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November 8, 1999

VIA HAND-DELIVERY

The Honorable Annette Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Attn: Rulemakings and Adjudications Staff

Re: *Niagara Mohawk Power Corporation, et al.*
(Nine Mile Point Nuclear Station, Units 1 and 2),
Docket Nos. 50-220 and 50-410, Notice of Consideration of Approval
of Transfer of Facility Operating License (64 Fed. Reg. 52798)

Dear Ms. Vietti-Cook:

Enclosed, in hard copy form, are the original and two copies of the Reply of Central Hudson Gas & Electric Corporation, Long Island Power Authority, and Rochester Gas and Electric Corporation to the Answers of AmerGen Energy Company, LLC, Niagara Mohawk Power Corporation and New York State Electric & Gas Corporation in the above-captioned case. The Reply was filed by e-mail today in accordance with 10 C.F.R. § 2.1313.

Should you have any questions, please contact me. Thank you for your assistance.

Sincerely,


Daniel F. Stenger

DFS:ahr
Enclosures
cc: All Parties

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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In the Matter of)
)
Niagara Mohawk Power Corporation,)
New York State Electric & Gas)
Corporation,)
And)
AmerGen Energy Company, LLC)
(Nine Mile Point, Units 1 & 2))

OFFICE OF PUBLIC
UTILITY COUNSEL
ADJUDICATIVE STAFF

Docket Nos. 50-220 & 50-410

**REPLY OF CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
LONG ISLAND POWER AUTHORITY, AND ROCHESTER GAS AND
ELECTRIC CORPORATION TO THE ANSWERS OF AMERGEN ENERGY
COMPANY, LLC, NIAGARA MOHAWK POWER CORPORATION AND
NEW YORK STATE ELECTRIC & GAS CORPORATION**

I. INTRODUCTION AND SUMMARY

Pursuant to Subpart M of the Nuclear Regulatory Commission's ("NRC") Rules of Practice and Procedure, and specifically 10 C.F.R. § 2.1307(b), Central Hudson Gas & Electric Corporation ("Central Hudson"), Long Island Power Authority ("LIPA"), and Rochester Gas and Electric Corporation ("RG&E")(collectively referred to as "Co-tenants") hereby file their reply to the Answer of AmerGen Energy Company ("AmerGen"), and the Answer of Niagara Mohawk Power Corporation ("NMPC") and New York State Electric & Gas Corporation ("NYSEG")(all collectively referred to as "Applicants") to the Co-tenants' Petition for Leave to Intervene and Request For Hearing ("Request for Hearing") in the above-captioned license transfer proceeding.

Based on a review of the Answers filed by the Applicants, it is abundantly clear that the issues raised by the Co-tenants are admissible for hearing. Chief among the concerns that remain unresolved are the following:

- Co-tenants alleged in their Request for Hearing at page 21 (see Issue 2.C.2)¹ that the \$110 million parent company guarantee available for all AmerGen plants (Application at 18) appears to conflict with a condition of the NRC’s Order approving the transfer of the Three Mile Island Unit 1 (“TMI-1”) license to AmerGen. In their Answers, the Applicants do not deny this allegation. Accordingly, serious questions exist as to the availability and sufficiency of the \$110 million guarantee in view of AmerGen’s obligation under the TMI-1 Order, an obligation that AmerGen has apparently disregarded.
- The Applicants acknowledge that there will be a shortfall in the decommissioning funds collected for Nine Mile Point (“NMP”) Unit 2 over the life of the facility. AmerGen claims that the shortfall will be covered by “additional financial assurances,” the details of which AmerGen has withheld from public disclosure. AmerGen’s novel decommissioning funding mechanism, however, is not authorized by the NRC’s decommissioning regulations in 10 C.F.R. § 50.75(e). Even if permissible, AmerGen’s approach requires NRC review and approval under Section 50.75(e)(1)(vi). Accordingly, the adequacy of AmerGen’s approach to decommissioning funding is an appropriate issue for hearing.
- With respect to technical qualifications, AmerGen does not dispute the fact that it lacks a corporate-level organization capable of providing management oversight and technical support. AmerGen simply brushes this issue aside by noting that it plans to acquire essentially the whole NMP site organization

¹ Citations to the issue numbers correspond to the listing of issues in Co-tenants’ Request for Hearing.

intact. (AmerGen Answer at 26.) However, for a licensee seeking to own a diverse fleet of power reactors operated as “merchant plants,” as AmerGen intends to do, a corporate organization is essential in order to provide adequate management oversight, resources and technical support across all the sites. Moreover, AmerGen intends to rely on services provided by its parent companies for virtually all safety-critical activities at NMP – including management, operations, engineering and maintenance. (See Request for Hearing at 31-32; Issue 4.A.2.) Recent NRC guidance on non-owner operating service entities indicates that the nature and extent of services being provided must be carefully scrutinized before this transfer can be approved.

