UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	
NORTH ATLANTIC ENERGY SERVICE CORP. et al.	Docket No. 50-443
(Seabrook Station, Unit 1)	

CLI-99-06

MEMORANDUM AND ORDER

The Montaup Electric Company ("Montaup") seeks to transfer its 2.9-percent ownership[1] interest in Seabrook Station, Unit 1, to the Little Bay Power Corporation ("Little Bay"). Montaup is one of eleven co-owners of the Seabrook Station, Unit 1. Little Bay is a wholly-owned subsidiary of BayCorp Holdings, Ltd. ("BayCorp"), which is also the holding company for the Great Bay Power Corporation (the holder of a 12.1-percent ownership interest in Seabrook). On Montaup's behalf, Seabrook's licensed operator, the North Atlantic Energy Service Corporation ("NAESCO"), submitted the transfer application to the Commission for approval. The Atomic Energy Act ("AEA") requires Commission approval of transfers of ownership rights. See AEA, § 184, 42 U.S.C. § 2234. Recently-promulgated NRC regulations ("Subpart M") govern hearing requests on transfer applications. See Final Rule, "Public Notification,

[1] All ownership percentages specified in this order are approximate.

Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications," 63 Fed. Reg. 66,721 (Dec. 3, 1998), to be codified at 10 C.F.R. §§ 2.1300 et seq.

Pursuant to Subpart M, the New England Power Company ("NEP") -- a 10-percent co-owner of the Seabrook plant -- has filed a timely intervention petition opposing the Montaup-to-Little Bay transfer application as well as a petition for summary relief or, in the alternative, a request for hearing. Another co-owner, United Illuminating Company ("United," with a 17.5-percent ownership interest in the plant), has filed an untimely intervention petition. We grant NEP's intervention petition and request for hearing, limit the scope of that hearing, and deny United's late-filed request to intervene.

BACKGROUND

Pursuant to Section 184 of the AEA and section 50.80 of our regulations,[2] Montaup and Little Bay seek approval of the proposed transfer as part of Montaup's efforts to divest all of its electric generating assets pursuant to the restructuring of the electric utility industry in Massachusetts and Rhode Island.[3] Under the transfer arrangement, Little Bay would (among other things) assume full responsibility for Montaup's remaining share of Seabrook's future costs, including obligations for capital investment, operating expenses[4] and any escalation of

---

[2] This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders.

[3]To achieve this divestiture, Montaup has negotiated comprehensive settlement agreements with the regulatory authorities in both these states -- agreements approved by both states and the Federal Energy Regulatory Commission.

[4] For the sake of simplicity, this order will use the phrase "operating expenses" to include both such expenses and capital investment.

decommissioning obligations in excess of Montaup's pre-funded contribution (described immediately below).

In their application, Montaup and Little Bay offer the following two forms of assurance that the decommissioning and operating expenses associated with the 2.9-percent ownership interest will be fully paid. First, Montaup offers to provide an $11.8 million pre-funded decommissioning payment -- an amount which, assuming 4-percent inflation plus 1.73-percent rate of real return, would purportedly grow by the year 2026 to equal the amount required to satisfy the decommissioning funding obligation associated with Montaup's 2.9-percent interest in Seabrook. Montaup compares its proposed 1.73-percent rate of real return to the 2-percent rate provided for in the NRC's Final Rule, "Financial Assurance Requirements for Decommissioning Nuclear Power Reactors," 63 Fed. Reg. 50,465 (Sept. 22, 1998), corrected, 63 Fed. Reg. 57,236 (Oct. 27, 1998), to be codified at 10 C.F.R. § 50.75(e)(1)(i).

