

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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In the Matter of

EXELON GENERATION COMPANY, LLC

(Three Mile Island Nuclear Station,  
Units 1 and 2)

Docket Nos. 50-289-LA  
50-320-LA

**CLI-20-10**

**MEMORANDUM AND ORDER**

This order responds to a filing by Eric J. Epstein and Three Mile Island Alert, Inc. (together, TMIA) regarding the Atomic Safety and Licensing Board's decision denying their petition to intervene and request for hearing with respect to a license amendment request (LAR).<sup>1</sup> For the reasons described below, we affirm the Board's decision.

**I. BACKGROUND**

This proceeding arises from an LAR submitted by Exelon Generation Company, LLC (Exelon) to amend the operating license for Three Mile Island Nuclear Station, Unit 1 (TMI-1), which was permanently shut down on September 26, 2019.<sup>2</sup> Exelon seeks to revise the TMI

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<sup>1</sup> LBP-20-2, 91 NRC 10 (2020).

<sup>2</sup> See Letter from Michael P. Gallagher, Exelon, to NRC Document Control Desk (July 1, 2019) (ADAMS accession no. ML19182A182) (LAR); see *also* Letter from Michael P. Gallagher,

site emergency plan and emergency action levels to reflect the permanent defueling of the reactors at the Three Mile Island site.<sup>3</sup> Approval of the LAR depends on approval of a request for exemptions from portions of 10 C.F.R. § 50.47 and 10 C.F.R. Part 50, Appendix E.<sup>4</sup>

On November 12, 2019, TMIA filed a petition to intervene and hearing request, in which it argued that the LAR adversely affected Exelon's decommissioning funding assurance and that Exelon should have provided an environmental report with its application.<sup>5</sup> On January 23, 2020, the Board denied the hearing request and found that neither Eric Epstein, individually, nor Three Mile Island Alert, Inc., as an organization, had established standing.<sup>6</sup> It further found that neither of the jointly proposed contentions was admissible.<sup>7</sup>

On February 16, 2020, TMIA filed a "Motion to Stay Memorandum and Reply to Proposed Order Denying Intervention and Petition" before the Board.<sup>8</sup> On February 19, 2020, the Board denied the motion to the extent it constituted a request for a stay because it was filed

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Exelon, to NRC Document Control Desk (Sept. 26, 2019) (ML19269E480) (certifying permanent removal of fuel).

<sup>3</sup> See LAR.

<sup>4</sup> See Letter from Michael P. Gallagher, Exelon, to NRC Document Control Desk (July 1, 2019) (ML19182A104) (Emergency Planning Exemption Request). According to the LAR, Exelon also maintains the emergency planning responsibilities for Three Mile Island, Unit 2 (TMI-2), which is owned by First Energy Corporation (First Energy), through a service agreement. First Energy has a possession-only license for TMI-2, which is currently maintained in SAFSTOR condition. According to Exelon, the LAR would "not impact Exelon's ability to maintain the [emergency planning] service agreement." LAR at 2.

<sup>5</sup> *Eric J. Epstein, Chairman of Three Mile Island Alert Inc.'s Petition to Intervene and Hearing Request* (Nov. 12, 2019) (Petition to Intervene).

<sup>6</sup> See LBP-20-2, 91 NRC at 29-32.

<sup>7</sup> *Id.* at 33-38.

<sup>8</sup> *Motion to Stay Memorandum and Reply to Proposed Order Denying Intervention and Petition* (Feb. 16, 2020) (Appeal).

almost two weeks late and TMIA had not shown good cause for the delay.<sup>9</sup> The Board also rejected the pleading as a motion for reconsideration on timeliness grounds.<sup>10</sup>

The Board also referred TMIA's pleading to the Commission to the extent it could be considered an appeal.<sup>11</sup> The Staff and Exelon oppose such an appeal.<sup>12</sup>

## II. DISCUSSION

In consideration of TMIA's *pro se* status, we accept the Board's referral and consider the pleading as an appeal under 10 C.F.R. § 2.311.<sup>13</sup> The appeal does not, however, demonstrate Board error. As explained below, the requested licensing action would modify the emergency plan for TMI-1.<sup>14</sup> The LAR would not transfer the license of either TMI-1 or TMI-2, and it would not authorize decommissioning of either unit.<sup>15</sup> Therefore, TMIA's arguments concerning license transfer and the possible challenges presented in decommissioning TMI-2 are outside the scope of this proceeding. Moreover, with respect to TMIA's arguments related to the LAR

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<sup>9</sup> Memorandum and Order (Denying Motion for Stay and to Reply to Licensing Board Decision and Referring Pleading to the Commission) (Feb. 19, 2020), at 2 (unpublished) (citing 10 C.F.R. § 2.342(a) (motion for a stay must be filed within ten days of Board's ruling)).

