

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'99 AUG -3 P4:13

OFFICE OF THE
GENERAL COUNSEL
ADJUDICATIVE
DIVISION

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

~~Docket No. 50-423~~
License No. NPF-49

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

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

**REPLY OF THE CONNECTICUT LIGHT AND POWER COMPANY,
WESTERN MASSACHUSETTS ELECTRIC COMPANY, AND
NORTH ATLANTIC ENERGY CORPORATION TO RESPONSE OF
NEW ENGLAND POWER COMPANY TO REQUESTS FOR HEARING**

I. Introduction

New England Power Company ("NEP") filed an application ("Application") for transfer of control of its licenses for the Millstone Station, Unit 3 ("Millstone 3") and the Seabrook Station ("Seabrook") to reflect the fact that NEP's parent company and 100% owner, New England Electric System ("NEES") is merging with, and will become a wholly-owned subsidiary of, The National Grid Group plc ("National Grid"), a public limited corporation incorporated under the laws of England and Wales. In response to Federal Register notices announcing the Application and providing an opportunity for public hearing, The Connecticut Light and Power Company ("CL&P") and Western Massachusetts Electric Company ("WMECO"), co-owners of Millstone 3, timely filed a Motion to Intervene and Request for Hearing with respect to the Millstone 3 license transfer on July 20, 1999. Concurrently, CL&P and North Atlantic Energy

20703

Corporation ("NAEC"), co-owners of Seabrook, timely filed a Motion to Intervene and Request for Hearing with respect to the Seabrook license transfer.^{1/} On July 27, 1999, NEP filed a consolidated "Response of New England Power Company to Requests for Hearing" ("Response"). Pursuant to 10 CFR § 2.1307(b), CL&P, WMECO, and NAEC (collectively "Petitioners") hereby file their consolidated Reply to NEP's Response.

II. Under 10 CFR § 2.1308, Petitioners are Clearly Entitled to an Oral Hearing in this Proceeding

In their Requests, Petitioners seek a hearing on two issues relating to the transfer of NEP's licenses for Millstone 3 and Seabrook: (1) NEP has not provided sufficient assurance of its continued financial qualifications to support Millstone 3 and Seabrook; and (2) NEP's proposed "negation action plan" is not sufficient to prevent foreign domination or control of NEP, which will be indirectly 100% owned by National Grid, a foreign entity. As detailed in the Requests, Petitioners, as co-owners and co-licensees of Millstone 3 and Seabrook, seek a hearing in order to ensure that their financial, property, and license interests in those respective facilities are protected. So long as these interests are protected, Petitioners do not oppose the NEES/National Grid merger.

The Petitioners' Requests specifically address the factors that the Commission is to consider in determining whether a hearing is warranted. *See* 10 CFR § 2.1308(a)-(c). As explained in those Requests, Petitioners have a clear interest in the license transfer proceeding that will be affected by approval or denial of the license transfer (Requests at 3-4); the

^{1/} For convenience, the Motions to Intervene and Requests for Hearing filed by CL&P, WMECO, and NAEC are herein referred to as the "Requests."

Commission can grant relief by denying the license transfer or conditioning the transfer upon appropriate guarantees (*Id.* at 4); the issues sought to be litigated are within the scope of the proceeding, are relevant to the findings the Commission must make to approve the transfer, and are appropriate for litigation (*Id.* at 3-5, 7-9); and Petitioners have provided a concise statement of the facts upon which they rely with references to specific sources and documents (*Id.* at 5-11).

There should be no dispute that the factors the Commission must consider under 10 CFR § 2.1308 militate in favor of an oral hearing. Indeed, NEP does not contest that a majority of these factors clearly support conducting an oral hearing. For example, NEP does not contend that Petitioners lack an interest in this proceeding ^{2/}; does not claim that Petitioners' concerns lie outside the scope of the proceeding; does not claim that Petitioners' interests will not be affected by approval or denial of the license transfer; and does not claim that Petitioners' concerns are irrelevant to the findings the Commission must make to act on the license transfer.

Instead, NEP alleges that Petitioners' claims are not factually "credible" (Response at 2) and makes various factual claims to support NEP's assertions that: (1) NEP is financially qualified as an "electric utility;" (*Id.* at 4-6) and (2) its proposed "negotiation action plan" is adequate.