With respect to Co-tenants’ intervention, the Applicants do not challenge Co-tenants’ standing to intervene as of right. Applicants, however, contest the admissibility of all the issues raised by the Co-tenants in the Request for Hearing. According to the Applicants, not a single one of the issues set forth in detail by the Co-tenants warrants a hearing. In spite of Applicants’ desire to have the NRC “rubber stamp” their Application, it is evident that the five (5) main issues raised in Co-tenants’ Request for Hearing remain unaddressed and require resolution through an evidentiary hearing. Predictably, the Applicants also oppose Co-tenants’ suggestion that the NRC adopt more formal hearing procedures to govern certain issues in this case and that the NRC defer consideration of the proposed license transfer in view of the ongoing New York Public Service Commission (“NYPS”) review of the transaction and the Co-tenants’ right of first refusal. We address these procedural issues first before turning to the substantive issues for hearing.

II. PROCEDURAL ISSUES

A. DEFERRED NRC CONSIDERATION WARRANTED GIVEN APPLICANTS' PREMATURE APPLICATION

AmerGen asserts that there is “no reasonable basis for delaying NRC’s review of the pending application” (AmerGen Answer at 4.) Specifically, AmerGen opposes the suggested deferment on the grounds that 1) Co-tenants’ request is a “direct challenge” to NRC policy opposing delays and decisions recognizing its independent jurisdiction, and 2) Subpart M does not contemplate deferring NRC action. (AmerGen Answer at 5.) Despite the opportunity, AmerGen offers the NRC no substantive justification to act on its premature application at this time. Instead, Applicants rely on general and conclusory statements of NRC “policy” and do not demonstrate how NRC “policy” is advanced by accelerated consideration of Applicants’ application under Subpart M.

Co-tenants have articulated two sound reasons for deferring action on AmerGen’s application: 1) Co-tenants’ pending right of first refusal, and 2) the broad and in-depth NYPSC review of the proposed transfer. Given these considerations, it would potentially be a waste of agency resources to require the NRC to apply efforts that will go into evaluating the public health and safety issues attendant upon the proposed transfer at this time. With respect to Co-tenants’ right of first refusal, a due diligence review has been substantially completed. While no decision has been reached, the exercise of the right of first refusal remains a viable option. The right of first refusal does not expire for RG&E until January 4, 2000 at the earliest.

Permitting simultaneous consideration of the transaction by the NRC and the NYPSC raises the possibility that the NRC will expend extensive time and resources on

AmerGen's application only to have NYPSC consideration nullify its efforts in whole or in part.² In such circumstances, to require that NRC review of AmerGen's application coincide with, or indeed precede, a NYPSC determination could result in a waste of the NRC's limited time and resources without any countervailing benefit. Consequently, the NRC should exercise its discretion to delay a hearing on the application until after completion of the NYPSC review or the expiration of the Co-tenants' right of first refusal.

It is patently incorrect for AmerGen to suggest that "Subpart M has no provision for deferring NRC review of a license transfer application or a hearing" (AmerGen Answer at 6.) Changes in the schedule are expressly contemplated in Subpart M. Pursuant to 10 C.F.R. § 2.1325(c), the Commission or Presiding Officer "may entertain motions for extension of time and changes in schedule"³ Obviously the Commission has discretion to set a hearing schedule with due consideration for the convenience and rights of the parties.

B. FORMAL PROCEEDINGS NECESSARY

Applicants argue that Subpart M is the exclusive procedural framework for the consideration of all proposed license transfers. AmerGen contends that the plain language of Subpart M makes it clear that more formal procedures are unavailable in license transfer actions. (AmerGen Answer at 7.) Applicants' argument in opposition

² The NYPSC staff recently requested and was granted a postponement of the hearings until after expiration of the Co-tenants' right of first refusal. As a result of the postponement, the Co-tenants' testimony in the NYPSC hearing is currently due in mid-January 2000.

³ AmerGen's suggestion that 10 C.F.R. § 2.1329 governs Co-tenants' requested deferral is misplaced. That provision applies only to requests to waive substantive NRC regulations, not procedural regulations governing the scheduling of hearings.

to the institution of more formal procedures, however, fails as a matter of law and must be rejected.

In recognition of the possibility that Subpart M's procedures may not be sufficient in all cases involving proposed license transfers, the NRC stated:

At the same time, the Commission recognizes that issues might arise that could require additional procedures. Therefore the rule explicitly provides that the Commission may use additional procedures or even convene a formal hearing 'on specific and substantial disputes of fact necessary for the Commission's decision, that cannot be resolved with sufficient accuracy except in a formal hearing.' See § 2.1322(d). The rule thus provides sufficient flexibility to cope with extraordinary or unusual cases.⁴

In making the determination that formal procedures are needed, an agency enjoys broad discretion in determining how best to handle this procedural issue. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Although Subpart M may be the relevant procedural framework, the Commission reserved discretion in 10 C.F.R. § 2.1322(d) to establish more formal procedures when appropriate.

