DOCKETED

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

'99 AUG 12 P4:15

In the Matter of	)	
Northeast Nuclear Energy	)	Docket No. 50-423
Company, et al.	)	License No. NPF-49
Millstone Station, Unit 3	)	
In the Matter of	)	
North Atlantic Energy	)	Docket No. 50-443
Service Corporation, et al.	)	License No. NPF-86
Seabrook Station, Unit 1	)	

Response of New England Power Company

On August 3, 1999, The Connecticut Light & Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation, all subsidiaries of Northeast Utilities (and referred to collectively herein as "NU"), filed a Reply to support their previous request for a hearing. New England Power Company ("NEP") hereby files this response. While the Commission's rules do not specifically contemplate responses to a reply, they do not specifically forbid such responses. Moreover, NEP feels compelled to clarify the record, because NU has raised a brand new (and fictitious) legal standard for the first time in its reply, and has failed to demonstrate any facts which merit a hearing.

NU claims that it is entitled to a hearing simply because it has an interest in the case, has raised issues within the scope of the proceeding, and has provided a concise statement of facts. Reply at 3. However, to merit a hearing, NU must also show that "a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.1306 (b) (2) (iv). NU has not done so. Since applicants are fully qualified as a matter of law, there is no need for a hearing.

110012

20728

1. Because NEP Will Remain An Electric Utility As A Matter of Law, NU Has Not Raised Any Issues of Fact Which Merit A Hearing

NU still alleges that NEP might not be an "electric utility", as defined by the Commission. NEP meets the definition of an "electric utility" so clearly that there is no dispute about any material fact.

The Commission's definition of an "electric utility" reads in pertinent part as follows:

> *Electric utility* means any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities ... are included within the meaning of "electric utility."

10 C.F.R. § 50.2.

NEP will distribute electricity, and NU does not dispute that fact. NEP will be an investor-owned utility, and NU does not dispute that fact. NEP has and will remain rate-regulated by the FERC and absolutely nothing about the character of that regulation will change post-merger. These undisputed facts prove that NEP meets the definition of an electric utility, under the plain meaning of the rule. NU has not alleged any facts which contradict that plain meaning. There are no facts to be addressed at a hearing.

Instead of disputing the facts, NU has invented a new legal standard. According to NU, it is no longer enough simply to meet the definition in the rule. Now, suddenly, NEP is required to show "what proportion of NEP's business" will be regulated. Reply at 6. NU cites no authority for this imaginary new requirement, which appears nowhere in the rule. NEP is unaware of any case in which the Commission has required an investor-owned utility to show proportional regulation in a license transfer. However, it bears repeating that virtually all of NEP's activity will continue to be regulated. Unlike NU, NEP has divested its non-nuclear generation, and chosen to concentrate on the delivery of electricity through the transmission grid, an area which will remain pervasively

regulated. Therefore, the question of "proportionality" is unnecessary as a matter of law and moot as a matter of fact.

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[.]" *Public Service Company of New Hampshire*, 28 NRC 573 (1988). NU has not even tried to make such a showing, and could not do so.

Finally, NU has not alleged that anything about this transfer will affect NEP's status as an electric utility or its financial resources. Rather, NU seems to feel that the emerging competitive environment will somehow affect that status. Competition will continue to emerge whether or not this transfer is granted, and the transfer is irrelevant to that issue. In that sense, NU's claim is not within the scope of this proceeding, because it has nothing to do with the transfer. There is no need for a hearing to dismiss that claim.

2. The Transfer Will Comply With Commission Precedent As A Matter of Law, and NU Has Raised No Facts About Foreign Ownership Which Merit a Hearing.

NU's second point is that, although the Commission approved foreign ownership in *Amergen*, it should forbid foreign ownership here, because the statute refers to ownership of licensees, not to ownership of facilities. Reduced to its essence, NU's position is this: a foreigner can own 50% of a licensed facility in *Amergen*, but cannot own 34.5% of a licensed facility in this case.[1] That position makes no sense, as a matter of fact, policy, or law.

The policy behind the foreign ownership prohibition is focused on whether the foreign entity has "the ability to restrict or inhibit compliance with the security and other regulations of the AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor[.]" *General Electric Company and Southwest Atomic Energy Associates*, 3 AEC 99 (1966). NEP does not control any nuclear facility, but is a passive owner with no operating rights or access to any nuclear materials. Therefore, no British parent

---

[1] NEP does not own more than 34.5% of any licensed facility. The foreign party in *Amergen* also owned half the licensed operator. NEP owns no interest in any licensed operator.

of NEP will have any authority to cause a violation of any Commission rules, a default of any license obligations, or the diversion of any nuclear fuels. NU has not even alleged that any British company will have those rights. Instead, NU would have the Commission focus solely on control of one of the licensees, and ignore control of the facility. The Commission recognized, in its Standard Review Procedure, that control of the facility is the most critical fact, in terms of law and policy.

