November 1, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:	
Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, and AmerGen Energy Company, LLC (Nine Mile Point Nuclear Station, Units 1 and 2)	Docket Nos. 50-220-LT 50-410-LT

NIAGARA MOHAWK POWER CORPORATION'S AND NEW YORK STATE ELECTRIC & GAS CORPORATION'S ANSWER TO PETITION OF CENTRAL HUDSON GAS & ELECTRIC CORPORATION, LONG ISLAND POWER AUTHORITY, AND ROCHESTER GAS AND ELECTRIC CORPORATION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.1307(a), Niagara Mohawk Power Corporation ("Niagara Mohawk") and New York State Electric & Gas Corporation ("NYSEG"), licensees in the captioned matter, hereby file their answer to the petition for leave to intervene and request for hearing ("Petition") filed on October 20, 1999, by Central Hudson Gas & Electric Corporation ("Central Hudson"), Long Island Power Authority ("LIPA," as successor to Long Island Lighting Company),[1] and Rochester Gas and Electric Corporation ("RG&E") (collectively referred to as "Co-tenants" or "Petitioners"). The Petition responds to the "Notice of Consideration of Approval of Transfer of Operating Licenses and Conforming Amendments, and Opportunity for

[1] LILCO remains the licensed entity.

a Hearing," published in the *Federal Register* on September 30, 1999 (64 Fed. Reg. 52798) ("Notice"). The Notice concerns the Application to transfer to AmerGen Energy Company, LLC ("AmerGen"), Facility Operating License No. DPR-63 for Nine Mile Point Nuclear Station, Unit 1 ("NMP1"), and the respective ownership shares of Niagara Mohawk and NYSEG and the operating authority of Niagara Mohawk under Facility Operating License No. NPF-69 for Nine Mile Point Nuclear Station, Unit 2 ("NMP2"), (hereinafter, Niagara Mohawk, NYSEG, and AmerGen are referred to collectively as "Applicants").

To intervene in a Nuclear Regulatory Commission ("NRC" or "Commission") licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., the petitioner must demonstrate "standing." See the Atomic Energy Act of 1954, as amended ("AEA"), Section 189a, 42 U.S.C. § 2239(a). While the Commission has generally followed judicial notions of standing in reactor licensing cases, more recently the Commission has recognized that more limited standing may better serve the public interests encompassed by the AEA. This view has been endorsed by the United States Court of Appeals for the District of Columbia Circuit. See Envirocare of Utah, Inc. v. NRC, No. 98-1426 (D.C. Cir., Oct. 22, 1999). NRC regulations also require that a petition for intervention raise at least one admissible contention or issue. The standards for meeting these two requirements in license transfer cases come from the procedural regulations in 10 C.F.R. Part 2, Subpart M, as illuminated by NRC adjudications interpreting those regulations.

This Answer outlines the approval at issue and the legal standard for intervention in a Subpart M proceeding. It then discusses the showing of interest made by Petitioners, the primary issues raised by Petitioners and several other preliminary matters raised by them. As

discussed below, Petitioners have not satisfied the Commission's requirements for intervention. Therefore, in accordance with 10 C.F.R. § 2.1308, the Petition should be denied.

II. BACKGROUND

A. The Approval at Issue

Niagara Mohawk is currently the sole owner and operator of NMP1. The transfer of the license for NMP1 would be to AmerGen. Niagara Mohawk currently holds a 41% undivided ownership interest in NMP2, is its exclusive licensed operator, and acts as agent for its other co-owners. The other current co-owners, who may possess but not operate NMP2, are NYSEG with an 18% interest, LIPA with an 18% interest, RG&E with a 14% interest, and Central Hudson with a 9% interest. Under the proposed transfer for NMP2, Niagara Mohawk's and NYSEG's possessory interests, and Niagara Mohawk's operating authority under the license for NMP2, would be transferred to AmerGen.

