



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

TRANSFER OF FACILITY OPERATING LICENSE

FROM GENERAL PUBLIC UTILITIES NUCLEAR, INC., ET AL.

TO AMERGEN ENERGY COMPANY, LLC

AND APPROVAL OF CONFORMING AMENDMENT

THREE MILE ISLAND NUCLEAR STATION, UNIT 1

DOCKET NO. 50-289

1.0 INTRODUCTION

By application dated December 3, 1998, AmerGen Energy Company, LLC (AmerGen) and GPU Nuclear, Inc. (GPUN), acting for itself and on behalf of the Metropolitan Edison Company (Met-ED), Jersey Central Power and Light Company (JCP&L), and Pennsylvania Electric Company (Penelec), requested that the U.S. Nuclear Regulatory Commission (NRC) consent to the transfer of Facility Operating License No. DPR-50 for Three Mile Island Nuclear Station, Unit 1 (TMI-1) from GPUN to AmerGen. The application also requested the approval of a conforming license amendment to reflect the proposed transfer. The NRC staff reviewed the initial application and determined that additional information was needed to complete the review. On December 21, 1998, a request for additional information (RAI) was sent to GPUN and AmerGen related to technical and financial qualification issues. GPUN and AmerGen sent supplemental information dated January 11, 1999, in response to the NRC staff's RAI. Additional supplemental information was received on February 4, 1999. The supplemental information did not expand the scope of the application as originally noticed in the *Federal Register*.

Met-Ed, JCP&L, and Penelec (doing business as, and hereinafter referred to collectively as, GPU Energy) are wholly owned electric utility subsidiaries of GPU, Inc. (GPU), an electric utility holding company registered under the Public Utility Holding Company Act of 1935. GPUN, which is also a wholly owned subsidiary of GPU, is the licensed operator of TMI-1, and the GPU Energy companies are the licensed owners of TMI-1. Met-Ed owns 50% of TMI-1, and JCP&L and Penelec each own 25%; these three companies own the same respective shares of Three Mile Island Nuclear Station, Unit 2 (TMI-2). Upon completion of the proposed transfer, AmerGen will become the sole licensed owner and operator of TMI-1. The application does not propose any transfer of the TMI-2 license to AmerGen.

ENCLOSURE 3

#### 4.0 ANTITRUST CONSIDERATIONS

Section 105 of the Atomic Energy Act of 1954, as amended (the AEA), requires the Commission to conduct an antitrust review in connection with an application for a license to construct or operate a facility under Section 103 of the AEA. TMI-1 was licensed under Section 104b and, as a result, is not subject to an antitrust review by the NRC in connection with the proposed transfer of the TMI-1 license to AmerGen.

#### 5.0 FOREIGN OWNERSHIP, CONTROL, OR DOMINATION

##### A. Background

Section 104d of the AEA prohibits the Commission from issuing a license for a nuclear power plant under Section 104 to "any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." The Commission's regulations at 10 CFR 50.38 contain virtually identical language to implement this prohibition. The issue addressed in this section is whether, in the NRC staff's view, AmerGen is controlled by foreign interests such that it may not be issued a license under Section 104.

The NRC has developed a draft Standard Review Plan (SRP) to document the process that the staff uses to analyze whether an applicant is owned, controlled, or dominated by foreign interests within the meaning of Section 104d. The staff has used this SRP, which was approved by the Commission for interim use until made final, as guidance for evaluating the foreign ownership considerations of the proposed purchase of TMI-1 by AmerGen.

##### B. Discussion

##### AmerGen's Ownership and Organization

AmerGen is a limited liability company formed to acquire and operate nuclear power plants in the United States. AmerGen is organized under the laws of the State of Delaware pursuant to an agreement among PECO Energy Company (PECO) (a Pennsylvania corporation), British Energy, plc (BE, plc) (a Scottish corporation), and British Energy Inc. (BE Inc.) (a Delaware corporation that is a wholly-owned subsidiary of BE, plc). PECO and BE, Inc., each owns 50 percent of AmerGen. AmerGen's 50 percent indirect ownership by BE, plc, a foreign corporation, raises the issue of whether AmerGen is owned, controlled, or dominated by foreign interests within the meaning of the prohibition contained in Section 104d of the AEA.