Co-tenants submit that certain issues detailed in our Request for Hearing present the type of specific and substantial disputes of fact warranting additional hearing procedures, including discovery and cross-examination. These issues include AmerGen's financial qualifications and the availability of the \$110 million parent guarantee, the adequacy of the decommissioning funding for NMP 2, and AmerGen's

⁴ Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66721, 66723 (Dec. 3, 1998)(emphasis added).

technical qualifications, including its planned reliance on services by PECO and British Energy.

III. HEARING ISSUES

A. STANDARD FOR ADMISSIBLE CONTENTIONS

Applicants contend that none of the issues raised by the Co-tenants' Request for Hearing meet the NRC's requirements for an admissible issue under Subpart M. (See AmerGen Answer at 1-2, 11, n. 6; NMPC/NYSEG Answer at 3-4.) Subpart M, however, requires only that a party requesting a hearing state its issues, together with a concise statement of the facts or expert opinion supporting its position. The Applicants, in contrast, would require that Co-tenants prove the merits of their case by assembling evidence within the twenty (20) day notice period for interested parties to seek leave to intervene. This is not the correct standard, and Applicants' objections must be rejected.

Although Applicants correctly reference 10 C.F.R. § 2.1306 as setting forth the requirements for admissible issues, their unduly restrictive application of these conditions so as to defeat Co-tenants' intervention has no foundation in established NRC precedent or regulations. Generally, a petitioner must demonstrate standing and present admissible contentions for hearing before it will be permitted leave to intervene.⁵ NRC regulations governing the admissibility of contentions require that a petitioner for intervention only provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, demonstrating the need for further inquiry. *Yankee Atomic Electric Co.* (Yankee Rowe Nuclear Power

⁵ Applicants do not question, and thus concede, Co-tenants' standing as of right. (AmerGen Answer at 11, n. 6; NMPC/NYSEG Answer at 4, n. 2.)

Station), CLI-96-7, 43 N.R.C. 235, 249 (1996)(proceedings under Subpart G). This requirement does not mean that it is incumbent upon Co-tenants to prove their case at the contention stage. *Id.*; *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 205-06 (1993).⁶ The NRC has stated thusly:

At the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary disposition motion. What is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."

Gulf States Utility Co. (River Bend Station, Unit 1), CLI-94-10, 40 N.R.C. 43, 51 (1994)(citations omitted); *accord* Policy on Conduct of Adjudicatory Proceedings, 63 Fed. Reg. 41872, 41874, n. 1. Moreover, the NRC may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner. *Arizona Public Service Company* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2 and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991). Co-tenants supported their issues with ample references to NRC requirements, NRC decisions and other documents, including a detailed affidavit. Accordingly, the Co-tenants' issues readily satisfy the NRC's standards and should be admitted for hearing.⁷

⁶ In the context of Subpart G, the NRC observed that "Although section 2.714 imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner . . . For factual disputes, a petitioner need not proffer facts in 'formal affidavit or evidentiary form,' sufficient 'to withstand a summary disposition motion.'" *Id.*

⁷ Co-tenants appreciate that the NRC's standards for the admission of contentions are appropriately high. If, however, the bar were set as high as the Applicants suggest, effectively requiring that the party requesting a hearing set forth its case on the merits within twenty (20) days of the notice of receipt of the transfer application, serious questions would be raised concerning the consistency of Subpart M with basic
Footnote continued . . .

1. Issue 1: Insufficiency of Application

Applicants contest the admissibility of Co-tenants' Issue 1 (Application is Insufficient as a Matter of Law), asserting that 1) NMPC is authorized to act as agent on behalf of the Co-tenants in seeking approval of this license transfer, 2) issues concerning the current Operating Agreement and the Co-tenants' right of first refusal are contractual matters outside the scope of the NRC's consideration, and 3) withholding purportedly proprietary financial information does not materially prejudice evaluation of the transfer. (AmerGen Answer at 13; *see* NMPC/NYSEG Answer at 4-5.) Each of these bases is without merit and must be denied.

Applicants misconceive the Co-tenants' position on all these points. With respect to NMPC's ability to act as agent for the other Co-tenants, we recognized in Issue 1.A that NMPC, as lead licensee, may act as agent for the non-operating owners in seeking certain regulatory approvals. The issue, however, is the scope of that authority. It is simply a misrepresentation to state that NMPC is authorized to act on behalf of the Co-tenants in seeking regulatory approval of this license transfer. The Co-tenants have not consented to the proposed transfer and have not specifically authorized NMPC to act on their behalf in seeking this transfer. Approval of the requested transfer, in fact, would create a new majority owner/operator for NMP 2, a situation that would diminish the checks and balances in place under the current Operating Agreement and potentially reduce the effectiveness of current management and oversight of NMP 2.