Accordingly, following the proposed transfers, AmerGen would become the licensed operator of both NMP units, the sole owner of NMP1, and a 59% co-owner of NMP2. Under the proposed transfers, AmerGen would be authorized to possess, use, and operate NMP1 and NMP2 under essentially the same conditions and authorizations included in the existing licenses. No physical changes would be made to either NMP1 or NMP2 as a result of the proposed transfer, and there would be no significant changes in the day-to-day operations of either unit.

B. The Right to Intervene in a Subpart M Licensing Proceeding

To intervene in a Commission licensing proceeding under 10 C.F.R. Part 2, Subpart M, a petitioner must:

1. set forth the issues (factual and/or legal) that petitioner seeks to raise;

2. demonstrate that those issues fall within the scope of the proceeding;

3. demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application;

4. show that a genuine dispute exists with the applicant regarding the issues; and

5. provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. §§ 2.1306(b)(2) and 2.1308; North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201, 215 (1999). See generally Baltimore Gas & Elec. Co (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998).[2]

III. DISCUSSION

A. Issue 1: Sufficiency of the Application

Petitioners allege that, as a matter of law, the Application is insufficient in several respects and should be rejected by the NRC.

1. The scope of the Applicants' authority under the Operating and Basic Agreements is a contractual issue outside the jurisdiction of the NRC[3]

First, the Petitioners claim that "the Application incorrectly represents the scope of authority possessed by the Applicants." Petition at 14. Petitioners assert that Niagara Mohawk is not authorized to act as agent on behalf of the Petitioners in this matter. Id.

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[2] A petitioner must also demonstrate that its interest may be affected by an order granting the requested transfer, i.e., a petitioner must show that it has "standing." 10 C.F.R. § 2.1308(a)(1-3). Under the standard recently set forth in North Atlantic Energy Service Corp., 49 NRC 201, Niagara Mohawk and NYSEG do not contest Petitioners' standing in this proceeding. As noted, however, Petitioners' right to participate in any proceeding is not secured by traditional "standing" concepts.

[3] This issue is only applicable to the proposed license transfer for NMP2.

Petitioners appear to argue that they should be allowed to utilize the NRC adjudicatory process to block consideration of the subject license transfer based upon an interpretation of a contract among the parties.

This is clearly not an appropriate matter for consideration by the NRC. The NRC has clearly set forth its position that "[a]bsent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court." Gulf States Utilities Company, et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 39 n.5 (1994).

NRC cannot grant Petitioners any relief on this issue. Therefore, the contractual allegations raised by Petitioners are not within the scope of this proceeding and should not be addressed.[4]

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[4] Niagara Mohawk and NYSEG can point to a number of provisions in the Operating Agreement and Basic Agreement (in parts not supplied by Petitioners) that gives them the right to file this Application. For example, Section 4.01 of the Basic Agreement states that:

> Niagara Mohawk as agent for and on behalf of the Parties hereto, shall use its best efforts to obtain as expeditiously as possible, in consultation with the other Parties, all remaining governmental and regulatory licenses, consents or approvals, to effect the construction, operation and maintenance of the Plant. If a legal or regulatory condition prohibits Niagara Mohawk from acting as agent for and on behalf of the other Parties, the Parties hereto shall cooperate and use their best efforts to obtain such necessary licenses, consents or approvals."

Section 4.02 states that "[t]he Parties ... shall assist Niagara Mohawk in the preparation and obtainment of all licences [sic], consents or approvals necessary to effect the construction, operation and maintenance of the Plant."

Any other interpretation would give Co-tenants an absolute veto over the sale of an interest in the station, a result clearly not intended by the parties as reflected in these agreements.