^{2/} NEP professes to be "puzzled" as to how Petitioners' interests are affected by these issues. Response at 3. As explained in detail in Petitioners' Requests, as co-owners of Millstone 3 and Seabrook, Petitioners will be directly affected if NEP is unable to comply with its financial obligations with respect to those units or National Grid directs action not in the interest of those units. As the Commission recently noted in a similar proceeding brought by NEP, "it is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee whose costs may rise, and whose property may be put at radiological risk, as a result of an ill-funded license transfer." *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201, 215 (1999).

Id. at 8-10. Based upon these claims and assertions, a number of which are newly advanced, NEP argues that Petitioners' requests for hearing should be "rejected." *Id.* at 2, 15.

Rather than providing a basis to deny Petitioners' Requests, however, NEP's Response demonstrates that there are genuine disputes regarding material issues of law and fact which remain to be resolved, and which are appropriate for consideration in an oral hearing. As described in detail below, substantial factual questions remain about the adequacy of NEP's Application with respect to both NEP's financial qualifications and protection against foreign domination or control. Under these circumstances, an oral hearing is the fairest and most efficient means to address the credibility of the parties' claims, and to ensure that these matters are fully addressed and fairly resolved. Where material facts are in dispute, a further inquiry -- in this case a hearing -- is appropriate. *Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995).*

III. NEP's Application and Response Do Not Demonstrate that NEP Will Remain an Electric Utility, and Fail to Provide the Financial Information Required Absent Such a Demonstration.

As pointed out in Petitioners' Requests, NEP's Application is deficient in that it neither asserts that NEP is an "electric utility" as defined in 10 CFR § 50.2, nor provides the financial information (*e.g.*, five year *pro formas*) required in circumstances where a licensee is not an "electric utility." *See* 10 CFR § 50.33(f). Petitioners found this substantial deficiency troubling because the Commission's regulations are very clear as to the need to demonstrate financial qualification by one or the other of these two means, and Petitioners have a strong interest in

ensuring that their nuclear plant co-owners have adequate funding mechanisms in place to support Millstone 3 and Seabrook.

NEP now declares in its Response (as it did not in its Application) that it will in fact remain an “electric utility.” Response at 6. But NEP supports this conclusion only by avoiding focus on the crux of the definition of “electric utility” contained in 10 CFR § 50.2. In essence, NEP claims to find *two* definitions of “electric utility” in § 50.2, and alleges that it qualifies “under both definitions.” *Id.* at 5.

First, NEP contends that it is an electric utility because “clearly, NEP is an entity which will continue to ‘distribute’ electricity.” *Id.* This fact, while interesting, does nothing to address Petitioners’ concerns regarding NEP’s financial qualifications. Petitioners have never contended that NEP does not or will not continue to distribute electricity.

Second, NEP argues that it is an “investor owned utility” as evidenced by filings with the Securities and Exchange Commission in which NEP so labeled itself. NEP apparently believes that by calling itself an “investor owned utility,” it meets the definition of “electric utility” in 10 CFR § 50.2 and the financial qualification requirements of 10 CFR 50.33(f).

However, both of these points miss the crux and purpose of the definition of “electric utility” in 10 CFR § 50.2. Under that definition, in order to be an “electric utility,” an entity must “recover the cost of [the electricity it generates or distributes] . . . through rates established by the entity itself or by a separate regulatory authority.” This requirement is based on the assumption that ratemaking authorities will ensure recovery of reasonable costs and, therefore, the licensee will have adequate funding to meet its nuclear plant obligations. The second sentence of the definition of “electric utility” in 10 CFR § 50.2 simply makes clear that several

types of entities, including “investor owned utilities . . . public utility districts, municipalities, rural electric cooperatives, and state and federal agencies . . .” (many of which would not be considered “utilities” in normal parlance) can come within this definition if they recover their costs of electricity through rates set by themselves or an independent authority.

