DOCKETED
USNRC

'00 JAN 24 P4:39

OFFICE ... RULE... ADJUD... STAFF

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, Units 1 & 2)**	**Docket Nos. 50-222 & 50-410** **License Nos. DPR-63 and NPF-69**

AMERGEN'S REPLY TO THE RESPONSE OF ROCHESTER GAS AND ELECTRIC CORPORATION TO AMERGEN'S REQUEST TO LIFT THE TEMPORARY SUSPENSION

AmerGen Energy Company, LLC ("AmerGen") hereby submits its Reply to the Response of Rochester Gas and Electric Corporation ("RG&E") to AmerGen's Request To Lift the Temporary Suspension of the above-captioned proceeding. For the reasons set forth below and in AmerGen's Request To Lift The Temporary Suspension, filed January 3, 2000, the Commission should lift the temporary suspension of this proceeding announced in its Memorandum and Order, CLI-99-30, dated December 22, 1999, and establish an expedited schedule for the completion of this proceeding in accordance with the policies and procedures set forth in Subpart M of 10 CFR Part 2 of the Commission's regulations.

I. BACKGROUND

Niagara Mohawk Power Corporation ("NMPC") is the licensed operator of Nine Mile Point Station, Units 1 and 2 ("NMP 1 and 2"). NMPC owns 100% of NMP 1 and 41% of NMP 2. The remaining ownership interests of NMP 2 are held by four co-owners in the

21168

percentages identified below, pursuant to an ownership agreement dated September 22, 1975 (the "NMP 2 Basic Agreement"):

New York State Electric & Gas Corporation ("NYSEG")-- 18%
Long Island Power Authority ("LIPA")---------------------- 18%
RG&E--- 14%
Central Hudson Gas & Electric Company ("CH") ---------- 9%

On June 23, 1999, NMPC and AmerGen executed an Asset Purchase Agreement in which NMPC agreed to transfer its ownership and operating interests in NMP 1 to AmerGen. AmerGen also executed a separate Asset Purchase Agreement with NMPC and NYSEG, in which they agreed to the transfer their respective ownership and operating interests in NMP 2 to AmerGen.

On September 10, 1999, NMPC, NYSEG, and AmerGen submitted a Joint Application for Order and Conforming Administrative License Amendments for License Transfers ("Application") to the NRC. The Application consisted of two separate requests. First, NMPC and AmerGen requested that the NRC consent to the transfer of the Facility Operating License No. DPR-63 for NMP 1 to AmerGen. Second, NMPC, NYSEG, and AmerGen requested that the NRC consent to the transfer of NMPC's and NYSEG's interests in, and NMPC's operating authority under, Facility Operating License No. NPF-69 for NMP 2 to AmerGen. Following the proposed transfers, AmerGen will become the licensed operator of both NMP Units, the sole owner of NMP 1, and the owner of 59% of NMP 2. Petitioners LIPA, RG&E, and CH will continue to have no ownership interests in NMP 1, and they will retain their respective ownership interests in NMP 2.

On October 20, 1999, LIPA, RG&E, and CH, submitted a Joint Petition requesting leave to intervene in the NMP license transfer proceeding and asking the NRC to hold a hearing on the

merits of the transfer prior to issuing an order granting or denying the transfer. Petitioners also requested two extraordinary forms of relief from the NRC: (1) that the NRC defer its review of the Application until the New York State Public Service Commission ("NYPSC") completes its independent review of the NMP sale; and (2) that the NRC hold a formal evidentiary hearing pursuant to the procedures set forth in Subpart G instead of the streamlined hearing process for license transfers required under Subpart M.

In the Commission's Memorandum and Order, CLI-99-30, dated December 22, 1999, the Commission denied Petitioners' requests to suspend this proceeding pending the completion of the NYPSC proceeding and to substitute Subpart G procedures for Subpart M procedures. CLI-99-30, slip op. at 9, 11. However, the Commission temporarily suspended this proceeding to allow the Petitioners' time to inform the Commission of their intentions with respect to their first refusal rights under the NMP 2 Basic Agreement. *Id.* at 8.

On December 23, 1999, RG&E notified the Commission that it had exercised it right of first refusal under the NMP 2 Basic Agreement on December 21, 1999. *See* RG&E's Notification of Exercise of Right of First Refusal ("RG&E's Notification") at 2. RG&E indicated that it believed that this action had mooted the present proceeding. On December 30, 1999, CH and LIPA notified the Commission that they did not intend to exercise their rights of first refusal.