2. Information withheld from public disclosure is available to Petitioners and not within the scope of this proceeding

Petitioners claim that the application is deficient because "information of substantial public interest has been withheld from public disclosure as proprietary without adequate basis." Petition at 14. But AmerGen has met the requirements of 10 C.F.R. § 2.790 for withholding of information from public disclosure, and Petitioners do not argue to the contrary. As may be seen by the Petition and attached Declaration of John J. Reed, Petitioners and their experts have had access to any publicly withheld information and are unable to demonstrate that they have been harmed by any public non-disclosure. Consequently, this issue does not deserve further consideration.

3. Issues arising under the Operating Agreement are contractual in nature and outside the jurisdiction of the NRC[5]

Petitioners next claim that the "Application is ultra vires in that it would effectively abrogate the current Operating Agreement for NMP 2 without the consent of the Co-tenants." Petition at 14. Again, this is a purely contractual matter, unrelated to the safe operation of the units. As discussed above in Section III.A.1, contractual disputes between co-owners of nuclear facilities should be resolved by the appropriate state, local, or federal court. River Bend, 39 NRC 31, 39 n.5.

4. Issues Arising Under the Basic Agreement are Contractual in Nature and Outside the Jurisdiction of the NRC[6]

The Petitioners' last claim under Issue 1 is quite similar to the previous claim: the "Application is ultra vires in that it effectively abrogates the Co-tenants' right of first refusal

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[5] This issue is only applicable to the proposed license transfer for NMP2.

[6] This issue is only applicable to the proposed license transfer for NMP2.

under the Basic Agreement in effect for NMP 2." Petition at 15.[7] Petitioners have not explained how this application abrogates their right of first refusal. They are merely attempting to gain some advantage in their possible bid for the units by utilizing the NRC adjudicatory process, and have failed to explain how their asserted right of first refusal is within the scope of the Commission's jurisdiction. As with disputes arising under the Operating Agreement, this issue, which arises under the Basic Agreement, is a purely contractual matter, unrelated to the safe operation of the units, and must be left for the court to decide. River Bend, 39 NRC 31, 39 n.5.

B. Issue 2: Financial Qualifications for Operations

Here, Petitioners claim that "[i]n several respects, AmerGen has failed to demonstrate the requisite financial qualifications to own and operate NMP 1 and 2 as required by 10 C.F.R. § 50.33 (f). . . ." Petition at 17. This issue is addressed in AmerGen's answer to the Petition. Niagara Mohawk and NYSEG concur with AmerGen's response that Petitioners have failed to state an issue meeting NRC requirements for adjudication and support its position that it is financially qualified to own and operate the units in accordance with NRC requirements. Niagara Mohawk and NYSEG are necessary parties to consideration of this issue in this proceeding, have unique information and perspectives available to them, and as such, can expect to significantly contribute to the evidence necessary for the NRC to make a proper decision were this issue to be admitted.

C. Issue 3: Decommissioning Funding Assurance

Petitioners claim that the "Application fails to demonstrate that AmerGen meets the NRC decommissioning funding requirements. . . ." Petition at 26. This issue is addressed in AmerGen's answer to the Petition. Niagara Mohawk and NYSEG concur with AmerGen's

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[7] Petitioners make an identical claim on page 4 of the Petition.

response that Petitioners have failed to state an issue meeting NRC requirements for adjudication and support its position that it meets NRC requirements for decommissioning funding. Niagara Mohawk and NYSEG are necessary parties to consideration of this issue in this proceeding, as the holders of the decommissioning trust funds have unique information and perspectives available to them, and as such, can expect to significantly contribute to the evidence necessary for the NRC to make a proper decision were this issue to be admitted.

D. Issue 4: Technical Qualifications

Petitioners claim that "AmerGen itself has not been shown to possess the requisite technical qualifications [to ensure safe operations of the units]." Petition at 30. This issue is addressed in AmerGen's answer to the Petition. Niagara Mohawk and NYSEG concur with AmerGen's response that Petitioners have failed to state an issue meeting NRC requirements for adjudication and support its position that it is technically qualified to own and operate the units in accordance with NRC requirements. We would note that at most the Petition raises "concerns" or generalized issues which do not fulfill the detailed requirements for admission of issues in NRC proceedings. Niagara Mohawk and NYSEG are necessary parties to consideration of this issue in this proceeding, have unique information and perspectives available to them, and as such, can expect to significantly contribute to the evidence necessary for the NRC to make a proper decision were this issue to be admitted.

