the determination'" or a right to "insist upon a postponement of the determination or issuance of the amendment."[170] Ultimately, neither the statutory nor regulatory provisions cited by the Department, nor its misunderstanding of the parallel nature of the consultation process, present "good cause" to grant an extension.

---

165 Petition at 15 ("It is imperative that the NRC has adequate time to gather and analyze all TMI-2 radiological characterization data and develop a complete record before it determines that there are 'no significant hazard conditions.'"). The Department appears to be focused on the requirements in 10 C.F.R. § 50.91(a)(b)(1) that, at the time that a licensee submits a request for a license amendment, "it must notify the State in which its facility is located of its request by providing that State with a copy of its application and its reasoned analysis about no significant hazards considerations."

166 LTA, Encl. 1 at 14. "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*.

167 *Id.*

168 10 C.F.R. § 2.1315(a). *See also* 10 C.F.R. § 2.1315(b) ("any challenge to an administrative license amendment is limited to the question of whether the license amendment accurately reflects the approved transfer.").

169 10 C.F.R. § 2.335(a) (prohibiting challenges to codified NRC regulations). Even if this determination had not been codified, NSHC determinations simply are not subject to challenge. 10 C.F.R. § 50.58(b)(6) ("No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination.").

170 Petition at 12 (quoting 10 C.F.R. § 50.91(c)).

C. The Department Fails to Demonstrate that "Unavoidable and Extreme Circumstances" Prevented It From Submitting a Hearing Request

The Petition does not demonstrate that DEP's failure to submit a hearing request was caused by "unavoidable and extreme circumstances." To the contrary, DEP's explanation of its extensive ongoing actions with regard to the Application, and the filing of the Petition itself, demonstrate quite the opposite—that DEP's *ability* to submit a hearing request has not been meaningfully impaired by a need to work remotely. Rather, DEP appears to want to "have its cake and eat it too." More specifically, it submitted a Petition that, in practical effect, contains the type of information required to request a hearing, but *chose* not to include an explicit hearing request (in order to contend that it has not requested a hearing and needs more time). DEP's intentional decision to withhold its hearing request fails to demonstrate "good cause."

For example, the Department contends that the COVID-19 pandemic (and associated "office closings" and "travel restrictions") has limited its capabilities to "complete a comprehensive review of the license transfer Application."[171] However, the Department has had access to the LTA for many months. During that time, DEP's on-site inspector had frequent communications with site personnel, and other DEP Staff and Applicant personnel held monthly in-person meetings. Additionally, the Department's multiple and *ongoing* communications with the NRC and the Applicants,[172] its detailed comments on the LTA,[173] and indeed its own filing

---

171 *See id.* at 13-14. The Department also claims difficulties related to a hiring freeze and hiring a consultant. *Id*.

172 *See, e.g.*, Petition, Exh. A.

173 Letter from P McDonnell, DEP, to NRC, "Docket ID NRC-2020-0082 Three Mile Island Nuclear Station, Unit No. 2; Consideration of Approval of Transfer of License and Conforming Amendment Docket No. 50-320 LT – Commonwealth of Pennsylvania Department of Environmental Protection Comments" (Apr. 27, 2020), *available at* https://www.regulations.gov/document?D=NRC-2020-0082-0004.

here, demonstrate that the Department is fully capable of reviewing, drafting, and filing documents notwithstanding any COVID-related restrictions (as are the Applicants and NRC).[174]

Ultimately, DEP provides insufficient justification for its assertion that it is incapable of reviewing the Application or drafting a hearing request until the Department's offices reopen. Here, where the Department has had ample time to review the Application, dispatched detailed questions and comments, and even *formulated and filed a petition to intervene with a proposed contention*—thereby submitting the type of information required by 10 C.F.R. § 2.309 to request a hearing—there plainly is insufficient support for a claim that "unavoidable and extreme circumstances" prevented it from including a few additional words requesting a hearing in that same filing. DEP cannot rely on its own failure to timely act, or its own indecision as to *whether* to submit a hearing request, to justify an extension.

* * *

For the above reasons, the Commission should reject the Department's request to extend the date to request a hearing.

VI. CONCLUSION

As established above, DEP did not proffer a contention that satisfies the contention admissibility requirements in 10 C.F.R. § 2.309 (f)(1). Nor did DEP provide grounds for an extension of time. Therefore, the Commission should reject the Petition in its entirety.

[174] *See* "NRC COVID-19 Update," https://www.nrc.gov/about-nrc/covid-19/ (Last updated May 6, 2020) (noting the NRC Staff is working remotely).

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)
Daniel F. Stenger, Esq.
Sachin Desai, Esq.
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5691
daniel.stenger@hoganlovells.com
sachin.desai@hoganlovells.com

Executed in Accord with 10 C.F.R. § 2.304(d)
Russell G. Workman, Esq.
TMI-2 SOLUTIONS, LLC
423 West 300 South, Suite 200
Salt Lake City, UT 841901
(801) 303-0195
rgworkrnan@energysolutions.com

Counsel for TMI-2 Solutions, LLC

Executed in Accord with 10 C.F.R. § 2.304(d)
Timothy P. Matthews, Esq.
John E. Matthews, Esq.
Grant W. Eskelsen, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5524
john.matthews@morganlewis.com
paul.bessette@morganlewis.com
grant.eskelsen@morganlewis.com

Executed in Accord with 10 C.F.R. § 2.304(d)
Karen A. Sealy, Esq.
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7869
ksealy.@tirstenergycorp.com

Signed (electronically) by Ryan K. Lighty
Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5274
ryan.lighty@morganlewis.com

Counsel for GPU Nuclear, Inc., Metropolitan Edison Co., Jersey Central Power & Light Co., and Pennsylvania Electric Co.

Dated in Washington, DC
this 11th day of May 2020

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 11, 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 Petition for Leave to Intervene and Request for Extension of Time to File a Hearing Request Filed by the Commonwealth of Pennsylvania, Department of Environmental Protection" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty

Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5274
ryan.lighty@morganlewis.com

Counsel for GPU Nuclear, Inc., Metropolitan Edison Co., Jersey Central Power & Light Co., and Pennsylvania Electric Co.