On January 3, 2000, AmerGen and NMPC, in separate submissions, responded to RG&E's Notification. Both NMPC and AmerGen disagreed with RG&E's claim that the exercise of their right of first refusal mooted the proceeding. *See* NMPC's Response to Notification of Exercise of Right of First Refusal ("NMPC's Response"); AmerGen's Response to RG&E's Notification of Exercise of Right of First Refusal and Request for Lifting of

Temporary Suspension ("AmerGen's Request"). AmerGen separately requested that the Commission lift their temporary suspension of the proceeding.

On January 10, 2000, RG&E submitted its Response to AmerGen's Request. RG&E opposed AmerGen's Request and asserted that its exercise of its right of first refusal "had the effect of preempting AmerGen's contracts [to purchase NMP 1 and 2]." *See* Response to the Responses to Its Notification of the Exercise of the Right of First Refusal and AmerGen's Request to Lift the Temporary Suspension ("RG&E's Response") at 4-5.

II. THE TEMPORARY SUSPENSION SHOULD BE LIFTED AND AN EXPEDITED SCHEDULE SHOULD BE ESTABLISHED

A. The Condition Precedent for Lifting the Temporary Suspension Has Been Satisfied

The Commission ordered a temporary suspension of this proceeding for a specific purpose -- to allow Petitioners time to notify the Commission whether they would "avail themselves of their purchase rights under the operating agreement." CLI-99-30, slip op. at 7. Each of the three Petitioners has now supplied the requested information. Therefore, subject to Commission review of these submittals, the condition precedent to lifting the suspension was satisfied on December 30, 1999. Continuing the suspension will serve no further purpose.

RG&E asserts that AmerGen is required to identify "a change in circumstances or new evidence" received by the Commission before the suspension can be lifted, *citing Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-10, 42 NRC 1 (1995). To the contrary, a logical reading of the *Georgia Tech* decision confirms that the Commission should lift a temporary suspension when the purpose of the stay has been satisfied. Here, the Commission imposed a temporary suspension "pending the co-owners' determination whether to avail themselves of their purchase rights under the operating

agreement." CLI-99-30, slip op. at 7. The Petitioners have provided the Commission with the information it requested. Consistent with the principles established by *Georgia Tech*, the Commission should resume this proceeding without further delay.

B. The Proceeding Has Not Been Rendered Moot

RG&E contends that its purported exercise of its right of first refusal "has mooted the present license transfer proceeding since AmerGen no longer has any right to acquire the NMP facility." RG&E's Notification at 2. However, RG&E's claims regarding AmerGen rights to NMP are in dispute, and the resolution of that dispute is irrelevant to the NRC's prosecution of the pending Application. AmerGen's Application is predicated upon the ownership interests and operating responsibilities for NMP 1 and 2 being transferred to AmerGen in accordance with the terms of the NMP 1 and 2 Asset Purchase Agreements and subject to all of the other regulatory approvals required to proceed to closing. NRC need not become embroiled in questions about whether or not AmerGen will satisfy these conditions precedent to its effecting the proposed transfer.

Clearly, the mere existence of opposition to a transfer here, or at any of the other regulatory agencies, does not mean that the Applicants cannot, or will not, obtain the other required regulatory approvals, or that the ownership interests identified in the Application will not ultimately be transferred to AmerGen. Despite RG&E's suggestion to the contrary, the NYPSC is moving forward with its Section 70 proceeding for the transfer of NMP 1 and 2 to AmerGen. The Applicants have entered into definitive agreements to transfer NMPC's and NYSEG's interests in NMP 1 and 2 to AmerGen and, assuming that the other closing conditions are met, AmerGen intends to close on these transactions upon receipt of all required regulatory approvals.

C. The Commission Has An Independent Obligation To Review AmerGen's Application Irrespective Of Any Related Contractual Disputes

The fact that RG&E has notified the Commission and the Applicants of its attempt to exercise q right of first refusal does not mean that this exercise is valid under applicable law. Serious questions exist concerning the legitimacy and validity of RG&E's actions under the terms of the NMP 2 Basic Agreement and New York law. Indeed, RG&E itself acknowledged such potential commercial issues in its Response, *i.e.*, "issues may very well be raised regarding the effect of its exercise of the right of first refusal." RG&E's Response at 5.

A Commission decision not to lift the temporary suspension simply because RG&E has attempted to exercise its right of first refusal and/or because of the existence of a dispute concerning the validity of RG&E's actions, would be inconsistent with the Commission's independent obligation to determine, in a timely manner, whether the proposed license transfer to AmerGen is consistent with the statutory requirements set forth in Section 184 of the Atomic Energy Act. Indeed, the Commission recognized as much in CLI-99-30, ruling that its responsibilities are unaffected by opposition to an underlying transaction, up to, and including outright litigation in state or federal court:

> [license] transfer[s are] often the subject of simultaneous regulatory proceedings before one or more appropriate state public utility commissions, the FERC, the Securities and Exchange Commission, the Internal Revenue Service, the Department of Justice and/or Federal Trade Commission, and the NRC -- in addition to which the parties to those proceedings may be involved in court litigation with plant co-owners.