<sup>10</sup> *Id.* at 3 (citing 10 C.F.R. § 2.323(e) (motion for reconsideration must be filed within ten days)).

<sup>11</sup> *Id.* at 3-4.

<sup>12</sup> *NRC Staff Answer Opposing Epstein Motion* (Mar. 12, 2020); *Exelon Generation Company, LLC's Answer Opposing Eric J. Epstein's February 16, 2020 Filing as Referred to the Commission by the Atomic Safety and Licensing Board's Order of February 19, 2020* (Mar. 12, 2020).

<sup>13</sup> A *pro se* petitioner may be granted some leeway in pleading and minor procedural matters where the opposing party is not prejudiced thereby. *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

<sup>14</sup> *See* LAR, Attach. 1, Description and Evaluation of Proposed Changes, at 2.

<sup>15</sup> *See id.* at 2, § 1.0, Summary Description; *see also* Biweekly Notice: Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 84 Fed. Reg. 47,542, 47,548 (Sept. 10, 2019).

that are within the proceeding's scope, we find no error in the Board's rulings that the contentions lacked sufficient bases. Accordingly, we affirm the Board's decision on contention admissibility and need not reach the question of standing.

#### **A. Contention 1**

In Contention 1, TMIA argued that "Exelon's LAR does not provide financial assurances [and] does not demonstrate that either Exelon or FirstEnergy are fiscally responsible, or that either have access to adequate funds for decommissioning."<sup>16</sup> The Board found the contention beyond the scope of the proceeding. The Board observed that the contention sought to "redirect the focus" of the proceeding to an exemption that the NRC Staff had already granted that allowed Exelon to use a portion of the TMI-1 decommissioning trust fund for spent fuel management activities.<sup>17</sup> The Board also clarified that this proceeding does not involve a license transfer.<sup>18</sup>

TMIA offered several other arguments in support of Contention 1, which similarly are outside the scope of the proceeding. TMIA asserted that the LAR does not address Exelon's "confused management organization," or explain "where resources will be derived to deal with environmental impacts."<sup>19</sup> TMIA argued that Exelon's decommissioning cost estimates rest on several incorrect assumptions and do not include an adequate contingency factor.<sup>20</sup> TMIA also referred to a website, which it claimed included a list of incidents reflecting historic poor

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<sup>16</sup> Petition to Intervene at 28.

<sup>17</sup> LBP-20-2, 91 NRC at 34-35. The request was approved on October 16, 2019. See Exelon Generation Company LLC; Three Mile Island Nuclear Station Unit 1; Exemptions; issuance; 84 Fed. Reg. 56,846 (Oct. 23, 2019); see also Letter from Michael P. Gallagher, Exelon to NRC Document Control Desk (Apr. 12, 2019) (ML19102A085).

<sup>18</sup> LBP-20-2, 91 NRC at 36.

<sup>19</sup> Petition to Intervene at 28.

<sup>20</sup> *Id.* at 32-35.

management at TMI from 1979 to 2019.<sup>21</sup> The Board ruled that these assertions were outside the scope of the proceeding because they raise decommissioning financial assurance issues rather than emergency planning issues related to the LAR.<sup>22</sup>

TMIA further claimed that Exelon disregarded the possibility of spent fuel pool accidents.<sup>23</sup> But the Board held that TMIA did not provide factual or expert support for this claim and did not show a genuine dispute with the application.<sup>24</sup> In fact, the LAR did consider the possibility of spent fuel pool accidents, and TMIA did not dispute this analysis in its Petition to Intervene.<sup>25</sup>

On appeal, TMIA does not directly address or show error in the Board's ruling concerning the scope of the proceeding. Instead, TMIA reasserts claims about the financial qualifications of potential license transferees.<sup>26</sup> We find no error in the Board's determination that arguments related to license transfer are outside the scope of the proceeding.

TMIA also reiterates its assertion that the "Post Defueled Emergency Plan will not provide the necessary response staff with the appropriate guidance to protect the health and safety of the public" and that the proposed LAR therefore "involves a significant reduction in the margin of safety."<sup>27</sup> While this claim may be within the scope of the proceeding, it was factually

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<sup>21</sup> *Id.* at 35-37, 39.

<sup>22</sup> LBP-20-2, 91 NRC at 35.

<sup>23</sup> Petition to Intervene at 35-39.

<sup>24</sup> LBP-20-2, 91 NRC at 35 n.43.

<sup>25</sup> See, e.g., LAR, Attach. 1, Description and Evaluation of Proposed Changes, § 5.1.2, Hottest Fuel Assembly Adiabatic Heat-Up (Zirconium Fire); LAR, Attach. 2, Permanently Defueled Emergency Plan, § 2.9, Mitigation of Consequences of Beyond Design Basis Events.

<sup>26</sup> Appeal at 20 ("There can be no doubt that whether a licensee transfer is financially qualified (Contention 1), and whether the NRC can approve a license transfer without [an] environmental assessment . . . (Contention 2) are within the scope of this proceeding.").

