

**- Petition Pursuant to 10 CFR 2.206 -  
Demand for Information  
Proposed Merger between FirstEnergy  
and Allegheny Energy  
Re: The Impact on Three Mile Island Unit-2's  
Nuclear Decommissioning Trust Fund**

Stephen Burns, General Counsel  
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September 30, 2010

**I. Introduction**

Pursuant to §2.206 of Title 10 of the Code of Federal Regulations, Eric Joseph Epstein (“Epstein” or Mr. “Epstein”) hereby petitions the Nuclear Regulatory Commission (“NRC” or “the Commission”) to take enforcement action in the form of a Demand for Information from FirstEnergy (“FENOC”, “the Company” or “the licensee”) relating to inadequate financial assurances provided by the licensee for Three Mile Island Unit-2’s (“TMI-2”) nuclear decommissioning fund (1) *prior* to the consummation of FirstEnergy’s proposed merger with Allegheny Energy.

According to the NRC, (1) FirstEnergy’s Decommissioning Trust Fund for TMI-2 is grossly underfunded: “The current radiological decommissioning cost estimate is \$831.5 million. The current amount in the decommissioning trust fund is \$484.5 million, as of December 31, 2008.” (2) However, **the level of rate recovery** for the Trust Fund has been set by the Pennsylvania Public Utility Commission (“PUC”). The proposed merger with Allegheny Energy will endanger an already fragile funding protocol.

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<sup>1</sup> Per 10 CFR 50.75(f)(1), licensees for shutdown reactors are required to report annually on the status of decommissioning funding by March 31 (in the following year).

<sup>2</sup> NRC website: <http://www.nrc.gov/info-finder/decommissioning/power-reactor/three-mile-island-unit-2.html>. 1

According to the NRC, the cost to decommission TMI-2 has **increased by \$26.5 million in less than three years** while the Decommissioning Trust Fund's assets have **decreased by \$116.5 million** during the same period. The NRC determined in 2007, "The current radiological decommissioning cost estimate is \$805 million and \$27 million for non-radiological funds. The current amount in the decommissioning trust fund is \$601 million, as of December 31, 2007." (3)

Mr. Epstein seeks enforcement action in the form of a Demand for Information ("DFI") requiring FirstEnergy to provide the NRC with site-specific information and financial guarantees that demonstrate and verify the licensee has adequate funding in place to decommission and decontaminate TMI-2, and that the proposed merger will not place additional financial pressures on FirstEnergy's ability to satisfy its decommissioning obligations in 2036.

FirstEnergy's decommissioning report is inadequate, and fails to account for the special status of TMI-2, the current level of underfunding, or the fact that decommissioning rate recovery for Metropolitan Edison (4) and Pennsylvania Electric cease per PUC Orders on December 31, 2010. (5)

The decommissioning trusts of JCP&L and the Pennsylvania Companies are subject to regulatory accounting, with unrealized gains and losses recorded as regulatory assets or liabilities, since the difference between investments held in trust and the decommissioning liabilities will be recovered from or refunded to customers. NGC, OE and TE recognize in earnings the unrealized losses on available-for-sale securities held in their nuclear decommissioning trusts as other-than-temporary impairments. On June 18, 2009, the NRC informed FENOC that its review tentatively concluded that a shortfall existed in the decommissioning trust fund for Beaver Valley Unit 1. On November 24, 2009, FENOC submitted a revised decommissioning funding calculation using the NRC formula

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3 NRC website: <http://www.nrc.gov/info-finder/decommissioning/power-reactor/three-mile-island-unit-2.html>.

4 Metropolitan Edison (Docket No. R-00974008) and Penn Electric (Docket No. R-00974009).

5 Penn Elec's final TMI-2 collection for \$7.817 million occurred in 2009.

method based on the renewed license for Beaver Valley Unit 1, which extended operations until 2036. FENOC's submittal demonstrated that there was a de minimis shortfall. On December 11, 2009, the NRC's review of FirstEnergy's methodology for the funding of decommissioning of this facility concluded that there was reasonable assurance of adequate decommissioning funding at the time permanent termination of operations is expected. FirstEnergy continues to evaluate the status of its funding obligations for the decommissioning of these nuclear facilities. (6)

The Company acknowledged, "The values of FirstEnergy's nuclear decommissioning trusts fluctuate based on market conditions. If the value of the trusts decline by a material amount, FirstEnergy's obligation to fund the trusts may increase. Disruptions in the capital markets and its effects on particular businesses and the economy in general also affects the values of the nuclear decommissioning trusts."