Second, Little Bay submits estimates for the total operating expenses at Seabrook attributable to Montaup's 2.9-percent ownership share of Seabrook for the first five years of Little Bay's ownership and the sources of funds to cover those costs. Little Bay also proffers favorable revenue predictions for the future, based on the assumptions that Seabrook will operate until its current license expires in 2026 and that market revenues through the year 2026 should be sufficient to cover Little Bay's share of the plant's decommissioning expenses and operating expenses, even if the estimates for those costs are later revised upward. As a further indication of the adequacy of Little Bay's financial assurances, the application points out that Little Bay's take-or-pay sales contract with Great Bay requires the latter to pay for all of Little Bay's Seabrook-related costs, whether or not Great Bay succeeds in reselling the electricity it buys from Little Bay.

Under the license transfer, NAESCO would remain the managing agent for the facility's eleven joint owners and would continue to have exclusive responsibility for the management, operation and maintenance of the Seabrook Station. The license would be amended only for administrative purposes to reflect the transfer of Montaup's ownership interest to Little Bay.

The Commission, in its December 14, 1998, Federal Register notice of Little Bay's and Montaup's application (63 Fed. Reg. 68,801), indicated that the proposed transfer would involve no changes in the rights, obligations, or interests of the other ten co-owners of the Seabrook Station, nor would it result in any physical changes to the plant or the manner in which it will operate.

INTERVENTION PETITIONS

Responding to the Commission's December 14th Notice, NEP and United filed petitions to intervene pursuant to the Commission's Rules of Practice set forth in Subpart M.[5] Petitioners are concerned that Little Bay cannot provide adequate assurance that, as a licensee, it can meet its financial obligations for the operation and eventual decommissioning of the Seabrook plant. This concern is grounded in the fact that the license transfer would shift the financial responsibility for Montaup's share of the Seabrook facility from a rate-regulated electric utility (Montaup) to an exempt wholesale generator (Little Bay). According to petitioners, a transfer to an exempt wholesale generator (particularly this one) would lessen the financial assurance with respect to Montaup's current share of the plant and would commensurately increase the financial and radiological risks of the other owners, such as petitioners.

---

[5] In our December 14th Federal Register Notice, we also indicated that, as an alternative to requests for hearing and petitions to intervene, persons were permitted to submit written comments to the Commission by January 13, 1999, regarding the license transfer application. The Commission has received one such comment, from co-owner Massachusetts Municipal Wholesale Electric Company, which raises arguments similar to those of NEP and United. We have referred this comment to the staff for its consideration. As we indicated in the Notice, the comment does not constitute a part of the decisional record.

In support, petitioners explain that satisfaction of Montaup's obligations is currently assured by both the rate recovery it is guaranteed under its approved restructuring settlements and also the income from its other assets. By contrast, Little Bay (like all other exempt wholesale generators) cannot provide rate-recovery assurance, as it is dependent solely upon unguaranteed market revenue for the satisfaction of its financial obligations. (Little Bay purportedly lacks other assets on which it can rely for income.)

Petitioners find scant comfort in Montaup's pre-funded decommissioning payment and Little Bay's favorable revenue predictions. Petitioners assert that, if the transfer were approved, Little Bay would be obliged to sell its share of Seabrook's electric output to Great Bay (another exempt wholesale generator) whose ability to meet its contractual obligations to Little Bay would depend on Great Bay's own uncertain ability to resell that same electric output in the bulk power market at a sufficient price. Petitioners also point out that Great Bay's assets (like those of Little Bay) consists almost exclusively of an ownership interest in Seabrook, thereby precluding any meaningful additional source of revenue if applicants' favorable five-year forecasts of market revenues prove overly optimistic.

Further, although petitioners recognize that Commission regulations accept Montaup's and Little Bay's two financial vehicles (prepayment and revenue prediction) as mechanisms by which entities that do not qualify as electric utilities under 10 C.F.R. § 50.2 may satisfy NRC financial assurance and financial qualifications requirements (see 10 C.F.R. §§ 50.33(f)(2), 50.75(e)(1)), petitioners nevertheless assert that the reality of today's electric power market in New England undermines the financial assurances that these alternative methods might otherwise have offered.