##### Guidance Relevant to the Issue of Foreign Control

The Commission has had limited experience with license transfer applications that involve the issue of foreign ownership, domination, or control. The Commission has stated that, in the context of the other provisions of Section 104d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security. Guidance in the SRP provides that an applicant that is partially owned by a foreign entity, for example, foreign ownership of 50 percent or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant who are responsible

for special nuclear material must be U.S. citizens. In addition, partial ownership must be considered in light of all of the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of ownership interests or shares.

A 1973 Atomic Energy Commission decision, relating to the transfer of several licenses issued under Section 104d of the AEA, is somewhat analogous to the situation of AmerGen and provides further guidance. This decision was cited in Exhibit 3 of Appendix 4 of the TMI-1 license transfer application. The Commission approved a request by the Gulf Oil Corporation (Gulf) to transfer licenses for three TRIGA research reactors and the Barnwell spent fuel reprocessing plant then under construction to a newly formed partnership, the General Atomic Company, that was 50 percent owned by Gulf and 50 percent owned by Scallop Nuclear, Inc., a Delaware corporation that was in turn ultimately owned by both Royal Dutch Petroleum, a Netherlands company, and Shell Transport and Trading, a British Company. In approving these transfers, the Atomic Energy Commission imposed several conditions to ensure that there would not be foreign control over the licenses being transferred.<sup>1</sup>

#### Information Provided

AmerGen has provided the information required by 10 CFR 50.33(d) and specified in Section 2.2 of the draft SRP on Foreign Ownership, Control, and Domination. AmerGen has also submitted information that essentially describes a "negation action plan" as referred to in Section 4.4 of the SRP. In addition, Exhibit 3 of Appendix A of the TMI-1 license transfer application contains a discussion of "Foreign Ownership Issues Related to the Transfer of the TMI-1 License to AmerGen In Light of British Energy's Participation in AmerGen," (the foreign ownership discussion). The staff believes that this information is sufficient to conclude that AmerGen has taken, or has committed to take, sufficient mitigating steps to ensure that AmerGen is not owned, controlled, or dominated by an alien, foreign corporation, or foreign government for the purposes of the AEA and the NRC's regulations.

As stated earlier, AmerGen is a limited liability company. Its principal place of business is Wayne, Pennsylvania. Principal officers of AmerGen include both U.S. and British citizens, with the chief executive officer (CEO) and chief nuclear officer (CNO) being U.S. citizens, and the president being a British citizen. The management committee, which directs and controls

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<sup>1</sup> These conditions included the following:

- (1) the president and any officers of the partnership having direct responsibility for the control, and any employees having direct custody of, special nuclear material must be U.S. citizens.
- (2) a separate department of General Atomic must be responsible for special nuclear material, and the head of the department must report directly to the president.
- (3) the president shall be charged with the responsibility and exclusive authority of ensuring that the business and activities of the partnership are at all times conducted in a manner consistent with the protection of the common defense and security of the United States.
- (4) the foregoing conditions apply to the partnership and to any entities in which the partnership shall have voting control.
- (5) General Atomic will not change any of the foregoing conditions without approval of the Director of Regulation of the AEC or of the person holding any equivalent successor position with the Commission or its successor.

the affairs of AmerGen, consists of at least 50 percent U.S. citizens, including the chairman. The chief executive officer "shall employ," subject to management committee approval, officers of the company "necessary or appropriate" to conduct AmerGen's business.

In its application of December 3, 1998, AmerGen indicated that, based on filings with the U.S. Securities and Exchange Commission (SEC), "as of June 30, 1998, no alien, foreign corporation, foreign government or foreign entity owns or controls more than 5% of the outstanding voting stock of PECO Energy." AmerGen indicated that PECO Energy is aware of one foreign entity that owns 2.27 percent of PECO Energy's stock. This entity is a U.K. subsidiary of a U.S. insurance company and, therefore, is ultimately under the control of a non-foreign entity. Additionally, on March 4, 1999, Michael J. Egan submitted a supplementary letter to the NRC under affirmation, which indicated that United Bank of Switzerland AG (UBS), AG, a Swiss bank, has filed a Form 13G with the SEC. This Form 13G indicates that UBS, AG, currently owns approximately 7 percent of PECO Energy voting stock. [

] The staff has evaluated this ownership in the context of AmerGen's management committee structure and mechanisms to ensure that control over decisions on safety issues remains in the hands of the non-foreign member group of AmerGen, and the conditions of approval of the transfer set forth below that require that certain officers of AmerGen and appointees to the management committee be U.S. citizens. The staff concludes that UBS, AG's ownership of 7 percent of PECO Energy voting stock, given the special circumstances and limitations regarding UBS, AG's holding of the stock described in the March 4, 1999, letter and the context described above, does not provide the staff reason to believe that AmerGen is controlled by foreign interests within the meaning of the prohibition in Section 104 of the AEA.