CLI-99-30, slip op. at 9. Thus, RG&E's assertion that it has a legal right to purchase NMP 2 and its related assertion that this will preclude the sale of NMP 1 and 2 to AmerGen from going

forward, have no bearing on the Commission's own statutory obligation to proceed with the review of this Application.[1/]

D. Continuing The Suspension Will Further Embroil The Commission In The Commercial Dispute Among The Parties

In its Response, RG&E argues that the Commission should avoid becoming embroiled in contractual disputes between parties, takeover battles for control of NRC licensees, and other similar commercial disputes. This position is consistent with Commission precedent, and AmerGen agrees with RG&E on this point. *See, e.g., Gulf States Utilities Co.* (River Bend Station, Unit 1) LBP-94-3, 39 NRC 31, 39, n. 5 (1994) ("Absent 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.") However, any continuance of the existing temporary suspension would represent an abandonment of this policy of non-involvement and neutrality. Such an action would implicitly accept RG&E's position regarding the validity of its exercise of first refusal rights notwithstanding the pendency of any ongoing commercial dispute over this issue.

1/ The Commission underscored its position stating "the potential for an action by a state or local regulatory authority that will affect a facility seeking an NRC license normally is not sufficient reason for this agency to stay its licensing action pending the outcome of any proceeding to impose additional requirements." CLI-99-30, slip op. at 9, *quoting Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982) (footnote and citations omitted), *aff'd City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). *See also Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974) ("it would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval").

Continuing the suspension would mean that a petitioner's mere attempt to assert contractual rights which are in conflict with the interests of an applicant effectively supersedes the Commission's obligation to review, in a timely manner, the application before it. Moreover, by continuing the suspension, the NRC's inaction could significantly impact AmerGen's ability to obtain the required regulatory approvals in sufficient time to permit the consummation of the NMP transactions in accordance with the requirements set forth in the NMP Agreements.[2/] Continuing the suspension could, therefore, allow RG&E to prevail over AmerGen regardless of any ultimate decision on the merits of a commercial dispute over the validity of RG&E's action.[3/]

E. Further Delaying This Proceeding Would Be Contrary to Commission Precedent and Policy

Failing to lift the temporary suspension would also be contrary to the Commission's well-established policy of avoiding unnecessary delay in its proceedings. *See, e.g., Baltimore Gas & Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52 (1998) ("We have a regulatory responsibility which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings."); *Nuclear Fuel Services, Inc., and New York State Atomic and Space Development Authority* (West Valley Reprocessing Plant), CLI-74-4, 1 NRC 273, 275 (1975) ("'fairness to all parties . . . and the obligation of administrative agencies to conduct their functions with efficiency and economy require that

---

2/ The NMP Agreements between AmerGen and NMPC, and among AmerGen and NMPC and NYSEG, state that they can be terminated by any of the parties if the transaction is not closed on or before September 1, 2000. Asset Purchase Agreements, ¶ 9.1(a)(iii).

3/ The Commission has clearly indicated its sensitivity of the type of concerns AmerGen raises herein. Indeed, in promulgating Subpart M, the Commission acknowledged that many license transfer cases involve transactions that are highly time-critical and that timely processing of license transfer applications by the NRC was essential. "Streamlined Hearing Process for NRC Approval of License Transfers," 63 FR 66723 (Dec. 3, 1998).

Commission adjudication be conducted without unnecessary delays'") (quoting 10 CFR Part 2, Appendix A).

Indeed, the Commission explicitly acknowledged in CLI-99-30 that its independent statutory obligation to review license transfer applications in a timely manner supersedes considerations of judicial efficiency. Thus, the Commission firmly rejected the argument previously made by RG&E that the Commission was obliged to suspend its review of AmerGen's Application pending the outcome of the ongoing proceeding before the NYPSC on the basis that such a suspension would "conserve agency resources" and that conducting parallel reviews would be inefficient because "many of the issues that will be of concern to the NRC will also be issues in the NYPSC proceeding." RG&E's Petition for Leave to Intervene at 4-5. Nevertheless, in its response, RG&E again requests that the Commission extend the present suspension indefinitely and halt the NRC Staff's review of the pending Application.[4/]