Congress did not expect the Commission to be blind to the facts. The fact is that 34.5% control of a facility is not as significant as 50% control of a facility, the amount approved in *Amergen*. To ignore that fact would contravene the substance and purpose of the law.

In addition, of course, NEP has taken steps to prevent foreign control which provide greater assurance than those provided in *Amergen*. As a matter of logic and of law, the Commission cannot disapprove NEP's application without reversing the decisions taken in the SRP and in *Amergen*. These facts were discussed in NEP's July 27, 1999 response. This transfer is consistent with that precedent and should be approved.

3. NU's Concerns are Not Sincere.

The Reply goes to great lengths to demonstrate the sincerity of NU's interest in the proceeding, with an elaborate proclamation of sincerity. However, NU cannot seriously be concerned about the issues it has raised. As to NU's first point, NEP is in a more financially stable position than NU. As to the second point, NU cannot maintain seriously that the acquisition of NEP by a British entity is a risk to the common defense. That issue already has been decided when on April 29, 1999, the Department of the Treasury, Committee on Foreign Investment in the United States, concluded that National Grid's acquisition of NEES did not raise issues of national security. More recently, on August 9, 1999, the New Hampshire Public Utilities Commission approved the merger and indicated that any national security concerns had been resolved by the Department of the Treasury. NEP always has been a minority licensee company operating under a holding company. This same corporate structure will continue after the acquisition with only the addition of another holding company imposed above the existing holding company. The foreign ownership issue is a question of public

policy that has no bearing upon the operations of the facilities in this proceeding.

NU claims that it is merely trying to preserve the financial integrity of the facilities and their operators, but NEP has never been a threat to that integrity, and NU knows that. NEP has never defaulted on any financial obligation regarding Seabrook or Millstone. Nothing about the merger will threaten NEP's financial position, and NU has not alleged anything to the contrary. NU cannot credibly contend, nor has it even tried to argue, that the British are going to sabotage Seabrook or Millstone, divert nuclear fuel, or take other actions that are contrary to national security or the public interest. Nor can NU justifiably care whether one or more of NEP's directors are U.K. citizens.

In short, NU has raised not a single legitimate concern with the proposed transfer that is grounded in the Atomic Energy Act. One must therefore search outside its pleadings for the reason for NU's filing. The answer may reside in the fact that NEP has sued NU for mismanagement of Millstone (See NEP's Response to NU's Requests for Hearing, p. 3 n.3). It is not unreasonable to conclude that NU is really motivated by a desire to retaliate against NEP for pursuing this litigation. The NRC should not allow its procedures to be misused for such ancillary purposes.

4. Conclusion.

The Commission has previously held that a hearing is not necessary in a license transfer proceeding, unless "potentially significant health or safety issues were raised." *Long Island Lighting Company*, 35 NRC 69 (1992). NU has not even alleged any threat to the public health or safety. As to those issues or any others, mere allegations will not suffice to require a hearing. *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 127 (D.C. Cir. 1982). NU's allegations are unsupported by any

facts. Thus, there are no genuine issues of material fact in dispute. The Commission can and should approve the application without a hearing.

Respectfully submitted,

Mary A. Murphy

Edward Berlin, Esq.
Scott P. Klurfeld, Esq.
Swidler Berlin Shereff
Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007-5116
(202) 424-7500
(202) 424-7500

Samuel Behrends IV, Esq.
Mary A. Murphy, Esq.
Yvonne M. Coviello, Esq.
LeBoeuf, Lamb, Greene
MacRae, L.L.P.
1875 Connecticut Avenue, NW,
Suite 1200
Washington, DC 20009
(202) 986-8000

Thomas G. Robinson, Esq.
New England Power Company
25 Research Drive
Westborough, MA 01582
(508) 389-2877

Paul K. Connolly, Jr., Esq.
LeBoeuf, Lamb, Greene &
MacRae, L.L.P.
260 Franklin Street
Boston, MA 02110
(617) 439-9500

Attorneys for New England
Power Company

Attorneys for NGG Holdings LLC

August 10, 1999