

**- Petition Pursuant to 10 CFR 2.206 -  
Non Compliance of Emergency  
Preparedness Planning**

**Re:**

**- Direct License and Indirect License Transfers of Facility Operating Licenses and Conforming Amendments of Exelon Generation Company, LLC and PSEG Nuclear LLC, at Peach Bottom Atomic Power Station, Units 2 and 3; [Docket Nos. 50-277 and 50-278] (ML050670664)**

**- Indirect License Transfer of Three Mile Island Nuclear Station, Unit 1 Facility Operating License No. DPR-50; NRC Docket No. 50-289**

Luis A. Reyes, Executive Director for Operations  
William F. Kane, Deputy Executive Director for Reactor & Preparedness Programs  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

November 18, 2005

Dear Messers. Reyes and Kane:

Pursuant to §2.206 of Title 10 of the Code of Federal Regulations, Eric Joseph Epstein (“Epstein” or “Mr. Epstein”) petitions the Nuclear Regulatory Commission (NRC) to take enforcement action against AmerGen, the licensee for Three Mile Island - 1, and Exelon Generation Company (“Exelon”) the licensee of Peach Bottom 2 and 3 (“Peach Bottom”).

Mr. Epstein seeks enforcement action in the form of a Demand for Information (DFI) that would require AmerGen and Exelon to provide the NRC with information that establishes that both organizations are in compliance with their operating license in terms of providing adequate emergency planning for residents living within 10 (ten) miles of both nuclear generating stations.

[The requested action is necessary because there is compelling reason to believe that] Three Mile Island Unit-1 and Peach Bottom Atomic Power Station 2 & 3 are in violation of **10 CFR § 50.47** (a) (1) regarding “reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency,” and **10 CFR § 50.54 Conditions for licenses:**

(2)(i) For operating power reactors, the licensee, state, and local emergency response plans shall be implemented by April 1, 1981, except as provided in section IV.D.3 of appendix E to this part.

(ii) If after April 1, 1981 the NRC finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency (*including findings based on requirements of appendix E, section IV.D.3*) and if the deficiencies (*including deficiencies based on requirements of appendix E, section IV.D.3*) are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate. In determining whether a shutdown or other enforcement action is appropriate, the Commission shall take into account, among other factors, whether the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons for continued operation.

(3) The NRC will base its finding on a review of the FEMA findings and determinations as to whether state and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the licensee's emergency plans are adequate and capable of being implemented. Nothing in this paragraph shall be construed as limiting the authority of the Commission to take action under any other regulation or authority of the Commission or at any time other than that specified in this paragraph.

More specifically, under the “Petition For Rulemaking (PRM 50-79) Emergency Planning For Nursery Schools and Day Care Centers,” the senior Nuclear Regulatory Commission (NRC) Staff Member charged with overseeing the merits of proposed Petition has filed an NRC Differing Professional Opinion (DPO), and concluded that AmerGen and Exelon are in violation of their NRC issued operating licenses. The action requested by this petition is needed to resolve the doubt raised by this DPO.

The findings clearly state the health and welfare of residents living within 10 (ten) miles of Three Mile Island and Peach Bottom are in jeopardy, and immediate action is requested by the Commission and the following problems need to be retrofitted prior to transfer of the Indirect and Direct Licensee at the above mentioned nuclear generating stations:

1. Children in Pennsylvania living within 10 (ten) miles of Three Mile Island and the Peach Bottom Atomic Power Station are not safe during a nuclear emergency:

The Commission's emergency planning regulations, specifically 10 CFR 50.47(a)(1), require that **nuclear power plant licensees develop and maintain emergency plans that provide reasonable assurance that adequate protective actions can and will be taken for the protection of the public in an emergency.** (1) Section 50.47(a)(2) states that the NRC will base its findings regarding adequacy of these plans on a review by NRC of FEMA, who will determine if the plan are adequate and whether there is reasonable assurance that they can be implemented. NRC and FEMA promulgated NUREG-0654/FEMA-REP-1 to provide detailed guidance on the development and implementation of these plans. Appendix 4 in NUREG-0654 details the requirements for the identification and planning for special facility populations and schools. FEMA Guidance Memorandum (GM) EV-2, "Protective Actions For School Children," provides guidance to assist federal officials in evaluating adequacy of state and local government offsite emergency plans and preparedness for protecting school children during a radiological emergency. The term "school" refers to all public and private schools, pre-schools, and licensed day care centers with 10 or more students.