BE, plc, does not have securities registered with the SEC and thus beneficial owners of BE, plc, securities are not subject to SEC filing requirements. The NRC staff has no reason to believe that BE, plc, is other than a widely-held Scottish company as represented in its financial reports.

#### AmerGen's Proposed Measures To Address Foreign Control Concerns

AmerGen has developed a negation action plan to address foreign control issues. The foreign ownership discussion outlines several steps that AmerGen has taken and intends to take to ensure that "all [s]afety issues" will be under the control of U.S. citizens. Under the Limited Liability Company Agreement (LLC Agreement), included with the application the "property,

business, and affairs" of AmerGen are directed and controlled by a Management Committee pursuant to Article 6.3. Under Article 6.1(a) of the LLC Agreement, PECO, through the PECO Energy Member Group, appoints and may remove half of the members of the Management Committee, and BE, Inc., through the BE Member Group also appoints and may remove half of the members of the Management Committee. (AmerGen indicates that, currently, there are six members of the Management Committee, half of whom are appointed by PECO Energy and are U.S. citizens, and half of whom are appointed by BE, Inc., and are U.K. citizens.) Pursuant to Article 6.1(d) of the LLC Agreement, the PECO Energy Member Group appoints the Chairman of the Management Committee. The Chairman can only be removed by the PECO Energy Member Group. The Chairman of the Management Committee has a tie-breaking vote on the Management Committee regarding "all [s]afety issues."

"Safety Issue" is defined in Section 1.7 of the LLC Agreement to mean any matter that concerns any of the following:

- (i) implementation or compliance with any Generic Letter, Bulletin, Order, Confirmatory Order or similar requirement issued by the NRC;
- (ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
- (iii) placement of the plant in a safe condition following any nuclear event or incident;
- (iv) compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC rule;
- (v) compliance with a specific operating license and its technical specifications;
- (vi) compliance with a specific Updated Final Safety Analysis Report, or other licensing basis document.<sup>2</sup>

The staff concludes that this definition broadly encompasses all issues involving common defense and security as well as public health and safety that are under NRC jurisdiction.

AmerGen indicates that Michael J. Egan, a U.S. citizen and Chief Financial Officer of PECO Energy, is the Chairman of the Management Committee. Additionally, the CEO of AmerGen, who is elected by the Management Committee and is responsible for the day-to-day operations of AmerGen, is Dickinson M. Smith, a U.S. citizen. The president of AmerGen is Dr. Robin Jeffrey, a U.K. citizen. AmerGen indicated in the September 17, 1998, meeting with NRC staff that the president will not have decision-making authority with respect to TMI-1 operations. Rather, the president's duties will be directed toward business decisions, such as future acquisitions by AmerGen and other financial matters. He will also monitor the performance of AmerGen's nuclear assets and will provide, from time to time, advice regarding operational matters. The NRC staff believes that the provisions of the LLC Agreement may not specifically require that AmerGen's CEO and Chairman of the Management Committee must be U.S. citizens in the future. However, AmerGen has indicated in its supplemental

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<sup>2</sup> The definition of "Safety Issue" also states, "Any matter on which the Management Committee shall vote in accordance with Section 6.3 that is not primarily one of nuclear safety shall not constitute a Safety Issue, so that, for purposes of illustration only, any plant expenditure of a material nature intended to extend the economic operational life or improve the economic performance of the power station in question shall not be considered a safety question." The staff believes that, for purposes of establishing whether safety decisions are subject to foreign ownership, domination, or control, this and analogous distinctions are acceptable and do not appear to compromise such safety decisions.

information that it commits to having the Chairman, as well as half the Management Committee, be U.S. citizens. As discussed below, the staff believes that such a requirement should be made a condition of the order issued to approve AmerGen's application to own and operate TMI-1.