To the extent that it addresses the issue of recovery through rates at all, NEP’s Response claims that NEP meets this definition because its “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.” *Id.* Aside from being confusing, these representations provide no clear basis for concluding that NEP will remain an electric utility. For example, though NEP claims that “transmission of electricity” will be its “principal focus,” NEP has provided no specific information regarding what proportion of NEP’s business will lie within this area of “principal focus.” Nor has NEP indicated the proportion of its costs that will be recovered in approved rates, or, even if NEP is currently an electric utility, what guarantees exist that National Grid will not act to change that status.^{3/}

Instead of providing any clear evidence that it is an electric utility, NEP touts its general financial health, claiming that it is “becoming a member of a corporate aggregation with a greater total capitalization.” *Id.* at 7. But NEP has avoided providing the specific information necessary

^{3/} NEP does provide some information indicating how it intends to recover nuclear plant decommissioning costs, as well as a percentage of the operating and maintenance costs attributable to its nuclear plant shares. *Id.* at 7-8. But NEP’s filings leave unclear whether, overall, NEP’s cost recovery structure will qualify it as an “electric utility.” In the event that it is determined that NEP is no longer, or may not remain, an “electric utility,” NEP also has not provided the basis (e.g., the five-year *pro forma* financial information) required by the Commission in order for it to conclude that NEP is otherwise financially qualified.

to meet the NRC's financial qualification requirements, and does not describe any protections to prevent NEP's transmission and distribution resources (which will now be indirectly controlled by National Grid) from migrating to other parts of the "corporate aggregation" that may not have obligations to Millstone 3 and Seabrook. Indeed, NEP notes that it has already divested itself of its non-nuclear generating assets.^{4/}

In these circumstances, an oral hearing is warranted to determine the truth of these disputed factual issues and to ensure that the Commission places sufficient conditions in the NEP license to assure that its financial qualifications are maintained. *Georgia Institute of Technology*, CLI-95-12, 42 NRC at 118.

^{4/} NEP cites its alleged past record as a responsible co-owner of Millstone 3 and Seabrook as evidence that it is financially qualified and that Petitioners and the Commission should be unconcerned about NEP's ability to meet its financial obligations to those units. Response at 6. Whatever this record may be, it was compiled under prior owners and Board members in a fundamentally different business climate, not under National Grid in a competitive environment. It is future performance under ownership of National Grid and future business conditions that are at issue here. NEP's past record is of little if any relevance to this question. NEP also places great weight on the fact that it "takes very seriously its contractual commitments." *Id.* However, NEP was not equally confident in Little Bay's contractual commitments under the Seabrook Agreement for Joint Ownership when NEP sought to intervene in the proposed transfer of Montaup's interest in Seabrook to Little Bay:

According to Little Bay, that [Joint Ownership] Agreement undermines NEP's claim of heightened risk of liability for operating and decommissioning-fund expenses. We cannot agree with Little Bay that NEP has no legitimate concern whatsoever. The Commission itself has stated in a policy statement that, under 'highly unusual situations,' it might hold co-owners financially liable for the share of such expenses attributable to a defaulting co-owner . . . And the State of New Hampshire has apparently imposed similar joint and several liability on all Seabrook co-owners.

North Atlantic Energy Service Corp., CLI-99-6, 49 NRC at 216.

IV. NEP's Application and Response Do Not Indicate Sufficient Protection Against Foreign Domination or Control

As described on pp. 8-11 of Petitioners' Requests, NEP's "negation action plan" is not sufficient to prevent foreign domination of NEP and its licenses for Millstone 3 and Seabrook. NEP's Response provides no more assurance than did its initial Application that NEP will not be subject to foreign domination or control under the proposed merger agreement.

Section 184 of the Atomic Energy Act of 1954, as amended (the "Act"), and 10 CFR § 50.38 are quite clear that an entity that is controlled or dominated by a foreign corporation is ineligible for an NRC license for a power reactor. As noted in 10 CFR § 50.38,

Any . . . corporation . . . which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

This provision prevents foreign control of NRC power reactor licenses and licensees. It applies both to licensees who own and operate nuclear power plants, as well as to non-operating co-owners of nuclear power plants, who must be licensed under 10 CFR Part 50. *See Public Service Company of Indiana (Marble Hill 1 and 2), ALAB-459, 7 NRC 179, 200-201 (1978)*. To prevent prohibited foreign domination or control of an NRC licensee, an adequate negation action plan is required. *See NRC Standard Review Plan on Foreign Ownership, Control or Domination ("SRP on Foreign Ownership")*. 64 *Fed. Reg.* 10,166 (March 2, 1999).