However, FirstEnergy's rate recovery opportunities in Pennsylvania are restricted after December 31, 2010. Three Mile Island Unit-2 will no longer receive rate payer funding for decommissioning after December 31, 2010 when Metropolitan Edison and Penn Elec's "rate caps" are lifted. (Please refer to Enclosure 1)

This is a settled issue at the Pennsylvania Public Utility Commission. (7) TMI-2's decommissioning funding was litigated in both Met Ed and Penn Elec's Restructuring Cases as well as the 2006 Distribution base rate case at the PUC. As part of the Restructuring Settlement, Met Ed and Penn Elec are collecting TMI-2 decommissioning expenses through the Competitive Transition Cost ("CTC") as a stranded cost through December 31, 2010. In the 2006 Distribution base rate case; however, Met Ed sought an increase in the TMI-2 decommissioning expense as part of its CTC revenue requirement. The claim was made as part of a request for a specific exception to the generation rate cap that was allowed under the restructuring settlement. (8)

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6 *FirstEnergy 2009 Annual Report*, p. 44.

7 *FirstEnergy 2009 Annual Report*, p. 59.

8 *Metropolitan Edison and Pennsylvania Electric Company v. Pa. PUC* No. 2404 C.D. 2003 (Pa. Cmwlth. 2006) (filed July 19, 2006).

The Pennsylvania Public Commission stated:

The Commonwealth Court affirmed the Commission's order requiring Metropolitan Edison and Pennsylvania Electric Company (Electric Companies) to retroactively adjust their accounting entries for stranded cost recovery, as if their Settlement Stipulation had never been approved by the Commission. The Electricity Generation Customer Choice and Competition Act (Competition Act) allowed electric companies to recover stranded costs through a competitive transition charge (CTC), subject to a rate cap. Every electric company was also required to file a restructuring plan explaining its compliance with the Competition Act, subject to approval by the Commission. After the Commission approved the Electric Companies' merger, they sought a rate increase pursuant to the Competition Act, or an immediate rate cap increase of \$316 million per year. Interveners opposed the merger and Electric Companies' requests. The parties failed to reach a consensus, and the Electric Companies proposed a "Settlement Stipulation," which the Commission adopted in 2001. However, Commonwealth Court voided the Stipulation Settlement and reversed the Commission's order in *ARIPPPA v. Pa. PUC*, 892 A.2d 636 ( Pa. Cmwlt. 2002) after multiple parties appealed. In response to the decision, the Commission ordered the Electric Companies to reverse any accounting changes made pursuant to the Settlement Stipulation.

The Commonwealth Court held that the Commission complied with its order directing the Electric Companies to return revenues collected for the distribution and transmission rates to the same levels that existed before the Settlement, thereby ensuring customers were placed back in the same position before the rate change occurred. Furthermore, the Commission guaranteed that when the amount of stranded costs they received was settled, the Electric Companies could collect for any deficiencies. The Court also disagreed with the Electric Companies that the Commission can only change approved rates prospectively and are not subject to retroactive adjustment, since the rates previously approved by the Commission were not legal. (9)

Additionally, long-standing Atomic Energy Commission and Nuclear Regulatory Commission precedent makes it clear that "once a regulation is adopted, the standards it embodies represent the Commission definition of what is required to protect the public health and safety."

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9 Metropolitan Edison and Pennsylvania Electric Company v. Pa. PUC, No. 2404 C.D. 2003 (Pa. Cmwlt. 2006) (filed July 19, 2006).