Finally, RG&E's expressed concern that lifting the suspension will create parallel proceedings is premature at best. There is but a single application for the transfer of the NMP licenses before the NRC Staff -- the Application submitted on September 21, 1999. If RG&E submits its own application, the Commission should evaluate RG&E's qualifications and make a ruling on that application in due course. RG&E's claim that the Commission must terminate the present proceeding to avoid a wasteful exercise, RG&E's Response at 6, also ignores recent Commission experience in this regard. For example, the Commission recently reviewed and approved the transfers of Duquesne Lighting Company's ("Duquesne") interests in the Beaver

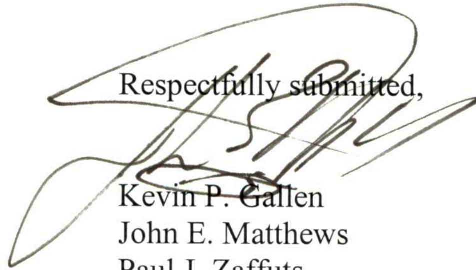
---

4/ RG&E Response at 5. RG&E implies that the NRC Staff has suspended their review of the pending Application. The Applicants have received no such notification from the NRC Staff, and AmerGen believes that RG&E's exercise of their right of first refusal provides no basis for such an interruption.

Valley and Perry nuclear plants to various subsidiaries of FirstEnergy Corporation. 64 Fed. Reg. 54650 (Oct. 7, 1999); 64 Fed. Reg. 55310 (Oct. 12, 1999). However, Duquesne had previously sought and obtained NRC approval of a proposed merger with the Allegheny Power System ("Allegheny"), 63 FR 4495 (Jan. 29, 1998), and Allegheny continued its pursuit of that merger. In fact, key judicial decisions were being handed down in litigation between Duquesne and Allegheny well after the NRC had issued its approval of the conflicting transaction with FirstEnergy. Under RG&E's theory, the Commission should not have reviewed or approved the FirstEnergy application unless and until the pending commercial dispute between Duquesne and Allegheny over the merger agreement had been resolved. Obviously, such a result makes no sense, and it would, in fact, have favored Allegheny's interests over FirstEnergy's. Similarly, the NRC should remain neutral and proceed with its review and approval of the pending Application without regard to the ongoing dispute between RG&E and AmerGen. Allowing RG&E to stymie the review of the pending Application may foreclose the only viable transfer of NMP.

III. CONCLUSION

For all the foregoing reasons, AmerGen respectfully requests that the Commission lift the temporary suspension of this proceeding and establish an expedited schedule for the completion of this proceeding.



Respectfully submitted,

Kevin P. Gallen
John E. Matthews
Paul J. Zaffuts
Morgan, Lewis & Bockius LLP
1800 M Street, NW
Washington, DC 20036-5869
(202)467-7000
Facsimile: (202)467-7176
E-mail: jematthews@mlb.com

Counsel for AmerGen Energy Company, LLC

Dated: January 18, 2000

DOCKETED
USNRC

'00 JAN 24 P4 :39

CERTIFICATE OF SERVICE

I hereby certify that copies of the AmerGen's Reply to the Response of Rochester Gas and Electric Corporation to AmerGen's Request To Lift the Temporary Suspension were served upon the persons listed below by E-mail with a conforming copy deposited in the U.S. mail, first class, postage prepaid, this 18th day of January 2000.

Office of the Secretary
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
Washington, D.C. 20555
(E-mail: secy@nrc.gov)

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: ogclt@nrc.gov)

Samuel Behrends IV, Esq.
LeBoeuf, Lamb, Greene & McRae, L.L.P.
1875 Connecticut Avenue, Suite 1200
Washington, D.C. 20009-5728
(E-mail: sbehrend@llgm.com)

James M. D'Andrea, Esq.
Keyspan Energy
175 E. Old Country Road
Hicksville, NY 11801
(E-mail: jdandrea@keyspanenergy.com)

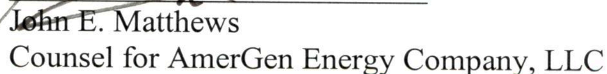
Robert J. Glasser, Esq.
Gould & Wilkie, LLP
One Chase Manhattan Plaza
New York, NY 10005
(E-mail: bobglasser@gouldwilkie.com)

Office of the Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: hrb@nrc.gov)

Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
(E-mail: mwetterh@winston.com)

Daniel F. Stenger
Hopkins & Sutter
888 16th Street, N.W.
Washington, D.C. 20006
(E-mail: dstenger@hopsut.com)

Thomas W. Yurik
Rochester Gas and Electric Corp.
89 East Avenue
Rochester, NY 14649
(E-Mail: tom_yurik@rge.com)



John E. Matthews
Counsel for AmerGen Energy Company, LLC

1-WA/1346809.1