The proposed merger between National Grid and NEES will indirectly result in NEP becoming 100% owned by National Grid, a foreign corporation. Obviously, without adequate protections, NEP will be dominated or controlled by National Grid, either directly or through NEES, NEP's parent and a wholly-owned subsidiary of National Grid. For example, as the

100% owner of NEES and NEP, National Grid can procure the appointment or dismissal of members of NEP's Board of Directors, as to which there is no limit on foreign membership.^{5/} Through those members, National Grid could demand dissolution of NEP, could arrange the transfer of assets out of NEP, and could direct the flow of NEP's revenues.^{6/} All of these actions would constitute control of NEP and could affect NEP's ability to meet its obligations with respect to Millstone 3 and Seabrook.

NEP attempts to avoid this problem by comparing its situation to that of AmerGen, an American corporation only partially owned by a foreign entity, and claims that because NEP will own a smaller part of Millstone 3 and Seabrook than AmerGen will own of TMI-1, National Grid's 100% ownership of NEP does not violate Section 184 of the Act and the Commission's regulations. Response at 13. NEP misapprehends the nature of the prohibitions in the Act and the Commission's regulations. Both the Act and the regulations specifically prohibit foreign

^{5/} In its June 17, 1999 response to an NRC Staff Request for Additional Information, NEP described the membership of the NEP Board of Directors, a majority of whom are currently U.S. citizens. However, as Petitioners pointed out in their Requests, there is no restriction which would prevent National Grid in the future from creating a NEP Board comprised of a majority of foreign nationals, including the Chairman of the Board. Indeed, NEP has represented that four of nine members the Board of Directors of NEES, NEP's parent and 100% owner, will at the time of the merger be foreign nationals, including the Chairman of NEES. NEP's Response does not contest these facts, nor does it explain how, in these circumstances, National Grid will be prevented from controlling or dominating NEP, the licensee.

^{6/} Such actions can materially affect the financial security of Petitioners, particularly in light of the NRC's Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry. 62 *Fed. Reg.* 44,071, 44,074, 44,077 (Aug. 19, 1997) (the Commission has stated that it reserves the right to impose joint and several liability on co-owners when one or more co-owners have defaulted).

domination or control of a *licensee* and hence the license.^{7/} In this case, NEP will be 100% foreign-owned, compared to the 50% foreign ownership (with numerous protections) found acceptable for AmerGen. NEP's references to Section 3.2 of the SRP on Foreign Ownership is telling; that section clearly states that in cases where a 100% foreign-owned licensee seeks a share of a nuclear power facility, further consideration is required. Particularly because the NEP/National Grid license transfer presents a case of first impression, this consideration should include an oral hearing.

The fact that NEP currently proposes to include two well-known and respected figures on the Nuclear Committee of its Board of Directors is similarly irrelevant. Response at 12-13. Petitioners have not and do not contend that the membership of that committee is inappropriate, but that the powers reserved to the full Board (as well as the inherent powers of the full Board described above) give effective control of NEP to a foreign entity, including control of matters intimately connected to NEP's role as an NRC licensee.^{8/} Given these reservations, the fact that the Nuclear Committee is currently proposed to include some individuals of good character provides no permanent guarantee that NEP (including the Committee) will not be dominated or controlled by National Grid.

^{7/} NEP argues that it complies with the NRC's SRP on Foreign Ownership because it will have less than 50% ownership of Millstone 3 or Seabrook. Response at 9-10. However, NEP cannot rewrite the Atomic Energy Act or the Commission's regulations by referring to ownership of a *facility*, when the Act and the regulations clearly prohibit foreign domination or control of a *licensee*.

^{8/} NEP implicitly recognizes this fact by its offer to amend these reservations by eliminating the right of the full Board to act on orders of the Commission or other agencies or courts. Response at 11.

NEP's argument that it does not have day-to-day control over reactor operations at Millstone 3 and Seabrook is similarly shallow. As noted above, the Act's prohibitions on foreign domination or control explicitly apply to *licensees* and hence the license, not facilities. Furthermore, as a co-owner possessing or soon to possess a more than 12% ownership share of Seabrook, and a more than 15% share of Millstone, NEP has strong influence on their financial viability, which is the very interest Petitioners seek to have protected.^{2/} But NEP's authority does not stop there. For example, at Seabrook the co-owners play a direct role in such key decisions as whether to appoint or remove Seabrook's Managing Agent or shut down the reactor and cease operations (a power that NEP wishes to reserve to its full Board, not the Nuclear Committee). Agreement for Joint Ownership, ¶¶ 24, 36. Furthermore, NEP is a member of Seabrook's Executive Committee, which has the power to approve or modify the budgets and conduct searches and make recommendations to the Participants with respect to the appointment of new managing agents. *Id.* ¶ 37.

