

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)
Northeast Nuclear Energy Company, *et al.*)
Millstone Station, Unit 3)

Docket No. 50-423)
License No. NPF-49)
OFFICE OF THE SECRETARY)
BUREAU OF)
ADJUDICATION)

In the Matter of)
North Atlantic Energy Service Corporation, *et al.*)
Seabrook Station, Unit 1)

Docket No. 50-443)
License No. NPF-86)

**MOTION OF THE CONNECTICUT LIGHT AND POWER COMPANY,
WESTERN MASSACHUSETTS ELECTRIC COMPANY, AND
NORTH ATLANTIC ENERGY CORPORATION TO STRIKE
UNAUTHORIZED RESPONSE OF NEW ENGLAND POWER COMPANY**

I. Introduction

On July 20, 1999, pursuant to 10 CFR § 2.1306, The Connecticut Light and Power Company ("CL&P") and Western Massachusetts Electric Company ("WMECO"), co-owners of Millstone Station, Unit 3 ("Millstone 3") filed a motion to intervene and request for hearing concerning New England Power Company's ("NEP") application for transfer of NEP's license for Millstone 3 to reflect the fact that New England Electric System ("NEES"), NEP's parent and owner, is being acquired and will become 100% owned by The National Grid Group plc ("National Grid"), a public limited corporation incorporated under the laws of England and Wales. Concurrently, CL&P and North Atlantic Energy Corporation ("NAEC"), co-owners of Seabrook Station, Unit 1 ("Seabrook"), filed a motion to intervene and request for hearing with respect to a similar transfer of NEP's license for Seabrook, which NEP requested in the same

application.^{1/} As provided by NRC regulations (10 CFR 2.1307(a) and (b)), NEP filed a Response to Petitioners' Requests within the ten days allowed for response, and Petitioners filed a Reply to NEP's Response within the five days allowed for such replies. No further pre-hearing filings are contemplated under 10 CFR Part 2, Subpart M, which governs NRC power reactor license transfer proceedings.

Subsequently, however, on August 10, 1999, NEP filed an unauthorized "Response of New England Power Company" ("Unauthorized Response") to Petitioners' Reply. This Unauthorized Response was filed more than seven days after Petitioners' Reply and was received by Petitioners without any prior notice from NEP. Petitioners hereby respectfully move the Commission to strike this Unauthorized Response on the grounds that it is not authorized by the NRC's regulations, that it mischaracterizes Petitioners' pleadings and Commission authority, and that it includes prejudicial, untrue, and irrelevant assertions for which NEP has advanced not one shred of evidence.

II. NEP's Unauthorized Response Should be Stricken Because the Commission's Regulations Do Not Provide for Such Responses and No Good Cause for Departure from the Commission's Regulations has been Shown

The Commission's regulations governing license transfers in 10 CFR Part 2, Subpart M, specifically define the pre-hearing filings permitted in connection with license transfers. These include: (1) a hearing request and a petition for leave to intervene (10 CFR § 2.1306(c)(1)); (2) an answer to a hearing request or intervention petition (10 CFR § 2.1307(a)); and (3) a reply to an answer (10 CFR § 2.1307(b)). No other pre-hearing filings are authorized.

^{1/} For convenience, CL&P, WMECO, and NAEC are herein referred to as "Petitioners," and their motions to intervene and requests for hearing are referred to as the "Requests."

NEP's Unauthorized Response should therefore be stricken. The demanding time frames for filings in Subpart M are designed to provide a fair opportunity for the parties to address the need for a hearing, while ensuring an expeditious process. In addition, the Commission's policy is that "parties to a proceeding . . . are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing" NRC Policy on Conduct of Adjudicatory Proceedings, 63 Fed. Reg. 41872, 41874 (August 5, 1998). Here, while Petitioners have complied with these time frames, NEP has avoided their strictures by filing its Unauthorized Response. Furthermore, NEP did not even contact Petitioners or their counsel before proceeding with this unauthorized filing, either to inquire whether Petitioners would object, or to offer Petitioners an opportunity to respond.

NEP fails to provide any plausible good cause for its unauthorized and untimely filing. NEP claims it somehow felt "compelled to clarify the record" because Petitioners' Reply supposedly raised a "brand new (and fictitious)" legal standard regarding NEP's status as an "electric utility." Unauthorized Response at 1. In fact, however, Petitioners have consistently noted, both in their initial Requests and in their Reply to NEP's initial response to those Requests, that NEP's license transfer Application does not provide evidence that NEP is an "electric utility." In particular, Petitioners specifically explained in their initial Requests that NEP's Application failed to show that NEP "will continue to recover its share of the costs of generating electricity through rates established by a separate regulatory authority." Requests at 7.