By the same token, neither the applicant nor the staff should be permitted to challenge applicable regulations, either directly or indirectly, those parties should not generally be permitted to seek or justify the licensing of a reactor which does not comply with applicable standards. Nor can they avoid compliance by arguing that, although an applicable regulation is not met, the public health and safety will still be protected. For, once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety. In short, in order for a facility to be licensed to operate, the applicant must establish that the facility complies with all applicable regulations. If the facility does not comply, or if there has been no showing that it does comply, it may not be licensed. (9)

The NRC can not ignore or manipulate its own regulations relating to financial assurances for decommissioning

FirstEnergy recently acknowledged the embedded uncertainty and historic variability associated with “nuclear generation involves risks that include uncertainties relating to health and safety, additional capital costs, the adequacy of insurance coverage and nuclear plant decommissioning.” (10) The Company's statement is underscored by the inability of TMI-2's management to predict decommissioning costs or funding levels over the past 25 years.

On January 18, 1994, at the NRC's Advisory Panel meeting, GPU's President Robert E. Long stated that the Company had \$104.7 million on hand to decommission TMI-2. GPU's spokesperson, Mary Wells said, “We have a detailed plan in place to make sure that the money is going to be there.”

By February, 1997, GPU reported in its *1997 Annual Report* that the cost to decommission TMI-2 **doubled in four years**. The original \$200 million projection has been increased to \$399 million for radioactive decommissioning. An additional \$34 million will be needed for non-radiological decommissioning.

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9 Vermont Yankee Nuclear Power Station), United States of America Atomic Energy Commission Atomic Safety & Licensing Appeal Board, Memorandum and Order, (ALAB-138) Docket No. 50-271, IV., p. 528, Section IV, Paragraph A., p. 528, July 31, 1973.

10 *FirstEnergy 2009 Annual Report*, p. 17.

The new funding “target” was **\$433 million or a \$328.3 million increase in just 48 months**. Ten years later, according to the NRC, the radiological decommissioning cost estimate was **\$779** million and \$26 million for non-radiological funds. The amount in the decommissioning trust fund was \$559 million, as of December 31, 2006.

In 2007 the TMI-2 site summary on the NRC’s website stated as of December 31, 2007, "The current radiological decommissioning cost estimate is \$805 million and \$27 million for non-radiological funds. The current amount in the decommissioning trust fund is \$601 million, as of December 31, 2007."

In 2008, according to the NRC, the radiological decommissioning cost estimate was \$831.5 million. The amount in the decommissioning trust fund was \$484.5 million as of December 31, 2008.

According to the NRC, the cost to decommission TMI-2 has **increased by \$26.5 million in less than three years** while FirstEnergy decommissioning trust fund’s assets has **decreased by \$116.5 million** during the same period.

However, the owners of Three Mile island Unit-2 promised the NRC that delaying the cleanup would decrease cost and increase safety. Frank Standerfer GPU vice-president and director of TMI-2 told the NRC, “If we wait [to decommission TMI-2] there would be less risk to our workers and it would be more cost effective. He also told the NRC’s TMI Advisory Panel, “GPU will not have a problem finding funds to shut both reactors in the next century.” (11)

After 31 years of broken promises, faulty assumptions, and inaccurate projections, the NRC should hold FirstEnergy accountable and demand a site-specific funding plan at the site of the nation’s worst commercial nuclear accident. **At a minimum, the proposed Merger must be held in abeyance** until Three Mile Island-2 can demonstrate that it has adequate funding in place to decommission Three Mile Island Unit-2 in 2036 - 57 years after the Accident.

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11 Transcript from the NRC’s TMI-2 Citizens Advisory Panel convened on May 27, 1988 in Harrisburg, PA.

## **II. Background**

In July, 1969 Met Ed began construction on Three Mile Island-2 Unit 2, and the station came on line in December 1978. TMI-2 was grossly over budget and behind schedule. The plant had been on-line for just 90 days, or 1/120 of its expected operating life, before the March, 1979, accident. One billion dollars was spent to defuel the facility. Three months of nuclear power production at TMI-2 has cost close to \$2 billion dollars in construction and cleanup bills; or the equivalent of over \$10.6 million for every day TMI-2 produced electricity. The above mentioned costs do not include nuclear decontamination and decommissioning or restoring the site to “Greenfield. TMI-2 had no funds socked away at the time of meltdown for decontamination or decommissioning.

At the time of the core-melt, LOCA in March 1979, Three Mile Island I and 2 were owned three utilities operating in two states, i.e., Metropolitan Edison (50%), Jersey Central Power & Light (25%) and Pennsylvania Electric (25%). The companies were organized under the General Public Utilities holding company umbrella. The operator of both plants was Met Ed.