Constitutional and Administrative Procedure Act protections. This is particularly true in light of the complex and voluminous nature of the Application here, and the fact that numerous materials are incorporated by reference.

Thus this is not purely a private contractual matter. The relief requested by the Co-tenants in Issue 1.A -- i.e., that appropriate conditions be imposed on any transfer to restrict the authority of the new licensee to act as agent for the Co-tenants -- is a proper subject for the hearing.

Similarly, with respect to Issues 1.C and 1.D, it is not correct that any issues concerning Co-tenants' rights under the current Operating Agreement and Basic Agreement for NMP 2 are *per se* beyond the scope of NRC review of a proposed license transfer as Applicants allege. (AmerGen Answer at 12-13; NMPC/NYSEG Answer at 4-5.) Indeed, NRC precedent establishes that the NRC examines operating agreements and related documents in connection with proposed license transfers. In this respect, the NRC has stated:

Prior to approving this license amendment, the NRC staff will examine the proposed operating agreement and other documents relevant to this license amendment application. The transfer of any right under the operating licenses is subject to NRC approval pursuant to 10 CFR 50.80(a).

Georgia Power Company, et al. (Edwin I. Hatch Nuclear Plant, Units 1 and 2), "Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations" 57 Fed. Reg. 47127 (Oct. 14, 1992). As explained in the Request for Hearing at 14-15, the proposed transfer would undermine the current oversight of NMP 2 as provided for under the Operating Agreement. Contrary to what NMPC and NYSEG claim, the transfer would have an impact on the operation of the unit by effectively eliminating any meaningful participation by the minority owners in the oversight and management of the facility. Thus, Issue 1.C remains, and the NRC should not approve the transfer until the parties have established an adequate operating agreement for NMP 2.

AmerGen also misconstrues Co-tenants' reliance on the right of first refusal granted under the Basic Agreement (Issue 1.D.). Co-tenants raise this issue to underscore the premature nature of Applicants' proposed transfer and the impact it has on Co-tenants' property rights, specifically including the safe management and operation of NMP. Co-tenants do not expect the NRC to consider private contractual issues among the parties. It is Co-tenants' position, however, that the NRC may not consent to the proposed transfer unless and until the right of first refusal has expired or been waived.

Finally, AmerGen is disingenuous in claiming that the absence of public disclosure of financial information is immaterial to this proceeding. (AmerGen Answer at 15.) Such disclosure, however, is necessary for the public to participate meaningfully in these proceedings. AmerGen is already seeking to have it both ways – withholding critical information from disclosure and then complaining that potential intervenors have failed to provide sufficient specificity in stating issues when they lack the information that AmerGen has requested be protected from disclosure under 10 C.F.R. § 2.790. See Answer of AmerGen Energy Company, LLC to the Petition of the Attorney General of the State of New York for Leave to Intervene, at Section III.A (claiming that the Attorney General's request for assurance regarding AmerGen's financial qualifications is a contention that lacks specificity when the Attorney General does not have the financial information that AmerGen has withheld from public disclosure).⁸

⁸ In an extraordinary about-face, AmerGen, four days after objecting to the Attorney General's intervention, withdrew its objection in a Supplement to its Answer, filed November 5, 1999. AmerGen no doubt recognized that its position was politically unwise. Because the issues raised by the Attorney General (*e.g.*, financial qualifications and decommissioning funding) are essentially identical to the same
Footnote continued . . .

Moreover, with regard to information claimed to be trade secrets or privileged commercial or financial information, “it is the policy of the Commission to achieve an effective balance between the legitimate concerns for protection of competitive positions and the right of the public to be fully apprised as to the basis for and effects of licensing or rule making actions” 10 C.F.R. § 2.790(b)(2). Significantly, in this case, the information that AmerGen seeks to protect from public disclosure is necessary for a determination of whether it is financially qualified to operate and safely decommission NMP. The burden falls squarely on AmerGen to demonstrate why this critical information should be withheld from the public.

