

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

SERVED 10/26/05

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-289-LT-2
)
(Three Mile Island Nuclear Station, Unit 1))

)

CLI-05-25

MEMORANDUM AND ORDER

Mr. Eric Joseph Epstein requests that we publish a notice of opportunity for hearing, and also grant his petition to intervene and request for hearing, regarding any license transfers associated with the pending merger of Public Service Enterprise Group, Inc. (PSEG) into Exelon Corporation (Exelon Corp.), the indirect parent of licensee AmerGen Energy Company LLC (AmerGen), insofar as that merger affects Unit 1 of the Three Mile Island Nuclear Station (TMI-1). Generally, Mr. Epstein argues that the purported license transfers raise issues involving financial and technical qualifications as well as the possible extent of foreign ownership. We deny all of Mr. Epstein's requests.

Section 189a(1)(A) of the Atomic Energy Act requires the Commission to offer an opportunity for a hearing in certain kinds of "proceedings" such as those involving transfers of control over licensed facilities.¹ But to bring into existence such a "proceeding" and its associated hearing rights, there must actually be a license transfer. Here, there is none. Because the applicant did not propose to change either operating or possession authority, there

¹ 42 U.S.C. § 2239a(1)(A).

is no direct license transfer. Similarly, because the ultimate parent (Exelon Corp.) already controls the licensee (AmerGen) indirectly, and because the Exelon Corp. will survive the merger and therefore will continue to control AmerGen and (indirectly) the license, there is no indirect license transfer.² Hence, no “proceeding” exists for which we can publish a notice of opportunity for hearing -- or in which Mr. Epstein can seek intervention and a hearing. Consequently, we reject Mr. Epstein’s three requests. But even if we viewed the PSEG-Exelon merger as effectively requiring some sort of license transfer, Mr. Epstein would lack standing to intervene and challenge it.

To qualify for intervention, Mr. Epstein must (among other things) demonstrate standing.³ Mr. Epstein presents two arguments in favor of his standing, both of which we reject. Under the traditional test for standing, Mr. Epstein must demonstrate (among other things) that the proposed transfer would injure his financial, property or other interests. In apparent support of a “traditional standing” claim, Mr. Epstein points to his involvement -- both personal and through organizations -- in numerous activities related to Three Mile Island. In a separate order issued today in the *Peach Bottom* license transfer proceeding, we consider and reject this same claim to standing.⁴ We incorporate that analysis by reference, and reject Mr. Epstein’s arguments here on the same grounds as in *Peach Bottom* -- in essence, such involvement does not support the necessary demonstration of injury.

² See letter from George F. Dick, NRC, to Christopher M. Crane, AmerGen Energy Company, LLC, dated July 6, 2005, ADAMS Accession No. ML051780114, concluding that no indirect license transfer approvals are required for (among others) TMI-1 in connection with the subject merger.

³ 10 C.F.R. § 2.309(d), (f).

⁴ *Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 and 3)*, CLI-05-___, 62 NRC ___, ___, slip op. at 2-3 (Oct. ___, 2005).

Mr. Epstein's second argument in support of his standing is that he lives and operates a business 12 miles from the TMI nuclear facility. Although he does not say as much, we presume that Mr. Epstein is relying on a series of Commission decisions granting "proximity standing" to prospective litigants upon the mere showing that they lived within a certain radius of the regulated facility at issue.

"Proximity standing" differs from "traditional standing" in that the petitioner claiming it need not make an express showing of harm. Rather, "proximity standing" rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working, living or regularly engaging in activities offsite but within a certain distance of that facility.⁵ In ruling on claims of "proximity standing," we determine the radius beyond which we believe there is no longer an "obvious potential for offsite consequences"⁶ by "taking into account the nature of the proposed action and the significance of the radioactive source."⁷

⁵ *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-47, *aff'd*, CLI-01-17, 54 NRC 3 (2001); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation ["ISFSI"]), LBP-02-23, 56 NRC 413, 426-27 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185 (2003).

⁶ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116 (1995); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

⁷ *Georgia Tech*, CLI-95-12, 42 NRC at 116-17. See also *Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 427; *Turkey Point*, LBP-01-6, 53 NRC at 149; *Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985).