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1 **Bold face type added.**

The state and local government offsite emergency plans shall address, at a minimum, preplanned transportation resources available for evacuating all schools including the licensed day care and nursery schools; preplanned reception and care centers for all schools including day care and nursery schools, alert and notification procedures for all schools including day care and nursery schools and public information for parents and guardians of all schools including day care and nursery school children. **No evidence has been presented to show that Pennsylvania complies with these emergency planning requirements.** (2)

2. Pennsylvania does not comply with the federal regulations requiring emergency planning for preschool children, and the Federal Emergency Management Agency (FEMA) (1) has been reaching a false finding for emergency planning compliance for the past 19 years:

I believe that FEMA and the State of Pennsylvania does not comply with FEMA guidance that NRC bases its licensing decisions on, I believe that the criteria in FEMA GM EV2 must be codified into NRC's emergency planning regulations, in order to permit the NRC to make a finding that "there is reasonable assurance that protective measures can and will be taken." (3)

Mr. Jamgochian's DPO states the criteria in FEMA GM EV-2 "Protective Actions for School Children" must be codified into NRC's emergency planning regulations in order to permit the NRC to make findings that "there is reasonable assurance that protective measures can and will be tak[en]."

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2 **Bold face type added.**

3 A "Show Cause" Order by the NRC does not affect the gravamen of requests before another agency with expertise in the area (Florida Power & Light Co., St. Lucie Plant, Unit No. 2), DD-81-15, 14 NRC 589 (1981).

Mr. Jamgochian has asked the NRC to begin 120 day count down for pulling the nuclear power licenses:

I also believe that the 120-day clock contained in 10 CFR 50.54 (s)(2) should be implemented in Pennsylvania during the rulemaking. My beliefs are base on the fact that in 45 FR 55406, dated August 19, 1980 the Commission state that the NRC will “review FEMA findings and determinations on the adequacy and capability of implementation of State and local plans (and will) make decisions with regard to the overall state of emergency preparedness (i.e. integration of the licensee’s emergency preparedness as determined by the NRC and of the State/local governments as determined by FEMA and reviewed by NRC) and issuance of operating licenses or shutdown of operating reactors. FEMA will approve State and local emergency plans and preparedness, where appropriate, based upon its findings and determinations with respect to the adequacy of State and local plans and the capabilities of State and local governments to effectively implement these plans and preparedness measures.

Mr. Jamgochian’s DPO also indicates that the consequences of not codifying state and local government’s specific responsibilities for day care and nursery school children is that these children will not have preplanned evacuation capabilities in the event of an emergency and the NRC would not be able to find its required level of “reasonable assurance.”

Mr. Jamgochian sites relevant NRC regulations and lists direct evidence sent to the NRC that leads him to these conclusions.

Based on the conclusions and evidence sited in Mr. Jamgochian’s DPO, it is necessary for the NRC to obtain and review this information to assure safe operation of Three Mile Island and Peach Bottom. The NRC is clearly aware of the emergency planning deficiencies based on DPO.

Long-standing AEC-NRC precedent makes it clear that “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.”

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. (4)

Currently, the Three Mile Island Nuclear Generating Station and the Peach Bottom Atomic Power Station [are appear to be] violating two NRC conditions for operation of a nuclear power plant and can not ensure adequate ensure the health and safety of area residents.

At a minimum, the proposed Indirect and Direct License transfer proposed as part of the PSEG-Exelon must be held in abeyance until Three Mile Island and Peach Bottom can **demonstrate compliance** with the operating licenses in regard to emergency planning.

Because the issue involves the timely transfer of operating licenses involved in a nuclear merger affecting Three Mile Island, Peach Bottom, Limerick, Oyster Creek, Hope Creek and Salem, a Demand for Information as requested by Mr. Epstein via this Petition rather than a Bulletin is the appropriate means for the NRC to assure public health and safety.

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4 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.

It is prudent to visit the issue in an expedited manner to ensure AmerGen and Exelon are complying with their operating license prior to the Direct and Indirect License Transfers. More importantly, public health and safety has been jeopardized unnecessary for 19 years.

The NRC retains exclusive jurisdiction to make judgments regarding the conditions of nuclear power plant licenses relating to emergency preparedness exercises:

(3) The NRC will base its finding on a review of the FEMA findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the licensee's emergency plans are adequate and capable of being implemented. Nothing in this paragraph shall be construed as limiting the authority of the Commission to take action under any other regulation or authority of the Commission or at any time other than that specified in this paragraph. (5)

None of the issues identified in the Present Petition have been addressed by the Commission regarding the proposed Indirect and Direct License Transfers at the Three Mile Island Nuclear Generating Station or the Peach Bottom Atomic Power Station.. βIn addition, the aforementioned Petition for Rulemaking (PRM 50-79) should ultimately address the situation but it does nothing to address the public health problem that may presently exist.

The Demand for Information sought by Eric Joseph Epstein, via this Petition, is threefold:

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5      **10 CFR § 50.54 (3) Conditions for license.**

1. Mr. Epstein respectfully requests that the NRC issue a Demand for Information to AmerGen and Exelon on why the company thinks it is in compliance with the regulation for day care and nursery school children within the EP zone. The basis for the request is embedded in the DPO which raises substantial, overwhelming and reasonable doubt about whether AmerGen and Exelon is in compliance. And since the NRC's DPO process affords no public participation, there is no other recourse other than the 2.206 Petition to ask and answer this question..