2. Issue 2: Financial Qualifications

AmerGen opposes the admissibility of Co-tenants’ Issue 2 (AmerGen has failed to demonstrate the requisite financial qualifications to own and operate NMP under 10 C.F.R. § 50.33(f)(3)), conclusorily stating that it “complied fully with the NRC’s ‘Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance,’ NUREG-1577, Rev. 1. . . .” (AmerGen Answer at 16.) Next, AmerGen equates the NRC’s approval of the TMI-1 transfer with the effect of regulations, and implies that Co-tenants’ challenge to the adequacy of the proposed financial information constitutes an impermissible attack on NRC regulations because it was previously found financially qualified in the TMI-1 case. (AmerGen Answer at 16-17.) Co-tenants’ Request for Hearing is not an attempt to impose stricter requirements here than those provided for in NRC regulations. It is a request that a hearing be held to review the financial qualifications of AmerGen to own

issues raised by the Co-tenants, the Attorney General’s request for hearing should be granted.

and operate NMP in order to determine whether the Application complies with NRC regulations.

a. AmerGen's 5-year Projections Inadequate

Co-tenants raised the issue that Applicants' five (5) year cost/revenue projections were inadequate in this case to ensure safe operation for the period of the licenses for NMP 1 and NMP 2. Co-tenants specifically noted that the licenses for NMP 1 and NMP 2 expire in 2009 and 2026 respectively. Rather than easily cure this deficiency, AmerGen contends that it has satisfied its burden of proof on this issue because NRC regulations do not require that AmerGen project revenues and costs beyond five (5) years. Relying on the NRC's recent decision in *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 N.R.C. 201 (1999), AmerGen incorrectly asserts that 10 C.F.R. § 50.33(f)(2) requires only the submission of detailed financial projections covering the first five years. (AmerGen Answer at 17.) This was precisely the issue considered and rejected by the NRC in the *Seabrook* case.

As the NRC made explicitly clear, "section 50.33(f)(2) nowhere declares that the proffering of 5-year projections will, per se, prove adequate in any and all cases." *North Atlantic Energy Service Corp.*, 49 N.R.C. at 221.⁹ Indeed, AmerGen glosses over the text of 10 C.F.R. § 50.33(f)(2) requiring that "the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license." (Emphasis added.) Conveniently, AmerGen ignores the fact that its own

⁹ The NRC expressly noted that the party requesting the hearing "is entitled to argue that this case calls for additional financial qualification measures beyond 5-year projections and that the Applicants therefore have not met their burden under section 50.33(f)(2) to satisfy Commission financial qualification requirements." *Id.*

projections indicate that in year 4 (2003) revenues are expected to decline substantially. (Application, Enclosure 6A.)

Co-tenants are thus not precluded “as a matter of law” from arguing that AmerGen’s proposed license transfer requires additional financial qualification measures beyond 5-year projections and have raised specific issues on the ability of AmerGen to finance the safe operation of NMP through the term of the licenses. Co-tenants’ issues are particularly important given the fact that AmerGen is a limited liability company and its member companies have not made significant advance equity commitments. (See Application, Enclosure 6A); cf. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, ___ NRC ___, 1997 WL 812223 *8 (Dec. 18, 1997)(noting the ability of limited partners of the applicant to withdraw from the project).

b. NMP Transfer Distinct from TMI-1

AmerGen argues that since it was found financially qualified in the TMI-1 transfer, no further inquiry is necessary in this case. AmerGen relies on the NRC approval of the TMI-1 transfer as if it constitutes “law of the case” or some binding precedent. For example, AmerGen goes so far as to assert that:

Petitioners provide no facts or expert opinion which suggests that the NRC’s review process in TMI-1 was flawed, or that the NRC is now obliged to review AmerGen’s assets against a higher standard than it used in approving the TMI-1 transfer.

(AmerGen Answer at 18.) In so doing, AmerGen patently ignores NRC policy establishing that each proposed transfer must stand on its own merits. In SECY-99-171, Lessons Learned from the Transfer of the Operating Licenses of the TMI-1 and Pilgrim Nuclear Power Stations, dated July 1, 1999, the NRC Staff observed at page 2:

“[B]ecause each license transfer is likely to have unique characteristics, the staff expects that future transfer requests may well raise new policy issues”

In any event, at the time of the TMI-1 transfer, AmerGen was acquiring a single unit at a single site, with no co-owners. The NRC found that AmerGen was capable of meeting its financial obligations based in large part on the \$65 million parent guarantee pledged for that unit. As stated in the NRC’s Safety Evaluation, AmerGen’s available resources were considered sufficient in view of the fact that PECO Energy and British Energy had “the right to demand that AmerGen permanently cease TMI-1 operations. . . .”¹⁰ In the case of NMP 2, AmerGen and its parents would not have the unilateral right to shut down the unit permanently in the event of financial difficulties.

