

December 22, 2004

Mr. Christopher M. Crane
President and Chief Nuclear Officer
AmerGen Energy Company, LLC
4300 Winfield Road
Warrenville, IL 60555

SUBJECT: OYSTER CREEK NUCLEAR GENERATING STATION - EXEMPTION FROM
THE REQUIREMENTS OF SECTION 109(b) OF 10 CFR PART 2, REGARDING
THE EFFECT OF TIMELY LICENSE RENEWAL APPLICATION
(TAC NO. MC3967)

Dear Mr. Crane:

The Commission has approved the enclosed exemption from the specific requirements of Title 10 of the *Code of Federal Regulations* (10 CFR), Part 2, Section 109(b), for Oyster Creek Nuclear Generating Station (OCNGS). This action is in response to an application from AmerGen Energy Company, LLC, dated August 10, 2004. Specifically, this exemption allows AmerGen to submit a license renewal application for OCNGS less than 5 years prior to the expiration of the operating license, while maintaining the protection of the timely renewal doctrine contained in 10 CFR 2.109(b), subject to the conditions imposed by the exemption.

A copy of the exemption is enclosed and is being forwarded to the Office of the *Federal Register* for publication.

Sincerely,

/RA/

Peter S. Tam, Senior Project Manager, Section 1
Project Directorate I
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

Docket No. 50-219

Enclosure: Exemption

cc w/encl: See next page

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
AMERGEN ENERGY COMPANY, LLC
OYSTER CREEK NUCLEAR GENERATING STATION
DOCKET NO. 50-219
EXEMPTION

1.0 BACKGROUND

AmerGen Energy Company, LLC (the licensee), is the holder of Facility Operating License No. DPR-16, which authorizes operation of the Oyster Creek Nuclear Generating Station (OCNGS), a boiling-water reactor facility, located in Ocean County, New Jersey. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The current operating license for OCNGS expires on April 9, 2009.

By letter dated August 10, 2004, AmerGen informed the Commission that it had determined that it would seek renewal of its operating license for OCNGS, but that it was unable until recently to decide to seek license renewal for OCNGS because of events beyond its control. AmerGen was jointly owned by Exelon and British Energy plc (BE), until December 2003. The application stated that for several years, BE had faced financial difficulties, and in December 2003, BE sold its share of AmerGen to Exelon, thereby making AmerGen a wholly owned subsidiary of Exelon Generation Company, LLC. The application stated that AmerGen was not in a position to make a reasonable and sound business decision to pursue license renewal at OCNGS due to facility ownership issues, and BE's financial restraints. AmerGen stated that, in light of these and other factors, it could not prepare and file a sufficient license

renewal application by April 9, 2004, in order to meet the 5-year time period specified in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2, Section 109(b), "Effect of timely renewal application."

2.0 REQUEST/ACTION

Section 109(b) of 10 CFR Part 2 states: "If the licensee of a nuclear power plant licensed under 10 CFR 50.21(b) or 50.22 files a sufficient application for renewal of an operating license at least 5 years prior to the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined."

This requirement for license renewal applications was established in December 1991 in conjunction with the publication of the final license renewal rule, 10 CFR Part 54, "Requirements for Renewal of Operating Licenses for Nuclear Power Plants" (56 FR 64943).

AmerGen's application requested an exemption from the timing requirements of 10 CFR 2.109(b), for submittal of the OCNGS license renewal application. The exemption would allow the submittal of the renewal application with less than 5 years remaining prior to expiration of the operating license while maintaining the protection of the timely renewal provision in 10 CFR 2.109(b). AmerGen further requested that the exemption be issued at this time, subject to the condition that it becomes effective only if, 6 months prior to expiration of the existing facility operating license, the license renewal proceeding is ongoing and a renewed operating license for OCNGS has not been issued by the NRC and, only if by that time, the NRC staff has issued both an OCNGS draft supplemental environmental impact statement (SEIS) and an OCNGS safety evaluation report (SER) with open items.

3.0 DISCUSSION

Pursuant to 10 CFR 54.15, exemptions from the requirements of Part 54 are governed by Section 50.12. Pursuant to the requirements of 10 CFR 50.12, the Commission may grant an exemption from the requirements of Part 50 when the exemption is (1) authorized by law,

will not present an undue risk to the public health and safety, and is consistent with the common defense and security, and (2) special circumstances are present as defined in 10 CFR 50.12(a)(2). In its application, AmerGen stated that OCNGS met two special circumstances: 10 CFR 50.12(a)(2)(ii), “[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule;” and 10 CFR 50.12(a)(2)(iii), “[c]ompliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.”

The purpose of 10 CFR 2.109(b), as it is applied to nuclear power reactors licensed by the NRC, is to implement the “timely renewal” doctrine of Section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. §558(c), which states:

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

The underlying purpose of this “timely renewal” provision in the APA is to protect a licensee who is engaged in an ongoing licensed activity and who has complied with agency rules in applying for a renewed or new license from facing license expiration as the result of delays in the administrative process.