In particular, it is significant to note that Petitioners ignore the demonstrated ability and technical qualifications of the present employees of Niagara Mohawk to safely operate the facility. Both units are presently operated by a self-contained nuclear organization

that will be essentially the same immediately after the license transfer.[8] Petitioners have failed to allege that this organization is not capable of sustaining safe operation of the units after the license transfer.

E. Issue 5: Provision of Offsite Power

1. The new interconnection agreement demonstrates compliance with NRC requirements concerning off-site power

Petitioners claim that the "Application does not provide sufficient information to demonstrate compliance with [General Design Criteria 17 and 10 C.F.R. § 50.63]," which concern the ability to provide adequate off-site power. Petition at 33. Initially, though couched in terms of Commission requirements, this is in fact merely another instance of a contractual matter which Petitioners wish to inject into the Commission's adjudicatory process.

Whether or not the Management Committee reviews interconnection arrangements does not affect compliance with Commission requirements. The remainder of the stated issues dealing with the possibility of unilateral sale or disposition of interconnection facilities or changes to the offsite power for Unit 2 is completely speculative. Clearly, any licensee, including AmerGen, must obtain approval from the NRC for any future significant changes in the arrangements for offsite power.

Indeed, an interconnection agreement for NMP2 was discussed at a Management Committee meeting held on October 26, 1999, and one or more technical meetings are planned to discuss the agreement. A vote among the owners of NMP2 (based on their respective share of

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[8] Petitioners also raise questions concerning a possible future merger between one of the members of AmerGen, PECO Energy, and Unicom. Clearly, any consideration of that potential merger is premature in that no application has been filed and it is in its preliminary stages. Such merger is clearly beyond the scope of this proceeding.

the facility), for approval of an interconnection agreement is planned for November 30, 1999. Thus, Petitioners have failed to meet the requirements for consideration of this issue.

F. Other Issues

In addition to the five issues described above, Petitioners have raised several others in the Petition.

1. There is no basis to defer the NRC proceeding until completion of the state Public Service Commission ("PSC") proceeding

Petitioners suggest that, for several reasons, the NRC should defer any hearing on the license transfer application until completion of the proceedings now being conducted by the New York Public Service Commission ("NYPSC") pursuant to Section 70 of the New York Public Service Law.[9] Petition at 5. It is well settled, however, that the NRC, other federal agencies, and their adjudicatory boards must decide only the federal questions before them, without awaiting the decisions of others with differing concerns and responsibilities. The NRC has consistently proceeded expeditiously to consider matters before it, even during the contemporaneous conduct of proceedings on related issues before other agencies. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985). See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984). Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983) (citing cases). See also Cross Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 732-33 (2d Cir. 1978). Consequently, Petitioners' suggestion to defer the NRC proceeding until completion of the NYPSC proceeding should be denied.

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[9] Under § 70 of the New York Public Service Law, a utility may not transfer a generating plant without prior approval of the NYPSC.

2. There is no basis to defer the NRC proceeding because of any burden on the interested parties

Petitioners also suggest that the NRC should defer the license transfer proceeding "to lessen the burden on all interested parties." Petition at 5. Petitioners are thus asking the NRC to defer a proceeding instituted at their behest. Although this proceeding may impose some burden upon the parties, Petitioners assumed all the responsibilities attendant to intervention in NRC hearings by initiating this proceeding. The pressures of other professional responsibilities are not a basis for alleviating that burden. West Chicago Rare Earths Facility, 22 NRC at 832; Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2) ALAB-678, 15 NRC 1400, 1416 n.33 (1983). The NRC should not allow Petitioners to abdicate responsibilities required even of pro se intervenors who lack the resources available to Petitioners and their counsel. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 US 519, 553 (1978); Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems (Manufacturing License For Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975). Therefore, the NRC proceeding should not be delayed because of any potential burden to the parties.