Furthermore, AmerGen is now seeking to become a licensee with multiple reactors at multiple sites. AmerGen itself has linked the plants together by establishing a parent guarantee of \$110 million that is available for all AmerGen plants. In these circumstances, the NRC is free to review AmerGen’s financial qualifications again, and in fact consider those financial qualifications in view of the reality that AmerGen will own and operate a number of sites.¹¹

c. Information Regarding AmerGen’s Assets

In the Request for Hearing (at 17-18), the Co-tenants raised an issue as to AmerGen’s policy for the retention of earnings (Issue 2.B.2). Co-tenants noted that without an understanding of how AmerGen’s earnings would be distributed, it is not

¹⁰ Safety Evaluation Reviews for Transfer of Facility Operating License from GPUN, Inc. et al. to AmerGen Energy Co., LLC and Approval of Conforming Amendment, Three Mile Island Nuclear Station, Unit 1, at 7.

¹¹ AmerGen stated in the Application (at 19) that it “contemplates operating multiple reactors at several different sites.”

possible to determine whether AmerGen will have adequate resources to meet its financial obligations. In this connection, Co-tenants pointed out that by AmerGen's own admission (Application at 20), all of AmerGen's earnings will be available for distribution to its member companies. We also pointed out that under the Power Purchase Agreements for NMP 1 and NMP 2, AmerGen would receive no revenue if the respective unit were not operating. In its Answer, AmerGen offers nothing but generalized assurances – statements that amount to no more than “Trust Me.” Rather than have a discernible policy on dividends, AmerGen merely states:

AmerGen has repeatedly made clear that it intends to distribute earnings to its parents whenever it is appropriate or desirable to do so. . . .

(AmerGen Answer at 19.) In view of AmerGen's refusal to provide any details on whether it will retain earnings in order to bolster its financial stability, the issue whether AmerGen has provided sufficient financial information to meet 10 C.F.R. § 50.80 and 10 C.F.R. § 50.33(f)(2) must be set for hearing. *Cf. Louisiana Energy Services, L.P.*, 1997 WL 812223 at * 10 (noting that “[a]ny return on investment could be used to solidify [an applicant's] financial position”).

c. Availability and Sufficiency of \$110 Million Parent Guarantee

The Co-tenants' Request for Hearing raised issues concerning the availability and sufficiency of the \$110 million parent guarantee that, according to the Application, is available for all AmerGen plants. The Co-tenants noted that the terms of the guarantee implied that AmerGen had diminished the level of the parent guarantee pledged in the TMI-1 case, contrary to a specific condition in the NRC Order

approving the TMI-1 transfer. (Issue 2.C.2; Request for Hearing at 21).¹² In their Answers, neither AmerGen nor NMPC/NYSEG refute this allegation. Accordingly, it is undisputed that AmerGen has acted contrary to an express condition of the NRC's Order approving the transfer of the TMI-1 license.

This result quite clearly presents issues that must be admitted for hearing. More specifically, a hearing is necessary to determine the extent to which the \$110 million parent guarantee is actually available for NMP, if at all, in view of AmerGen's legal obligations under the TMI-1 Order. If \$65 million of the \$110 million must be dedicated to TMI-1 under the terms of the NRC Order approving the transfer of the TMI-1 license, then AmerGen, at most, has available only \$45 million for all its other plants, including NMP. Such an amount is plainly insufficient to meet the SRP standard of sufficient funds to cover fixed operating costs during an outage of at least six months.¹³ The availability and sufficiency of the \$110 million parent guarantee is

¹² The NRC's "Order Approving Transfer of License for Three Mile Island Nuclear Station, Unit 1, from GPU Nuclear, Inc., et al., to AmerGen Energy Company, LLC and Approving Conforming Amendment (TAC No. MA3307)," issued April 12, 1999 contained the following condition (at page 6):

AmerGen shall take no action to cause PECO or British Energy, plc to void, cancel, or diminish the \$65 million contingency fund commitment from PECO and British Energy for TMI-1, the existence of which is represented in the application, or cause them to fail to perform or impair their performance under the commitment, or remove or interfere with AmerGen's ability to draw upon the commitment.

¹³ AmerGen seems to suggest that the SRP in this regard goes beyond the NRC's regulations on financial qualifications, and therefore AmerGen is not legally obligated to meet the SRP. (AmerGen Answer at 20.) The regulations on financial qualifications give the NRC wide latitude to determine what information is necessary, especially for a newly-formed entity. See 10 C.F.R. § 50.33(f)(3). In any event, this suggestion ignores the fact that AmerGen itself has committed in its Application to maintain the \$110 million guarantee, and thereby made this commitment a material issue for this license transfer proceeding.

precisely the type of issue that warrants a full evidentiary hearing in view of the fact-intensive nature of the inquiry.