Petitioners allege that developers have announced plans to construct sixty new generating units in New England with a collective capacity of more than 30,000 MW and that,

although some of this capacity will probably never be built, a significant amount likely will be. Based on the expected resulting glut of electricity in the New England market, petitioners conclude that Little Bay's five-year revenue projections depend on highly questionable assumptions regarding Little Bay's and Great Bay's ability to sell electricity during the next five years (and beyond) at a price sufficient to meet Little Bay's operating and decommissioning cost obligations. Petitioners also question two assumptions underlying Little Bay's claim of adequate revenue -- that the Seabrook plant will not experience a prolonged shutdown and that it will remain operational until the expiration of its current license in 2026.

Based on these market conditions, petitioner NEP seeks two alternative forms of relief: either an evidentiary hearing on financial assurance and financial qualifications or (preferably) a summary order conditioning the Commission's approval of Montaup's license transfer request on Montaup's agreement to remain contingently liable should Little Bay prove unable to meet its financial obligations for the safe operation and decommissioning of Seabrook.

The other petitioner, United, supports NEP's two remedial proposals, and adds a third of its own: (1) The Commission would require BayCorp to build up a cash reserve to sustain Great Bay's and Little Bay's financial obligations in the event of a one-year shutdown of the plant. (2) The Commission would also prohibit BayCorp from withdrawing cash from Little Bay or Great Bay for any purpose other than supporting the financial obligations associated with Seabrook plant, until BayCorp has fully funded the reserve described above. (3) Further, the Commission would prohibit BayCorp from acquiring additional ownership in Seabrook until its cash reserve is sufficient to support any incremental purchases (using the one-year criterion described above) and until New Hampshire adopts legislation removing other Seabrook owners' exposure that might result from a default by Great Bay or Little Bay. (4) And finally, the Commission would

require Great Bay and Little Bay to obtain and maintain business interruption insurance for their ownership interest in Seabrook.

Montaup and Little Bay oppose NEP's and United's petitions. NAESCO takes no position. The NRC staff is not participating as a party in this proceeding.

DISCUSSION

I. NEP's Petition to Intervene and Request for Hearing

To intervene as of right in a Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," or in common parlance, it must demonstrate "standing." See AEA, § 189a, 42 U.S.C. § 2239(a). The Commission's rules require further that a petition for intervention raise at least one admissible contention or issue. The standards for meeting these two requirements in license transfer cases come both from our Subpart M procedural regulations and from judicial cases on standing (to which we look for guidance). Though our requirements for standing and for admissible issues overlap somewhat (see, e.g., our discussion of Scope of Proceeding, infra, which bears on both standing and issue admissibility), we can summarize them as follows:

To show STANDING, a petitioner must

(1) identify an interest in the proceeding by

(a) alleging a concrete and particularized injury (actual or threatened) that
(b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
(c) is likely to be redressed by a favorable decision, and
(d) lies arguably within the "zone of interests" protected by the governing statute(s).

(2) specify the facts pertaining to that interest.

To show ADMISSIBLE ISSUES, a petitioner must

(1) set forth the issues (factual and/or legal) that petitioner seeks to raise.

(2) demonstrate that those issues fall within the scope of the proceeding.

(3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application.

(4) show that a genuine dispute exists with the applicant regarding the issues.

(5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308. See generally Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-96 (1998) (standing); Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998) (admissible contentions).

A. Standing

NEP satisfies the standing test. It advances a plausible claim of injury: the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing NEP's risk of radiological harm to its property and its risk of being forced to assume a greater-than-expected share of Seabrook's operating and decommissioning costs. See, e.g., NEP's Intervention Petition at 3; NEP's Response at 2. Indeed, 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. This kind of situation justifies standing based on "real-world consequences that conceivably could harm petitioners and entitle them to a hearing." Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 205 (1998).