On March 25, 1980, Met Ed, blamed the plant’s designer, Babcock & Wilcox (B&W) for the TMI accident, sue B&W for \$500 million. TMI’s owners also filed an unsuccessful \$4 billion law suit against the NRC alleging that the Agency’s negligence contributed to the TMI accident.

In September, 1980, Met Ed renamed itself GPU Nuclear. Met Ed continued to operate the plant and owned 50% of its assets.

On January 18, 1994 at the NRC’s Advisory Panel meeting, GPU’s President Robert E. Long stated that the Company had \$104.7 million on hand to decommission TMI-2. GPU's spokesperson, Mary Wells said, “We have a detailed plan in place to make sure that the money is going to be there.”

On September 20, 1995, the Pennsylvania Supreme Court reversed a lower court's decision, and sided with GPU in allowing the Company to charge rate payers for the TMI-2 accident. One billion has been spent to defuel the plant, which now lays in idle shutdown, i.e., Post-Defueling Monitored Storage.

By February, 1997, GPU reported in its *1997 Annual Report* that the cost to decommission TMI-2 doubled in four years. The original \$200 million projection has been increased to \$399 million for radioactive decommissioning. An additional \$34 million will be needed for non-radiological decommissioning.

The new funding "target" was \$433 million or a \$328.3 million increase in just 48 months.

On July 17, 1998, AmerGen Energy announced that it reached an Agreement with GPU to purchase TMI-1 for \$100 million. The proposed sale includes \$23 million for the fuel inventory.

On July 21, 1999, GPU Nuclear received permission from the NRC to reduce the insurance at TMI-2 from \$1.06 billion to \$50 million.

On December 20, 1999, TMI-2's license was transferred from GPU Nuclear to AmerGen. TMI-2 remains a GPU possession in placed in Post-Defueling Monitored Storage in 1992. GPU contracts with AmerGen to maintain a skeletal staff presence at TMI-2.

On August 9, 2000, FirstEnergy and GPU announced a planned merger expected to be finalized by August 2001. FENOC would acquire GPU for approximately \$4.5 billion. Ownership of TMI-2 and liability for 1,990 health suits against GPU would be transferred to FirstEnergy.

In November, 2001, TMI-2 was formally transferred from GPU Nuclear to FirstEnergy. GPU Nuclear retains the license for TMI-2 and is owned by FirstEnergy Nuclear Operating Company.

In 2006, according to the NRC, the radiological decommissioning cost estimate was \$779 million and \$26 million for non-radiological funds. The amount in the decommissioning trust fund was \$559 million as of December 31, 2006.

In 2007 the TMI-2 site summary for 2007, the NRC's website, "The current radiological decommissioning cost estimate is \$805 million and \$27 million for non-radiological funds. The current amount in the decommissioning trust fund is \$601 million, as of December 31, 2007."

And in 2008, according to the NRC, the radiological decommissioning cost estimate for TMI-2 was \$831.5 million. The amount in the decommissioning trust fund was \$484.5 million as of December 31, 2008.

According to the NRC, the cost to decommission TMI-2 has increased by \$26.5 million in less than three years while FirstEnergy decommissioning trust fund's assets has decreased by \$116.5 million during the same period.

Winter-Spring, 2010, FirstEnergy and Allegheny Energy filed merger applications with various state and federal agencies, but made no such filing with the Nuclear Regulatory Commission.

On February 11, 2010, Standard & Poor's downgraded FirstEnergy's debt: "We downgraded FirstEnergy Corp. and subsidiaries to 'BBB-' from 'BBB' based on its intention to merge with lower-rated Allegheny Energy Inc."

