

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION
PROPOSED TRANSFER OF OYSTER CREEK NUCLEAR GENERATING STATION
OPERATING LICENSE
FROM JERSEY CENTRAL POWER & LIGHT COMPANY AND GPU NUCLEAR, INC.
TO AMERGEN ENERGY COMPANY, LLC
DOCKET NO. 50-219

1.0 INTRODUCTION

By application dated November 5, 1999, as supplemented by two letters dated April 6, 2000, and another letter dated April 13, 2000, AmerGen Energy Company, LLC (AmerGen), and GPU Nuclear, Inc. (GPUN), acting on its own behalf and on behalf of Jersey Central Power & Light Company (JC), requested that the U.S. Nuclear Regulatory Commission (NRC) consent to the transfer of Facility Operating License No. DRP-16 for Oyster Creek Nuclear Generating Station (OC, or Oyster Creek) from GPUN and JC to AmerGen. The application also requested NRC approval of a conforming license amendment to reflect the proposed transfer. The letters of April 6, 2000, and of April 13, 2000, provided clarifying information which did not expand the scope of the application as originally noticed in the Federal Register.

GPUN and AmerGen requested that the NRC consent to this transfer and authorize AmerGen to possess, use, and operate OC under the same conditions and authorizations included in the existing Operating License, except as modified as requested by their application. According to the applicants, no physical changes will be made to OC as a result of this transfer, and there will be no significant changes in the day-to-day operations of OC. GPUN, the licensed operator of OC, is a wholly owned subsidiary of GPU, Inc. (GPU), an electric utility holding company registered under the Public Utility Holding Company Act of 1935. JC is the 100-percent owner of OC and is also a wholly owned public utility subsidiary of GPU. After the proposed transfer, AmerGen will become the sole licensed owner and operator of OC.

2.0 BACKGROUND

AmerGen is a limited liability company formed to acquire and operate nuclear power plants in the United States; its principal office is in Wayne, Pennsylvania. AmerGen is organized under the laws of the State of Delaware pursuant to the AmerGen Limited Liability Company Agreement among PECO Energy Company (PECO Energy, or PECO), a Pennsylvania company; British Energy, plc (British Energy, or BE plc), a Scottish corporation; and British Energy, Inc. (BE Inc.), a Delaware corporation that is a wholly owned subsidiary of BE plc. BE plc is a party to the AmerGen Limited Liability Company Agreement, but only PECO and BE, Inc., are members of AmerGen, each holding a 50-percent ownership interest in AmerGen.

NRC Staff's Conclusion on the Decommissioning Funding Assurance Mechanism

The NRC staff concludes that, based on the above discussion and subject to the trust agreement containing the provisions previously discussed, AmerGen's proposed decommissioning funding assurance mechanism meets the requirements of 10 CFR 50.75(e). The staff further concludes that to ensure that the decommissioning trust is maintained consistent with the staff's action on the application, the following should be included as a condition of the transfer approval and as a condition in the Operating License:

AmerGen shall take all necessary steps to ensure that the decommissioning trust is maintained in accordance with the application for approval of the transfer of the Oyster Creek license to AmerGen and the requirements of the Order approving the transfer, and consistent with the safety evaluation supporting the Order.

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 104d.

The NRC has developed a 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, approved by the Commission on August 31, 1999, as guidance for evaluating the foreign ownership considerations of the proposed purchase of OC 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, BE Inc., and BE plc. PECO and BE Inc. each own 50 percent of AmerGen. In its application AmerGen has substantively provided the information required in 10 CFR 50.33(d). 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 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, control, or domination. 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 states that an applicant partially owned by a foreign entity – for example, partial 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. However, the NRC considered the issue of foreign ownership, control, or domination in the TMI-1 and Clinton transfer cases and approved AmerGen's purchase of TMI-1 and Clinton, and since the situation with respect to AmerGen's ownership of TMI-1, Clinton, and OC is virtually identical, the staff has followed the guidance of the TMI-1 and Clinton decisions considering foreign ownership issues with respect to OC.

Information Provided

AmerGen has submitted, in addition to information required by 10 CFR 50.33(d), information specified in Section 2.2 of the SRP on Foreign Ownership, Control, and Domination. In addition, AmerGen's information essentially describes a "negation action plan" as referred to in Section 4.4 of the SRP. On this basis, the staff concludes that AmerGen has taken, or has committed to take, sufficient mitigating steps to continue to ensure that AmerGen is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government for the purposes of the AEA and the NRC's regulations.

As stated earlier, AmerGen is a limited liability company with its principal place of business in Wayne, Pennsylvania. Principal officers of AmerGen include U.S. and British citizens. The positions of Chief Executive Officer (CEO) and Chief Nuclear Officer (CNO) are jointly held by a U.S. citizen, and the President is a British citizen. At least 50 percent of the Management Committee, which directs and controls the affairs of AmerGen, are U.S. citizens, including the Chairman. According to the application, the "CEO is authorized to employ and retain other officers, subject to the approval of the Management Committee."