NEP's allegations regarding its increased risk are sufficiently concrete and particularized to pass muster for standing. They are supported by two detailed affidavits and other evidentiary exhibits. The threatened injury is fairly traceable to the challenged action (here, the grant of the license transfer application) because the alleged increase in risk associated with Little Bay taking over Montaup's interest could not occur without Commission approval of the application.

Similarly, the threatened injury can be redressed by a favorable decision because the Commission's denial of the application would prevent the transfer of interest.

The risk to NEP's interest in the Seabrook plant lies within the "zone of interests" protected by the AEA. we held several years ago in another case where a reactor co-owner contested a change in ownership, the AEA protects not only human health and safety from radiologically-caused injury, but also the owners' property interests in their facility. Gulf States Util. Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994), citing AEA, §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b). Persons or entities who own (or co-own) an NRC-licensed facility plainly have an AEA-protected interest in licensing proceedings involving their facility.

One further matter bears discussion. Little Bay argues that NEP's claim of injury directly contravenes the statement in the Federal Register Notice of this application that "[t]he proposed transfer does not involve a change in the rights, obligations, or interests of the other co-owners of the Seabrook Station." See Little Bay's Answer to NEP's Intervention Petition, dated Jan. 13, 1999, at 11, citing 63 Fed. Reg. at 68,802. In our view, however, Little Bay is taking too literally the language of the Notice, which was intended only to indicate that the terms of the transfer on their face do not change rights, obligations or interests. We do not regard the Notice as (in effect) barring intervention by co-owners or as precluding all argument that the effects of the transfer may have adverse effects on co-owners' interest.

Little Bay maintains that NEP is under no risk whatever of suffering financial harm because, under the Joint Ownership Agreement, neither NEP nor any other co-owner can be held liable for Little Bay's share of any expenses.[6] According to Little Bay, that Agreement

---

[6] See Little Bay's Answer to NEP's Intervention Petition, dated Jan. 13, 1999, at 11 ("As set forth in the Seabrook Joint Ownership Agreement, the obligations of the joint owners are 'several and not joint,' so NEP[CO] cannot incur any liability from Little Bay as a result of this (continued...)

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. See "Final 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).[7] And the State of New Hampshire has apparently imposed similar joint and several liability on all Seabrook co-owners. See N.H. Senate Bill 140, signed by the Governor on June 11, 1998.

Under these circumstances, we cannot fairly find NEP's concerns implausible or that its claims of potential injury are insufficient for a threshold showing of standing.

B. Admissible Issues

NEP proffers two issues for Commission consideration: (1) whether the Montaup-to-Little Bay license transfer application contains sufficient assurance of adequate decommissioning funding, and (2) whether the license transfer application likewise contains sufficient assurance of adequate funding for operations. We reject the first issue for failure to present a genuine issue of material fact or law, but we conclude that the second issue is admissible and requires a hearing.

---

[6](...continued)
transaction"), citing Agreement for Joint Ownership, Construction and Operation of New Hampshire Nuclear Units (May 1, 1973), ¶ 6.1.

[7] The quoted language from our Policy Statement is currently the subject of a pending Request for Rulemaking (64 Fed. Reg. 432 (Jan. 5, 1999)) in which co-owners of another nuclear power reactor raise questions about the Commission's views on joint liability.

1. Financial Assurance regarding Satisfaction of Decommissioning Funding Obligation

On the facts and allegations of this case, we see no conceivable violation of our regulation, 10 C.F.R. § 50.75, requiring licensees to show sufficient assurance of adequate decommissioning funding.[8] When Little Bay and Montaup filed their license transfer application in September 1998, they calculated an $11.8 million prepayment amount based on the assumption that the plant's total decommissioning costs would total $489 million (in current dollars), and that, by 2026, the $11.8 million would grow into the $14.2 million (again, in current dollars) necessary to meet Montaup's 2.9-percent share of Seabrook's decommissioning costs. That assumption derived from the cost formula set forth in section 50.75(c), using NUREG-1307 (Rev. 7, Nov. 1997). Although the applicants' calculations were based on then-current information when submitted in September 1998, the Commission staff in December created an