On December 13, 1991, the NRC published the final license renewal rule, 10 CFR Part 54, with associated changes to 10 CFR Parts 2, 50, and 140 in the *Federal Register* (56 FR 64943). The statement of considerations (SOC) discussed the basis for establishing the latest date for filing license renewal applications and the timely renewal doctrine (56 FR 64962). The SOC stated that:

Because the review of a renewal application will involve a review of many complex technical issues, the NRC estimates that the technical review would take approximately 2 years. Any necessary hearing could likely add an additional year or more. Therefore, in the proposed rule, the Commission

modified §2.109 to require that nuclear power plant operating license renewal applications be submitted at least 3 years prior to their expiration in order to take advantage of the timely renewal doctrine.

No specific comment was received concerning the proposal to add a 3-year provision for the timely renewal provision for license renewal. The current regulations require licensees to submit decommissioning plans and related financial assurance information on or about 5 years prior to the expiration of their operating licenses. The Commission has concluded that, for consistency, the deadline for submittal of a license renewal application should be 5 years prior to the expiration of the current operating license. The timely renewal provisions of §2.109 now reflect the decision that a 5-year time limit is more appropriate.

AmerGen's application stated that the OCGNS license renewal application would be submitted in July 2005, and that application of the 5-year term in 10 CFR 2.109(b) for filing a license renewal application is not necessary in this situation to achieve the purpose of the regulation. The July 2005 filing date, which is approximately 44 months before expiration of the existing license in April 2009, according to AmerGen will provide the NRC staff with ample time in which to perform a full and adequate review.

Submittal of the OCGNS license renewal application approximately 44 months prior to expiration of the operating license would provide a review period exceeding the 3 years the NRC originally estimated was needed to review a renewal application and complete any hearing that might be held on the application. The NRC's current schedule for review of license renewal applications, which has been met for all renewal applications to date, is to complete its review and make a decision on issuing the renewed license within 22 months of receipt without a hearing. If a hearing is held, the NRC's model schedule anticipates completion of the staff's review, the hearing process, and issuance of a decision on issuing the license within 30 months of receipt. However, it is recognized that the estimate of 30 months for completion of a contested hearing is subject to variation in any given proceeding. A period of 44 months, nevertheless, is expected to provide sufficient time for performance of a full and adequate safety and environmental review, and completion of the hearing process. Meeting this

schedule is based on a complete and sufficient application being submitted in July 2005, and on the review being completed in accordance with the NRC's established license renewal review schedule.

In summary, the licensee has demonstrated that application of the subject regulation is not necessary to achieve the underlying purpose of the rule, thus meeting the criterion specified in 10 CFR 50.12(a)(2)(ii). Accordingly, the NRC staff agrees that special circumstances are present to justify the requested exemption.

It should be noted, though, that AmerGen requested that the exemption be issued now, to become effective only if circumstances were such that the NRC staff has not issued the renewed license for OCNGS 6 months prior to expiration of its existing operating license. Among the key matters central to resolution of issues associated with renewal of the operating license and also to the application of the "timely renewal" doctrine is the submission of a sufficient application. Completing the license renewal review process on schedule is, of course, dependent on licensee cooperation in meeting established schedules for submittal of any additional information required by the NRC, and the resolution of all issues demonstrating that issuance of a renewed license is warranted.

Therefore, the exemption is contingent upon the following conditions being met:

(1) on or before July 29, 2005, AmerGen must submit a sufficient license renewal application for OCNGS which the NRC staff finds acceptable for docketing in accordance with 10 CFR 2.101 and the requirements of 10 CFR Part 54; (2) to ensure timely completion of the

review process, AmerGen must provide any requested information as necessary to support the completion of the NRC staff's safety and environmental reviews in accordance with the review schedule issued by the NRC.

The NRC does not specifically condition the exemption subject to issuance of a draft license renewal SE and associated draft SEIS, despite the licensee's proposal to do so inasmuch as "timely renewal" requires only that the licensee submit a sufficient license renewal application in accordance with the agency's rules, in order for the existing license not to expire until there is a final agency determination. Of course, pending final action on the license renewal application, the NRC will continue to conduct all regulatory activities associated with licensing, inspection, and oversight, and will take whatever action may be necessary to ensure adequate protection of the public health and safety. The existence of this exemption does not affect NRC's authority, applicable to all licenses, to modify, suspend, or revoke a license for cause, such as a serious safety concern.

4.0 CONCLUSION

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not endanger life or property or common defense and security, and is, otherwise, in the public interest. In addition, special circumstances exist to justify the proposed exemption. Therefore, the Commission hereby grants the licensee an exemption from the requirement of 10 CFR 2.109(b) for OCNCS. Specifically, this exemption will allow the submittal of the OCNCS license renewal application with less than 5 years remaining prior to expiration of the operating license while maintaining the protection of the timely renewal provision in 10 CFR 2.109(b), subject to the two conditions set forth above.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (69 FR 76795).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 22nd day of December 2004.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

Ledyard B. Marsh, Director
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Oyster Creek Nuclear Generating Station
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