3. Issue 3: Decommissioning Funding Assurance

The Co-tenants' Request for Hearing raised issues concerning the sufficiency of decommissioning funding (Issue 3). In response, AmerGen and NYSEG/NMPC do not dispute that there is a shortfall in the funds available for decommissioning with respect to NMP 2.¹⁴ AmerGen proposes to make up this acknowledged shortfall by "additional financial assurances" – the form of which has been withheld from public disclosure by the Applicants. See Application at Enclosure 8A. Applicants claim that this novel decommissioning funding method meets NRC requirements. However, as detailed in the Request for Hearing (at 26-29), the Co-tenants have raised substantial questions as to whether this novel – and apparently secret – funding method complies with NRC regulations in 10 C.F.R. §§ 50.75(c) and (e).

AmerGen apparently believes that its method of providing "additional financial assurances" is so unique that it goes so far as to submit a separate "proprietary" enclosure to its Answer addressing this issue. One is left to wonder why, if AmerGen believes its method complies with NRC regulations, it has to be shielded from the public. The public has a right to know how AmerGen is complying with its regulatory obligations under the NRC's decommissioning regulations. To have a secret method of compliance is anathema to the policy of openness in the nuclear regulatory process.

¹⁴ The Application details that by 2025, AmerGen will fund the decommissioning costs for NMP 2 at a level below the NRC minimum formula amount. In contrast, AmerGen is funding the decommissioning costs for NMP 1, of which AmerGen will be the sole owner, fully 10% above the NRC minimum requirement. Application at Enclosure 11A.

Proprietary Material Deleted

In any case, it does not appear that AmerGen's funding method is permissible under NRC regulations. For NMP 2, AmerGen is using a combination of the prepayment method and []. Under the prepayment method of 10 C.F.R. § 50.75(e)(1)(i), the total amount of decommissioning costs must be deposited in advance (with credit allowed for fund earnings). Section 50.75(e)(1)(vi) allows use of "[a]ny other mechanism, or combination of mechanisms, that provides, as determined by the NRC upon its evaluation of the specific circumstances of each licensee submittal, assurance of decommissioning funding equivalent to that provided by the mechanisms specified in paragraphs (e)(1)(i)-(iv) of this section." Thus, the NRC's decommissioning rule does not specifically permit a combination of prepayment and [].¹⁵ If permissible at all, this combination of mechanisms requires review and approval by the NRC pursuant to Section 50.75(e)(1)(vi). Accordingly, the issue of decommissioning funding is an appropriate subject for hearing.

AmerGen's approach certainly does not offer protection for the Co-tenants and their customers. AmerGen itself has stated that it "does not intend to isolate the co-owners from liability other than negotiated in the operating agreement."¹⁶ This issue is of vital importance to the Co-tenants, who, unlike AmerGen's member companies,

¹⁵ Certain licensees are allowed by Section 50.75(e)(1)(vi) to use a combination of an external sinking fund and []. AmerGen suggests that this is the mechanism it is using. (AmerGen Answer, Encl. A at 1-2.) However, AmerGen is not using an external sinking fund since periodic deposits will no longer be made after the transfer. AmerGen's approach must be evaluated as a combination of an under-funded prepayment and [].

¹⁶ AmerGen response to Co-tenants' Information Request No. 13, New York Public Service Commission Case No. 99-E-0933.

could potentially be subject to joint and several liability under current NRC policy for any shortfall in decommissioning funding.

4. Issue 4: Technical Qualifications

AmerGen states in its Answer that, since “NMPC’s existing nuclear organization at NMP will be transferred to AmerGen intact with substantially all of NMPC’s nuclear managers and employees at NMP becoming AmerGen employees,” “[t]he existing organization’s technical qualifications are consistent with Commission requirements and will remain so with the wholesale organizational transfer.” (AmerGen Answer at 12.) AmerGen goes on to state that Co-tenants’ “concern with AmerGen’s services contract with PECO and British Energy is similarly outside the scope of this proceeding.” This attack on relevance and scope does not address the contentions raised by the Co-tenants (Issue 4), and is clearly at odds with the NRC Staff’s latest draft regulatory guidance on the “Criterion for Triggering a Review under 10 CFR 50.80 for Non-owner Operating Service Companies.” SECY-99-237 (Sept. 27, 1999).¹⁷

Significantly, under this policy guidance, the NRC Staff has developed criteria – a list of activities – by nuclear plant operating entities that would trigger review under Section 50.80 to determine whether the entity providing the services must be on the license. If final decision-making authority were granted to a new entity in any of the following areas, among others, then an automatic Section 50.80 review would be triggered:

¹⁷ This draft guidance should be given deference, as, according to SECY-99-237 at 1, it has been refined at the Commission’s direction from various earlier draft positions. See, *e.g.*, “Proposed Criterion for Non-owner Operating Service Companies,” 63 Fed. Reg. 54389, 54390 (Oct. 9, 1998), and SECY-97-144, “Potential Policy Issues Raised by Non-owner Operators” (Aug. 29, 1997).