## IV. Site Status Summary.

The NRC's website stated on September 30, 2010:

“The Three Mile Island, Unit 2 (TMI-2) operating license was issued on February 8, 1978, and commercial operation was declared on December 30, 1978. On March 28, 1979, the unit experienced an accident which resulted in severe damage to the reactor core. TMI-2 has been in a non-operating status since that time. The licensee conducted a substantial program to defuel the reactor vessel and decontaminate the facility. All spent fuel has been removed except for some debris in the reactor coolant system. The plant defueling was completed in April 1990. The removed fuel is currently in storage at Idaho National Laboratory, and the U.S. Department of Energy has taken title and possession of the fuel. TMI-2 has been defueled and decontaminated to the extent the plant is in a safe, inherently stable condition suitable for long-term management. This long-term management condition is termed post-defueling monitored storage, which was approved in 1993. There is no significant dismantlement underway. The plant shares equipment with the operating TMI - Unit 1. TMI-1 was sold to AmerGen (now Exelon) in 1999. GPU Nuclear retains the license for TMI-2 and is owned by FirstEnergy Corp. GPU contracts with Exelon for maintenance and surveillance activities. The licensee plans to actively decommission TMI-2 in parallel with the decommissioning of TMI-1. The current radiological decommissioning cost estimate is **\$831.5 million**. The current amount in the decommissioning trust fund is **\$484.5 million**, as of December 31, 2008.” (**Boldface type added.**) (12)

Estimated Date For Closure: 12/31/2036

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12 US, Nuclear Regulatory Commission, Three Mile Island - Unit 2, License No.: DPR-73 Docket No.: 50-320, License Status: Possession Only License.

<http://www.nrc.gov/info-finder/decommissioning/power-reactor/three-mile-island-unit-2.html>.

## V. Demand for Information.

It is prudent for the Commission to respond to Mr. Epstein's Petition requesting a Demand for Information in an expedited manner based on the timing of the proposed merger.

1) Mr. Epstein respectfully requests that the NRC Issue a Demand for Information to FirstEnergy for a **site-specific** decommissioning funding plan for TMI-2.

2) Mr. Epstein respectfully requests that the NRC Issue a Demand for Information to FirstEnergy requesting FENOC's site-specific funding plan for the TMI-2 decommissioning trust **after the rate caps expire** for Metropolitan Edison and Penn Elec on December 31, 2010.

3) The current radiological decommissioning cost estimate is **\$831.5 million**. As of December 31, 2008, the amount in the decommissioning trust fund was **\$484.5 million**.

This is not a de minimis shortfall.

Mr. Epstein respectfully requests that the NRC Issue a Demand for Information to FirstEnergy relating to FENOC's investment plan to make-up the current decommissioning **shortfall**.

4) Mr. Epstein respectfully requests that the NRC Issue a Demand for Information to FirstEnergy regarding FENOC's proposed **financial contribution** plan to make-up the current decommissioning shortfall.

5) The Company anticipates that the nuclear generating stations will operate at least until the end of their current licensed lives. In the event that any of the stations are retired early, the Company anticipates that funding will be adjusted to match any change in decommissioning schedule and/or cost scenario.

Mr. Epstein respectfully requests that the NRC Issue a Demand for Information to FirstEnergy relating to the Company's plan to **fund the** decommissioning trust for TMI-2, if TMI-1 is prematurely retired.

6) The Company anticipates that the nuclear generating stations will operate at least until the end of their current licensed lives. In the event that any of the stations are retired early, the Company anticipates that funding will be adjusted to match any change in decommissioning schedule and/or cost scenario.

Mr. Epstein respectfully requests that the NRC Issue a Demand for Information to FirstEnergy relating to the Company's **planned timing** for decommissioning TMI-2, if TMI-1 is prematurely retired.

Additionally, Mr. Epstein requests that the Nuclear Regulatory Commission:

(a) Provide Eric Joseph Epstein with copies of all correspondence sent to First Energy regarding this Petition.

(b) Provide Mr. Epstein with advance notice of all public and private meetings conducted by the Agency with regarding this Petition.

(c) Provide Mr. Epstein with an opportunity to participate in all relevant phone calls between NRC staff and FirstEnergy regarding this Petition.

(d) Provide Mr. Epstein with copies of all correspondence sent to Members of Congress and/or industry organizations (e.g., the Nuclear Energy Institute, the Electric Power Research Institute, the Institute for Nuclear Power Operations, Commonwealth of Pennsylvania) Department of Justice, the Securities and Exchange Commission regarding this Petition.

Respectfully submitted,

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**Enclosure**

Dated: September 30, 2010.

**CERTIFICATE OF SERVICE**

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