2. Mr. Epstein respectfully requests that the NRC issue a Demand for Information to AmerGen and Exelon requiring both licensees to “demonstrate to the Commission's satisfaction,” that emergency preparedness planning for day care and nursery school populations are “adequate” or that “adequate interim compensating actions have been or will be taken promptly.”

According to NRC regulations,

i) If after April 1, 1981 the NRC finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency (*including findings based on requirements of appendix E, section IV.D.3*) and if the deficiencies (*including deficiencies based on requirements of appendix E, section IV.D.3*) are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate. In determining whether a shutdown or other enforcement action is appropriate, the Commission shall take into account, among other factors, whether the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons for continued operation.

3. Due to the unique and traumatizing histories surrounding Three Mile Island (6) and Peach Bottom (7), the Commission must go beyond a “finding of adequate protection” (8) to ensure that both reactor communities are prepared to safely evacuate all residents living within 10 (ten) miles of either nuclear power plant.

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6 On March 28, 1979 the Three Mile Island-2 nuclear reactor core melt began. On March 30, 1979 Governor Richard Thornburgh recommended an evacuation of preschool children and pregnant women living within five miles of the plant. Out of a target population of 5,000, over 140,000 Central Pennsylvanians fled the area. Schools in the area closed.

On October 17, 2001, due to a “credible threat” against Three Mile Island, the Harrisburg and Lancaster airports were closed for four hours, air travel was restricted in a 20-mile radius, a fighter jets were scrambled around TMI.

Through the Freedom of Information Act, the *York Daily Record* (December 21, 2003) found a “twofold” challenge when a threat against Three Mile Island caused the Harrisburg and Lancaster airports to close for four hours: Air travel was restricted in a 20-mile radius and fighter jets were scrambled around TMI.

Officials struggled with whom to call first, next and last. Officials struggled with notifying state and local officials. And officials struggled with when and whether to notify the public...One NRC official had difficulty reaching senior management at TMI...No one contacted enforcement officials in York County about the threat...[PEMA] officials had to push plant officials to staff their emergency operations facility.

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7 March 31, 1987 Peach Bottom was indefinitely shutdown. Operators were found sleeping on the job, playing video games, engaging in rubber band and and paper ball fights, and reading unauthorized material.

8 A finding of “adequate protection” of public health and safety under 42 USCS § 2232 does not preclude the need for further consideration. The NRC can not rely on sufficiency under the Atomic Energy Act (42 USCS §§ 2011 et seq.) to avoid its statutory obligations (*Limerick Ecology Action, Inc. v US NRC* (1989, CA3) 869 F2d 719, 19 ELR 20907.)

Additionally, Mr. Epstein respectfully requests that the NRC:

(a) Provide Eric Joseph Epstein with copies of all correspondence sent to AmerGen and Exelon regarding this Petition and the subject of the Commonwealth of Pennsylvania's emergency preparedness planning;

(b) Provide Mr. Epstein 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 AmerGen and Exelon regarding this Petition; and,

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, Federal Emergency Management Agency, the Pennsylvania Emergency Management Agency, AmerGen and Exelon.

## **Remedies**

1. Until the Demand for Information sought by Eric Joseph Epstein in this Petition is addressed, the Direct License and Indirect License Transfers of Facility Operating Licenses and Conforming Amendments of Exelon Generation Company, LLC and PSEG Nuclear LLC, at Peach Bottom Atomic Power Station, Units 2 and 3; [Docket Nos. 50-277 and 50-278] (MLO50670664), and the Indirect License Transfer of Three Mile Island Nuclear Station, Unit 1 Facility Operating License No. DPR-50; NRC Docket No. 50-289, must be held in abeyance; and,

2. While Three Mile Island Unit-1 and Peach Bottom Atomic Power Station 2 & 3 remain in violation of **10 CFR § 50.47** (a) (1) regarding “reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency,” and **10 CFR § 50.54 Conditions for licenses**, the Direct License and Indirect License Transfers of Facility Operating Licenses and Conforming Amendments of Exelon Generation Company, LLC and PSEG Nuclear LLC, at Peach Bottom Atomic Power Station, Units 2 and 3; [Docket Nos. 50–277 and 50–278] (ML050670664), and the Indirect License Transfer of Three Mile Island Nuclear Station, Unit 1 Facility Operating License No. DPR-50; NRC Docket No. 50-289, can not be transferred per Nuclear Regulatory Commission’s statutory obligations and federally mandated regulations.

Thank you in advance for your assistance in this most urgent matter.

Respectfully submitted,



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**ATTACHMENTS**

Exhibit #1: Michael Jamgochian’s Differing Professional Opinion

Exhibit #2: FEMA’s 1986 Guidance Memorandum EV-2 “Protective Actions for School Children”

## CERTIFICATE OF SERVICE

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**DATE: November 18, 2005**