Similarly, the fact that some actions of NEP's Board may require approval or concurrence of the NRC or Millstone 3 or Seabrook co-owners is of little moment for purposes of compliance with the NRC's restrictions on foreign control. All nuclear plant licensees are subject to NRC regulations, and all that are co-owners are limited by their contractual arrangements with other owners. The Act's restrictions on foreign domination or control apply regardless of and in addition to whatever other normal requirements the Act, the Commission's regulations, or

^{2/} NEES is currently in the process of merging with Eastern Utilities Associates, which owns Montaup Electric Company. Application at 10. As a result of this merger, NEP will acquire Montaup Electric Company's interests in Millstone 3 and Seabrook, thereby increasing its ownership share in each unit to the levels described above.

licensees' commercial arrangements may impose, precisely because the putative licensee is a *foreign* entity. An entity is not allowed to *become* a licensee in the first place unless the restrictions on foreign domination and control are satisfied. By its argument, NEP would have the Commission simply ignore these restrictions.

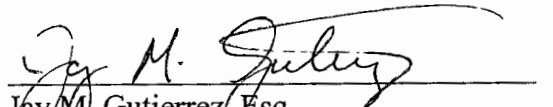
As with the financial qualifications issue, the best way for the Commission to resolve Petitioners' foreign ownership concerns is to hold a hearing, rather than dispositioning these issues based on an obviously incomplete application and the few hastily assembled additional points adduced in NEP's Response.

V. Conclusion

NEP's response attempts to cure several obvious defects in its Application, but does not resolve the fundamental problems that caused Petitioners to request a hearing in this proceeding. Instead, many of the facts stated in the Response appear to substantiate, or are at least consistent with, a number of Petitioners' concerns. Accordingly, Petitioners respectfully request a hearing on these issues. If NEP is given the opportunity to cure the defects in its Application, Petitioners

respectfully request that (1) they be provided thirty days to review and assess the new information provided by NEP, and (2) they be provided with an opportunity to amend, supplement, or withdraw their requests for hearing based upon their assessment of any such new information.

Respectfully submitted,



Jay M. Gutierrez, Esq.
William E. Baer, Jr., Esq.
Goran P. Stojkovich, Esq.
Counsel for CL&P, WMECO, and NAEC
Morgan, Lewis & Bockius LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7466
(202) 467-7176 (facsimile)
guti7466@mlb.com (e-mail)
baer7454@mlb.com (e-mail)
stoj7684@mlb.com (e-mail)

Dated: August 3, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply of The Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation to Response of New England Power Company to Requests for Hearing have been served upon the following by courier and facsimile this 3rd day of August, 1999.

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

OFFICE OF THE SECRETARY
RULEMAKING AND ADJUDICATIONS STAFF
U.S. NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

'99 AUG -3 P4:13

DOCKETED
USMRC

Courier delivery was made to the Office of the Secretary at the following address:

U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland

I hereby certify that copies of the foregoing Reply of The Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation to Response of New England Power Company to Requests for Hearing have been served upon the following by facsimile, with a conforming copy deposited in the U.S. mail, first class, postage prepaid, this 3rd day of August, 1999.

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

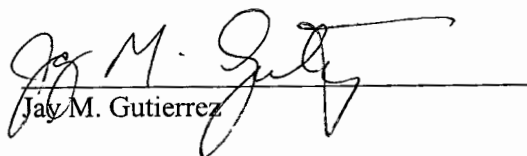
Lillian M. Cuoco, Esq.
Senior Nuclear Counsel
Northeast Utilities Service Company
107 Selden Street
Berlin, CT 06037

Edward Berlin, Esq.
Scott P. Klurfeld, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Thomas G. Robinson, Esq.
New England Power Company
25 Research Drive
Westborough, MA 01582

Samuel Behrends IV, Esq.
Mary A. Murphy, Esq.
Yvonne M. Coviello, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009

Paul K. Connolly, Jr., Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
260 Franklin Street
Boston, MA 02110


Jay M. Gutierrez