In their Reply, Petitioners simply pointed out the fact that NEP's Application and initial response gave no indication of what proportion of its business would be regulated, nor did it

indicate what proportion of its costs would be recovered in approved rates.^{2/} Reply at 6. This is hardly a “brand new” legal standard, as NEP claims, but is central to the question – raised in Petitioners’ Initial Requests – of whether NEP is an “electric utility” under 10 CFR § 50.2, which specifies that an entity is an “electric utility” only if it “recovers the cost of [the] electricity [it generates or distributes] . . . through rates established by the entity itself or by a separate regulatory authority.” Clearly, if only a minor portion of NEP’s business will be subject to rates set by a regulatory authority, or NEP will recover only some small fraction of the cost of the electricity it generates or distributes through established rates, there remains considerable doubt as to NEP’s “electric utility” status and there is a genuine dispute of both fact and law as to whether NEP’s license transfer application is adequate. The inclusion of this rather obvious point in Petitioners’ Reply provides no excuse for an unauthorized and untimely filing by NEP.^{3/}

NEP’s attempt to solicit Commission action through an unauthorized and untimely filing should not be rewarded, nor should other litigants before the Commission be encouraged to copy such tactics. Accordingly, NEP’s Unauthorized Response should not be considered by the Commission and should be stricken from the record of this proceeding.

2/ When it responded to Petitioners’ Requests, NEP suddenly claimed – as it had not in its Application – that it would retain its “electric utility” status following the NEES merger with National Grid. However, NEP provided no clear information as to whether it would recover the cost of the electricity it generates or distributes through established rates – the crux of the definition of “electric utility” in 10 CFR § 50.2. Instead, NEP provided the rather confusing statement that “NEP’s principal focus will be the transmission of electricity (e.g., wholesale ‘distribution’) and those of its affiliate retail distribution [sic?], with NEP’s rates regulated by the FERC.”

3/ The pretextual nature of NEP’s claim that it feels compelled to “clarify the record” on this one point is evident from the fact that NEP’s Unauthorized Response goes on to argue about a wide variety of other matters. See Unauthorized Response at 3-5.

III. NEP's Unauthorized Response Should be Stricken Because It Mischaracterizes Petitioners' Pleadings and Commission Authority

NEP's Unauthorized Response mischaracterizes both Petitioners' pleadings and Commission authority. Accordingly, it should not be considered and should be stricken from the record of this proceeding. Examples of these mischaracterizations include:

- **NEP's claim that Petitioners have for the first time advanced a "brand new (and fictitious)" legal standard.** (See pp. 3-4 above)
- **NEP's claim that Petitioners assert entitlement to a hearing "simply because [they] have an interest in the case, [have] raised issues within the scope of the proceeding, and [have] provided a concise statement of facts."** Unauthorized Response at 1.

While Petitioners agree that they have met these criteria, NEP omits to mention that Petitioners have also shown: (1) that the Commission can grant relief by denying the license transfers or conditioning them upon appropriate guarantees; (2) that the issues raised are relevant to the findings the Commission must make to approve the license transfer; and (3) that Petitioners' interests will be affected by the results of the proceeding. *See* Petitioners' Reply at 2-3.

- **NEP's claim that Petitioners "have not alleged any facts that contradict" NEP's assertion that it is an "electric utility."** Unauthorized Response at 2.

On the contrary, Petitioners specifically explained their basis for concluding that NEP's Application does not show that NEP is an "electric utility" as defined in 10 CFR § 50.2. Requests at 6-7; Reply at 4-7. In particular – Petitioners state again – NEP's Application is defective because it does not demonstrate (and NEP, in its Unauthorized Response, still does not allege) that NEP will recover the cost of the electricity it generates or distributes through rates established by itself or a separate rate authority. Even now, NEP only claims that it will be "rate-regulated by the FERC," (Unauthorized Response at 2) but

provides no specific information as to whether that regulation will entail rates set by FERC based upon the cost of the electricity NEP generates or distributes.^{4/} These facts clearly demonstrate a defect in NEP's Application, which it seems strangely reluctant to cure, as well as a material dispute as to the adequacy of that Application.