In today's *Peach Bottom* order, we have examined the issue of "proximity standing" in license transfer cases,⁸ and we believe our analysis in that decision is equally applicable here.⁹ The proposed Commission action (*i.e.*, the agency's purported approval of license transfers stemming from the merger) that triggered Mr. Epstein's instant petition poses no more radiological risk than the ones at issue in *Peach Bottom*. The merger will result in no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel.

Moreover, the merger activity is occurring several levels above the current licensee, AmerGen. Even after PSEG has merged into Exelon Corporation (ending the separate corporate existence of PSEG and leaving Exelon Corporation as the surviving company), AmerGen will continue to own and operate Unit 1 of Three Mile Island. It will remain a wholly-owned subsidiary of Exelon Generation Company, LLC, which will in turn remain a wholly-owned subsidiary of Exelon Ventures Company, LLC, which will itself remain a direct, wholly-owned subsidiary of Exelon Corporation, which survives the subject merger. There will thus be no "genealogical" change for AmerGen.¹⁰ Based on these facts, we conclude that the purported

⁸ *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-___, 62 NRC ___, ___- ___, slip op. at 3-8 (Oct. ___, 2005).

⁹ Also, for the reasons set forth in today's *Peach Bottom* order at note 22, we decline to consider the "proximity standing" argument presented for the first time in Mr. Epstein's untimely submitted Supplemental Filing.

¹⁰ After the merger, Exelon Corporation will change its name to Exelon Electric and Gas Corporation. However, the parent-subsidary relationships between AmerGen and Exelon Corporation will remain unchanged upon completion of the merger. We note that the Application for Consent to Indirect License Transfers, dated March 3, 2005, appears to be somewhat imprecise in its description of the merger. Thus, we have taken the opportunity to avail ourselves of the applicants' publicly available filings before the Securities and Exchange Commission for clarification. See Form U-1, Application-Declaration Under The Public Utility Holding Company Act of 1935, filed by Exelon Corporation and PSEG (Mar. 15, 2005), which clarifies the legal steps of the planned merger of PSEG into Exelon Corporation.

“license transfer” raises no “obvious potential for offsite consequences”¹¹ and that Mr. Epstein’s presumed claim of “proximity standing” consequently lacks merit.

Our ruling today on Mr. Epstein’s lack of “proximity standing” falls comfortably within the distance parameters of other rulings on “proximity standing” in license transfer proceedings. For instance, in the *Millstone* license transfer proceeding, we denied “proximity standing” to organizations claiming to have members living within 5-10 miles of the plant – even closer than Mr. Epstein’s 12-mile proximity to TMI.¹² We also observe that the furthest distance for which this agency has ever granted “proximity standing” in a license transfer case was (with one distinguishable exception¹³) 6½ miles.¹⁴ Because Mr. Epstein offers no specific claim of harm beyond proximity, he lacks standing.

¹¹ *Georgia Tech*, CLI-95-12, 42 NRC at 116; *St. Lucie*, CLI-89-21, 30 NRC at 329-30.

¹² *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129 (2000) (an indirect license transfer involving no change in the facility, its operation, licensees, personnel, or financing).

¹³ *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-5, 37 NRC 96 (1993), *aff’d*, CLI-93-16, 38 NRC 25 (1993), where we approved standing for a petitioner living 35 miles from the plant one week per month. The petitioner in *Vogtle* alleged that he could suffer harm from the transfer of operating authority to a company that, according to him, lacked the “character, competence, and integrity to safely operate the Vogtle plant, and lacks the candor, truthfulness, and willingness to abide by the regulatory requirements necessary to operate a nuclear facility.” CLI-93-16, 38 NRC at 33. The petitioner also alleged that management had submitted material false statements to the Commission in order to obstruct an NRC investigation. *Id.* Those unusual circumstances are not present here.

¹⁴ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000) (involving a direct transfer of both the ownership and operation of the plant).

For these reasons, we deny Mr. Epstein's petition to intervene, request for hearing, and request for publication of notice.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of October, 2005.