AmerGen has also indicated that the current site personnel at TMI-1 (approximately 700 employees) and selected headquarters employees will be transferred to AmerGen from GPU Nuclear, Inc., the current TMI-1 licensee. These people will be augmented by qualified AmerGen employees and contractors. Additionally, AmerGen expects that both PECO Nuclear (a division of PECO) and British Energy will also provide various support services.

The foreign ownership discussion also recommends that substantial weight should be given to the fact that BE, plc, is a corporate citizen of the United Kingdom. The U.K. is, of course, a close ally of the United States to the degree that the U.S. and the U.K. have had an often-cited "special relationship" since at least World War II. The U.K. is also a signatory to the Treaty on Non-Proliferation of Nuclear Weapons, supports the International Atomic Energy Agency (IAEA) safeguards, is a member of the European Atomic Energy Community (EURATOM), and adheres to other international nuclear safety and safeguards guidelines. The MLB paper specifically cites a 1995 decision by the U.S. Secretary of Energy, which found that a U.S. -- EURATOM agreement of cooperation is not inimical to the common defense and security of the United States. BE, plc, as a U.K. corporation, is subject to the laws of the U.K. and the international conventions and treaties to which the U.K. adheres.

The staff believes that, as a matter of policy, these facts are consistent with making a non-inimicality finding with respect to protecting the common defense and security of the U.S. Such facts, though not dispositive of the prohibition of foreign ownership, control, or domination under Section 104d of the AEA, are also consistent with a favorable determination under that section, because, as the Commission has stated, in context with the other provisions of Section 104d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security.

#### Staff Conclusions with Respect to Foreign Ownership Considerations

The staff has considered guidance contained in the Commission's previous decisions with respect to foreign ownership, domination, or control, and contained in the SRP. The staff has also evaluated AmerGen's proposed operating structure, and information concerning the management officials of the company. As a result, the staff concludes that the transfer of the operating license for TMI-1 to AmerGen would not violate the prohibitions in the AEA pertaining to foreign ownership, control, or domination, provided that AmerGen is subject to the following conditions. The staff believes that these conditions are consistent with Commission precedent.

#### Conditions of Approval/License Conditions:

1. The Limited Liability Company Agreement dated August 18, 1997, may not be modified in any material respect concerning decision-making authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.

2. At least half of the members of AmerGen's Management Committee shall be appointed by a non-foreign member group, all of which appointees shall be U.S. citizens.
3. The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) (if someone other than the CEO), and Chairman of the Management Committee of AmerGen shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of AmerGen with respect to the TMI-1 license are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States.
4. AmerGen shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of filing with the U.S. Securities and Exchange Commission any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered class of PECO Energy stock.

## 6.0 INSURANCE

The provisions of the Price-Anderson Act (Section 170 of the AEA) and 10 CFR Part 140 require that AmerGen be added to the current TMI indemnity agreement. Additionally, in accordance with these requirements, AmerGen must provide primary insurance of \$200 million and participate in the secondary retrospective insurance pool once it becomes a licensee. These requirements can be met by purchasing insurance policies from the nuclear liability insurance pool, American Nuclear Insurers. AmerGen also will be required to maintain property insurance as specified in 10 CFR 50.54(w). The staff does not have any reason to believe that AmerGen will be unable to meet the statutory and regulatory insurance requirements applicable to all power reactor licensees.

Consistent with NRC practice, the staff will require AmerGen to provide satisfactory documentary evidence that AmerGen has obtained the appropriate amount of insurance required of licensees under 10 CFR Part 140 of the Commission's regulations, prior to the issuance of the amended license reflecting AmerGen as the licensee. Since the issuance of the amended license is directly tied to the consummation of the sale and transfer of TMI-1, the order approving the transfer should contain a condition providing that prior to consummation of the sale and transfer of TMI-1 to AmerGen, AmerGen shall provide satisfactory documentary evidence to the staff that AmerGen has obtained the appropriate amount of insurance required of licensees under 10 CFR Part 140 of the Commission's regulations.

## 7.0 TECHNICAL QUALIFICATIONS

The staff reviewed the December 3, 1998, application and determined that additional information was needed to complete the review of AmerGen's technical qualifications. The NRC staff's December 21, 1998, request for additional information (RAI) asked that GPUN and AmerGen describe (1) the new organizational structure for the integrated management of the facility, (2) the management controls and lines of communication and authority between the new management and the organizational units involved in the day-to-day operation of the