- **NEP's citation of *Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, 28 NRC 573 (1988) for the proposition that "to require an electric utility to show that it meets financial qualifications, an intervenor must 'establish that the Applicants lacked sufficient funds to operate safely,'" and that, therefore, there is no need for a hearing.** Unauthorized Response at 3.

Citation of this case is completely inappropriate. First, the very question at issue is whether NEP will remain an electric utility. As demonstrated in Petitioners' Requests and Reply, NEP has not shown that it is an electric utility.^{5/} Second, *Public Service of New Hampshire* case deals with an intervenor's burden of proof to prevail once a contention has been admitted and the parties are in a hearing, not for purposes of demonstrating that there is a material dispute of law or fact. Citation of this case is therefore inappropriate and misleading.

4/ "Rate regulation" by the FERC may or may not involve rates based upon the cost of the electricity NEP generates or distributes. For example, in connection with the license transfer of TMI-1, the NRC rejected an argument by AmerGen that FERC's authorization of AmerGen to sell electricity at market-based rates "subject to regulation by FERC" qualified AmerGen as an "electric utility." See AmerGen's January 11, 1999, "Supplemental Information Submitted in Support of Proposed License Transfer and Conforming Administrative License Amendments," at Attachment 1, at 1-2, and the NRC Staff's subsequent "Safety Evaluation and Approval of Conforming Amendment" at 3, for TMI-1, Docket No. 50-289 (April 12, 1999).

5/ As the Applicant, NEP bears the ultimate burden of showing that it is an "electric utility" or otherwise meets the Commission's financial qualification requirements. See 10 CFR §§ 2.1326, 50.33, and 50.80. See also *Louisiana Power & Light Company* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983); *Commonwealth Edison Company* (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381 (1974), *Boston Edison Company* (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-17, 1 NRC 425, 427 (1975).

- **NEP's citation of *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), 35 NRC 69 (1992) for the proposition that a hearing is not necessary unless potentially significant health and safety issues were raised.** Unauthorized Response at 5.

That case was *sui generis* because it involved “an unprecedented situation in which one utility is transferring the license ... for an almost totally unused nuclear reactor, which has been defueled, to another entity which intends to decommission and dismantle it.” *Long Island Lighting Company, supra*, at 72. Furthermore, *Long Island Lighting Company* did not involve whether a hearing should be held, but only when – before or after issuance of the amended license. It is, therefore, inapposite to the question of whether or not a hearing should be held.^{6/} Also, in that case there were no co-owners whose interests might be affected. By contrast, in this case Petitioners have strong property and financial interests at stake as co-owners of Seabrook and/or Millstone 3. Less than six months ago, the Commission determined, at NEP's urging, that virtually identical interests entitled NEP to a hearing in the Montaup license transfer case, despite the fact that Montaup's interest in Seabrook was much smaller than NEP's interest in either Seabrook or Millstone 3. *See North Atlantic Energy Service Corp. (Seabrook Station, Unit 1) CLI-99-6, 49 NRC 201 (1999)*. It is therefore misleading and disingenuous for NEP to present *Long Island Lighting Company* as relevant precedent, when the more recent and on-point Seabrook license transfer case clearly controls.

^{6/} In fact, the Commission's decision contemplated that a hearing would ultimately be held. *Id.* at Fn. 6.

- **NEP's citation of *General Electric Company and Southwest Atomic Energy Associates*, 3 AEC 99 (1966), to support its argument that control of the facility, not the licensee, is the primary concern of the foreign control and domination provisions of the Atomic Energy Act.** Unauthorized Response at 3-4.

Again, this citation is misleading. That case specifically notes the Commission's view that "the Congressional intent [behind the prohibition on foreign ownership, control, and domination] was to prohibit such relationships where an alien has the power to direct the actions of the licensee." *General Electric, supra*, at 101 (emphasis added). In fact, the Commission's decision in that case turned on the fact that the license applicants, General Electric and Southwest Atomic Energy Associates, were not (unlike NEP following National Grid's acquisition of NEES) owned or controlled by foreign entities, so that even though foreign personnel would be working at the plant site, the prohibition on foreign ownership, domination and control was not triggered. *Id.* at 101-103. Finally, in that case, the foreign entity involved was not a licensee or owner, but simply a contractor. *Id.* Accordingly, NEP's application of the *General Electric* case is inapposite to the situation presented by the Seabrook and Millstone 3 license transfers, and is not an appropriate citation.