- Decision to continue operation or shut down for repairs, and the decision to start up the plant
- Authority to make operability determinations for safety-related equipment
- Authority to change staffing levels
- Authority to make organizational changes
- Decision to defer repairs for safety-related equipment
- Authority for quality assurance responsibilities (selecting audits, approving audit reports, accepting audit responses)
- Authority over the design control of the facility
- Decision to continue operation or permanently cease operation
- Authority to make determinations whether NRC approval is needed under 10 C.F.R. § 50.59
- Authority to perform maintenance on safety-related equipment

SECY-99-237, Attachment DG-1086, Section C. According to this guidance, if a threshold review indicates that the new entity is being granted final decision-making authority in these areas, then the NRC must consent to this change under 10 C.F.R. § 50.80. NRC review is also necessary to determine whether the organizational requirements of the facility's Technical Specifications will continue to be met. *Id.*

Even if the transfer of final decision-making authority in operational areas does not involve or substantially affect licensed activities, related services must be evaluated collectively to determine whether a 10 C.F.R. § 50.80 review is required. The recommended criteria for collective review include:

- Authority to provide health physics program services

- Authority for engineering work on safety-related systems
- Authority for maintaining design basis documentation
- Authority for compliance engineering or licensing engineering services

Id.

In the case of this proposed license transfer, as indicated in the Co-tenants' Request for Hearing at 31 (Issue 4.A.2), AmerGen has proposed that PECO and British Energy may provide services in connection with NMP 1 and 2, including management, engineering, operation and maintenance, and laboratory analysis services.¹⁸ By proposing that other entities would perform tasks in virtually every important department associated with running a nuclear power plant, AmerGen's plans could automatically trigger a Section 50.80 review for AmerGen and the companies that would be performing the services – PECO and British Energy. Even assuming that the nature and extent of the planned services do not trip the threshold for an “automatic” review, at a minimum a review of the collective activities and decision-making authority for each activity must be performed to determine whether a 10 C.F.R. § 50.80 review of the AmerGen-PECO/British Energy service company relationship is required.¹⁹ Accordingly, this issue is an appropriate subject for hearing.

5. Issue 5: Provision of Off-Site Power

In the Applicants' Answers, they collectively raised several arguments in opposition to Co-tenants' contention that the Application should not be approved

¹⁸ Response to Co-tenants' Information Request No. 42-a, NYPSC Case No. 99-E-0933.

¹⁹ For these reasons, it is absolutely incumbent upon AmerGen, in the context of this proceeding, to disclose the nature and extent of those services, the qualifications and affiliations of the personnel providing the services, and the degree of commitment provided by PECO and British Energy to maintain these services.

without an executed Interconnection Agreement (“ICA”) for NMP 2. The Applicants claim that the alleged potential effects on long-term off-site power are completely speculative. (AmerGen Answer at 24-25.) Nevertheless, as Co-tenants stressed in the Request for Hearing, given the critical importance of reliable off-site power arrangements, the proposed transfer should not be approved in the absence of an ICA for NMP 2 in a form acceptable to the NRC.

IV. CONCLUSION

For the foregoing reasons, Co-tenants submit that the five (5) main issues as presented in our Request for Hearing remain and should be set for hearing:

1. Whether the Application is sufficient for filing.
2. Whether AmerGen has demonstrated adequate financial qualifications.
3. Whether AmerGen has demonstrated adequate financial assurance for decommissioning.
4. Whether AmerGen has demonstrated adequate technical qualifications.
5. Whether adequate provisions have been established for off-site power.

Respectfully submitted,



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DATED: November 8, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

In the Matter of)
)
Niagara Mohawk Power Corporation,)
New York State Electric & Gas)
Corporation,)
And)
AmerGen Energy Company, LLC)
(Nine Mile Point, Units 1 & 2))

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OFFICE OF SECRETARY)
FILED)
ADJUDICATION STAFF)
Docket Nos. 50-220 & 50-410

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing REPLY OF CENTRAL HUDSON GAS & ELECTRIC CORPORATION, LONG ISLAND POWER AUTHORITY, AND ROCHESTER GAS AND ELECTRIC CORPORATION TO THE ANSWERS OF AMERGEN ENERGY COMPANY, LLC, NIAGARA MOHAWK POWER CORPORATION AND NEW YORK STATE ELECTRIC & GAS CORPORATION were served upon the following persons by e-mail in accordance with the requirements of 10 C.F.R. § 2.1313 this 8th day of November 1999:

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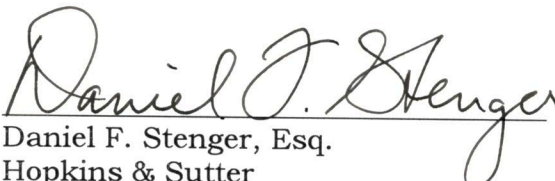
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