3. There is no basis to defer the NRC proceeding until the state PSC proceeding is complete

Petitioners raise several claims related to deferral of the NRC proceeding until completion of the NYPSC proceedings. Delay in the completion of this proceeding, however, could affect the parties' ability to complete this transaction in a timely manner, thus causing significant financial harm to these parties. Petitioners claim that the NRC proceeding should be deferred until resolution of public policy issues in the NYPSC proceeding. Petition at 3, 4.

Petitioners also claim that the NRC Proceeding should be deferred because the PSC is considering similar issues. Petition at 4.

Petitioners offer no basis, however, for the NRC proceeding to be deferred. The public policy argument fails because, as discussed above in Section F.1, the NRC and its adjudicatory boards, like other federal agencies, must decide only the federal questions before it, without awaiting the decisions of other agencies with differing concerns and responsibilities. West Chicago Rare Earths Facility, 22 NRC at 832. Although the NRC and other agencies must review this transaction, the standard used in the PSC proceedings derives from New York law and is clearly different from the standards and findings the NRC makes. Under the AEA, these findings concern, inter alia, decommissioning funding, financial resources, and perhaps even more significantly, the technical qualifications of AmerGen to operate the plants. Clearly, the NRC has specific statutory responsibility for these issues and should not await the outcome of state proceedings.

4. Petitioners have not demonstrated any appropriate basis to support their claim that this proceeding should be conducted pursuant to a Subpart G full evidentiary hearing rather than Subpart M

Petitioners state that "[i]f the hearing in this matter is not deferred, Co-tenants suggest that the issues identified herein be set for a full evidentiary hearing." Petition at 5. Petitioners request that a Subpart G hearing should be used because the "Subpart M hearing process did not contemplate the issues raised in this license transfer application." Id. at 5, 6.

Notwithstanding Petitioners' "suggestion" that the Commission may decide whether to exercise its discretion to use Subpart G in this proceeding (Petition at 6 n.1), "[n]either the Commission nor the Presiding Officer will entertain motions from the parties that request such special procedures or formal hearings." 10 C.F.R. § 2.1322(d). Petitioners'

"suggestion" to use Subpart G procedures is a thinly veiled request, prohibited by Section 2.1322(d).

Even so, it is clear that Subpart M is the proper vehicle for this proceeding. Petitioners choose to ignore that Subpart M was enacted specifically to address the kind of issues presented by this license transfer. See "Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66721 (Dec. 3, 1998). The NRC promulgated Subpart M in view of the restructuring typically seen in a deregulated environment. "Electric utilities in particular are now operating in an environment which is increasingly characterized by restructuring and organizational change." 63 Fed. Reg. at 66721. The NRC also noted that, "[i]n general, license transfers do not involve any technical changes to plant operations. Rather, they involve changes in ownership or partial ownership of facilities at a corporate level." Id. This is precisely the situation in the license transfer at issue here, and the norm in the current deregulated market — not the unusual or unique situation Petitions allege it to be.[10]

[10] Subpart M procedures are adequate and should be utilized if a hearing is required. The only reason that Subpart M procedures can be waived in a license transfer case is "because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted." 10 C.F.R. § 2.1329(b). Petitioners have neither attempted nor made any such showing here.

IV. CONCLUSION

For reasons set forth above, Petitioners' request for leave to intervene does not satisfy the requirements of 10 C.F.R. § 2.1306. Accordingly, the Petition should be denied.

Respectfully submitted,

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Dated in Washington, D.C.
this 1st day of November 1999