In sum, NEP's Unauthorized Response is rife with mischaracterizations of Petitioners' position and filings, as well as misleading citations to Commission authority. Commission policy is clear that "Parties are also obligated in their filings before the . . . Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis Failure to do so may result in material being stricken from the record." NRC Policy on Conduct of Adjudicatory Proceedings, 63 *Fed. Reg.* 41872, 41874 (August 5, 1998). NEP's multiple failures to adhere to this policy warrant striking of NEP's Unauthorized Response.

IV. NEP's Unauthorized Response Should be Stricken Because it Contains Baseless, Assertions, Irrelevant to the Merits of this Proceeding, for which NEP Provides No Evidence

On pages 4-5 of its Unauthorized Response, NEP suggests that Petitioners' "concerns are not sincere," and that Petitioners are "really motivated by a desire to retaliate against NEP for pursuing . . . litigation" against Northeast Utilities.

NEP's suggestion is prejudicial, untrue, unsupported by evidence, and irrelevant to the merits of this proceeding. Petitioners have explained the basis for their concerns at great length in their Requests and Reply: Petitioners may suffer financial harm and harm to their property if NEP no longer provides sufficient financial resources to support safe and efficient operation of Seabrook and Millstone 3, or if NEP's foreign owner takes action not in the interest of these U.S. nuclear plants. *See* Requests at 3-4, Reply at 4-5, 6-7, 8-9. As the Commission recently noted, "it is hard to conceive of an entity more entitled to claim standing than a licensee whose costs may rise, and whose property may be put at radiological risk, as a result of an ill-funded license transfer. This kind of situation justifies standing based upon 'real world consequences that conceivably could harm Petitioners and entitle them to a hearing.'" *North Atlantic Energy Service Corp.*, CLI-99-6, 49 NRC at 215, *quoting Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 205 (1998).

NEP's assertion – advanced without one single shred of evidence – serves only to distract the Commission from the very substantial flaws in NEP's license transfer application. This assertion is also prejudicial and irrelevant to the issues Petitioners have raised, the interests they seek to protect through a hearing, and the matters the Commission must decide in considering NEP's Application. The Commission should not countenance NEP's unfounded accusations, but

should strike NEP's Unauthorized Response from the record and conduct a hearing regarding the defects in NEP's Application.

V. Conclusion

NEP's Unauthorized Response should be stricken from this proceeding. It is not authorized by Commission regulations and does not comply with the time limitations imposed by those regulations. No good cause has been shown for departure from those regulations. Furthermore, the Unauthorized Response fails to comply with the Commission's policy in that it is rife with inappropriate and misleading statements and legal references. Finally, the Unauthorized Response contains prejudicial, untrue, and irrelevant assertions that are not supported by any evidence. For all of these reasons, Petitioners respectfully request that the Commission strike NEP's Unauthorized Response from this proceeding.

Respectfully Submitted,



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Dated: August 13, 1999

CERTIFICATE OF SERVICE

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I hereby certify that copies of the foregoing Motion of The Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation to Strike Unauthorized Response of New England Power Company, have been served by first-class U.S. mail, postage prepaid, this 13th day of August, 1999.

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U.S. Nuclear Regulatory Commission
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OFFICE OF THE SECRETARY
RULEMAKING AND ADJUDICATIONS
ADJUDICATIONS

VIA FIRST CLASS MAIL

August 13, 1999

Office of the Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudications Staff
Washington, D.C. 20555-0001

RE: Northeast Nuclear Energy Corporation et al. (Millstone Station, Unit 3, NRC License No. NPF-49), Docket No. 50-423; North Atlantic Energy Service Corporation et al. (Seabrook Station, Unit 1, NRC License No. NPF-86), Docket No. 50-443

Dear Ms. Vietti-Cook:

Enclosed for filing please find an original and two copies of the consolidated Motion of The Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation to Strike Unauthorized Response of New England Power Company in the above-captioned matters.

Copies of this Motion to Strike have been served upon the parties by first-class mail, in accordance with 10 CFR § 2.1313, as indicated in the Certificate of Service attached to the Motion.

If you have any questions or need any additional information related to this filing, please contact me at 202-467-7454 or my partner, Jay Gutierrez, at 202-467-7466. Thank you.

Sincerely,

William E. Baer, Jr.

Enclosure

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London Brussels Frankfurt Tokyo Singapore Jakarta