<sup>27</sup> Appeal at 20-21; see *a/so* Petition to Intervene at 8.

unsupported and did not dispute specific portions of the LAR with regard to emergency response.<sup>28</sup> Therefore, TMIA has not shown that the Board erred in dismissing the contention.

## **B. Contention 2**

TMIA argued in Contention 2 that the LAR should have included an environmental report to satisfy NRC regulations implementing the National Environmental Policy Act (NEPA).<sup>29</sup> In support, TMIA asserted that Three Mile Island is in a flood-prone river basin. TMIA further claimed that past environmental impact statements (EISs) relating to TMI have been inaccurate or incomplete.<sup>30</sup>

The Board rejected Contention 2 because TMIA did not address the applicant's analysis, which found that no additional NEPA analysis was necessary because the LAR falls within a categorical exclusion.<sup>31</sup> The Board pointed to the LAR's explanation that the application falls within both categorical exclusions 10 C.F.R. § 51.22(c)(9) and (25), and it observed that petitioners did not address Exelon's analysis of the matter.<sup>32</sup> The Board found that the contention therefore failed to show a genuine dispute with the application.<sup>33</sup>

On appeal, TMIA does not discuss the Board's reasoning and makes no mention of the LAR's discussion of a categorical exclusion. We find no error in the Board's conclusion that the contention did not raise a genuine dispute with the application. We therefore affirm the Board's decision that this contention is inadmissible.

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<sup>28</sup> See 10 C.F.R. § 2.309(f)(1)(v), (vi).

<sup>29</sup> Petition to Intervene at 40-46.

<sup>30</sup> *Id.* at 49, 50, 51.

<sup>31</sup> LBP-20-2, 91 NRC at 37.

<sup>32</sup> *Id.* at 37-38 (citing LAR Attach. 1, Description and Evaluation of Proposed Changes, at 13; Emergency Planning Exemption Request, Attach. 1, at 55-57).

<sup>33</sup> *Id.*

### C. Stay Request

TMIA also requested that the NRC stay the issuance of the license amendment until (1) an EIS is completed, (2) TMIA's concerns expressed in Exhibits 2 and 3 attached to its petition are addressed,<sup>34</sup> and (3) "financial assurances are guaranteed by [EnergySolutions]."<sup>35</sup> Our rules of procedure provide that within ten days of service of an adverse ruling, a party may apply to the presiding officer or the Commission for a stay.<sup>36</sup> Therefore, we find no error in the Board's finding that the stay request—filed twenty-six days after the denial of TMIA's hearing request—was untimely with no good cause shown. Moreover, the stay request does not include supported arguments that relate directly to the emergency planning LAR at issue. We therefore find no error in the Board's decision to deny a stay.

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<sup>34</sup> *Id.* Exhibit 2 to the Petition is an article from the *Philadelphia Inquirer* relating to voting machines in Pennsylvania. See Petition, Ex. 2, Jonathan Lai, *Why some Pa. counties are struggling with state order to upgrade voting machines*, Mar. 1, 2019. Exhibit 3 to the Petition consists of: A discussion of the Three Mile Island Post Defueled Emergency Plan; Press Release, James Lee Witt Associates, Governor Rendell Responds to Independent Review of State's Snowstorm Response; Pledges Reforms to Emergency Management Operations (Mar. 27, 2007); Letter from TMIA to the editor (unspecified) (Aug. 21, 2008) ("Why We Opposed the Move"); and Press Release, AmerGen, AmerGen to Relocate TMI Joint Information Center (Aug. 19, 2008).

<sup>35</sup> EnergySolutions is the parent company of TMI-2 Solutions, LLC, the proposed transferee in the Three Mile Island, Unit 2 license transfer proceeding. TMIA also asked that the license amendment be stayed until resolution of concerns raised by the Federal Emergency Management Agency in a December 2019 letter. See Letter from Michael S. Casey, FEMA, to Kathryn M. Brock, NRC (Dec. 20, 2019) (ML19360A127). On December 26, 2019, Mr. Epstein forwarded a link to the letter to the service list in this proceeding along with a request that the Board review the letter. The Board declined TMIA's suggestion to review the FEMA letter. See LBP-20-2, 91 NRC at 40 n.54.

<sup>36</sup> See 10 C.F.R. § 2.342(a).

### III. CONCLUSION

For the reasons discussed above, we *affirm* the Board's decision to deny TMIA's petition to intervene and also *find* the Board's decision correctly denied the stay request.

IT IS SO ORDERED.

For the Commission



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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 8<sup>th</sup> day of October 2020.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commission Memorandum and Order (CLI-20-10)** have been served upon the following persons by Electronic Information Exchange.

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**Commission Memorandum and Order (CLI-20-10)**

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 8<sup>th</sup> day of October 2020.