AmerGen further states in its application that there has been no material change in the nature and extent of foreign participation in AmerGen since the issuance of the TMI-1 safety evaluation.

AmerGen's Proposed Measures to Address Foreign Control Concerns

AmerGen developed a negation action plan to address foreign control issues when it proposed to acquire TMI-I. This plan would be applicable to AmerGen as the licensee for OC as well. Under the Limited Liability Company Agreement (LLC Agreement) by which AmerGen was formed, 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 (one of the two member groups of AmerGen), 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 states that currently there are six voting members on the Management Committee, half of whom are appointed by PECO 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 Management Committee decisions regarding “all [s]afety issues.”

The term “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 (AEA), 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.¹

The staff has previously concluded and continues to conclude that this definition broadly encompasses all issues involving the common defense and security and the public health and safety that are under NRC jurisdiction.

AmerGen states that Michael J. Egan, a U.S. citizen, is the Chairman of the Management Committee. Additionally, the CEO and CNO of AmerGen, who is elected by the Management Committee and is responsible for the day-to-day operations of AmerGen, is Gerald R. Rainey, a U.S. citizen. The President of AmerGen is Dr. Robin Jeffrey, a U.K. citizen. AmerGen stated in the

¹ 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, control, or domination, this and analogous distinctions are acceptable and do not appear to compromise such safety decisions.

TMI-1 and Clinton applications that the President will not have decision-making authority for TMI-1 and Clinton operations. Rather, the President's duties will be directed toward business decisions, such as future acquisitions by AmerGen. 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, in its application AmerGen has proposed that the NRC staff require that its CEO, CNO (if someone other than the CEO), Chairman of the Management Committee, and at least half the members of the Management Committee shall all be U.S. citizens, as reflected in license conditions that AmerGen has proposed for the OC transfer.

AmerGen has also stated that the current site personnel at OC, including senior managers, "will remain essentially unchanged." However, as OC experiences personnel changes, AmerGen expects that additional experienced personnel may join the site organization during the period immediately before and after the license transfer. In its application for the transfer of the TMI-1 and Clinton Operating Licenses, AmerGen recommended that substantial weight be given to the fact that BE plc is a corporate citizen of the United Kingdom (U.K.). The U.K. is a close ally of the United States, and the U.S. and the U.K. have had an often cited "special relationship" at least since 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. AmerGen specifically cited 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 such considerations are consistent with making a noninimicality finding with respect to the common defense and security of the U.S. Though not disposing of the prohibition of foreign ownership, control, or domination under Section 104d of the AEA, these considerations are also consistent with a favorable determination under that section, because, as the Commission has stated in *General Electric Co. and Southwest Atomic Energy Associates*, 3 AEC 99 (1966), 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.

AmerGen states that if it fills a senior management position with someone from outside the existing OC organization "contemporaneously with" the license transfer, it will inform the NRC in advance of any such change and provide the NRC with a resume for the person in advance of the effective date of the change. As a general rule, new personnel do not require prior approval by the NRC; however, the appointment of any such person must be consistent with the OC Operating License and licensing basis and any conditions of approval of the transfer.

Staff Conclusions With Respect to Foreign Ownership Considerations

The staff has considered guidance in the Commission's previous decisions on foreign ownership, control or domination, and in the SRP. Additionally, the staff has relied extensively on the analysis and conclusions of the TMI-1 and Clinton safety evaluations. 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 OC to AmerGen would not violate the prohibitions in the AEA against foreign ownership, control, or

domination, provided that approval of the license transfer to AmerGen is subject to the following conditions, to become license conditions when the conforming amendment is issued:

Transfer Approval and License Conditions

- (1) The Limited Liability Company Agreement dated August 18, 1997, and any subsequent amendments as of the date of this safety evaluation, 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 nonforeign member group, all of whose appointees shall be U.S. citizens.
- (3) The CEO, CNO (if someone other than the CEO), and Chairman of the Management Committee of AmerGen shall be U.S. citizens. They shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of AmerGen with respect to the OC Operating 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 Exchange Act of 1934 that disclose beneficial ownership of any registered class of stock of PECO Energy or any affiliate, successor, or assignee of PECO Energy to which PECO Energy’s ownership interest in AmerGen may be subsequently assigned with prior written consent of the NRC.

The staff concludes that these conditions are consistent with Commission precedent (they are virtually identical to those imposed in the TMI-1 and Clinton license transfers). The staff slightly modified certain conditions as proposed by the application in light of the potential transfer of PECO’s interest in AmerGen to a successor company, as noted in a February 28, 2000 submittal from AmerGen and AmerGen Vermont LLC to the NRC.

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 Oyster Creek 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.