---

[8] For this reason, we do not decide the question, raised by both Montaup and Little Bay, whether NEP's decommissioning funding argument amounts in its entirety to an impermissible collateral attack on sections 50.75(c) and 50.75(e)(1). We wish to make clear, however, that a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings. See, e.g., Commonwealth of Massachusetts v. NRC, 924 F.2d 311, 330 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991). Accord, Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 170-71 (1995); American Nuclear Corp. (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 708-10 (1986); Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 n.33 (1974); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

For example, no one would be free to argue in a license transfer case that site-specific conditions at a particular nuclear power reactor render unusable the generic projected costs calculated under our rule's cost formula. In our decommissioning rulemakings, we deliberately decided to avoid a requirement for site-specific cost estimates to show financial assurance. See, e.g., Final Rule, "General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,030-31 (June 27, 1988) (discussing 1988 rule). Nor could anyone argue that prepayment is not an acceptable means of providing financial assurance for decommissioning. Our rules expressly say that it is. Subpart M allows participants to "petition that a Commission rule or regulation be waived" in particular cases upon a showing that because of "special circumstances ... application of a rule or regulation would not serve the purpose for which it was adopted." See 10 C.F.R. § 2.1329.

an alternate method for calculating expected costs of low-level waste disposal, with the result that the estimated decommissioning cost for plants of Seabrook's type now can be decreased considerably, from $489 million to $289 million.[9]

As a result of the recent revision, the $11.8 million committed by Montaup already exceeds, by a healthy margin, the minimum amount required to fully fund its 2.9-percent share of Seabrook's decommissioning costs, as calculated under section 50.75(c) and the new decommissioning cost alternative -- an amount of less than $8.4 million. This renders NEP's concerns, including Seabrook's allegedly high risk of early closure, inconsequential for our financial assurance determination.[10]

---

[9] See NUREG 1307 at page 6, example 3 (Rev. 8, Dec. 1998). Despite the $200 million downward revision, the applicants have not sought to reduce Montaup's prepayment amount. Sometimes, in response to site-specific circumstances, utilities prudently set aside more funds than the NRC requires. The NRC focuses its requirements on the amount of money required to reduce residual radioactivity to levels that permit release of the property (see 10 C.F.R. § 50.2). However, release can also involve activities other than those falling within the NRC's definition of "decommissioning" -- activities such as removal and disposal of spent fuel or of non-radioactive structures and materials beyond what is necessary to reduce residual radioactivity to required levels (see 10 C.F.R. § 70.75(c), footnote 1). The costs of these activities can amount to a large fraction of the NRC's required funding figure. Moreover, decommissioning funding is also subject to regulation by agencies having jurisdiction over rates -- agencies such as the Federal Energy Regulatory Commission and state Public Utilities Commissions, and these agencies can set funding requirements that are in addition to funding requirements set by the NRC (see 10 C.F.R. § 50.75(a)).

[10] Since we find as a matter of law that the proposed payment by Little Bay provides adequate assurance for decommissioning, we need not reach the question whether NEP's decommissioning funding issue would otherwise be admissible for litigation. However, we note that there is substantial doubt whether an argument based on a theoretical early shutdown of a facility is within the scope of this proceeding. There is nothing about the transfer to a new owner that changes the expected life span or cost of decommissioning a facility. As a general matter, license transfer proceedings are not the appropriate place for considering changes to requirements applicable to the facility and all its owners, as opposed to requirements directed at the proposed transferee. Indeed, if NEP's premise were correct, it would be more appropriate to consider generically whether to impose a change in the decommissioning funding process for all owners of the plant. The financial nature of these issues does not necessarily make them relevant to the financial questions presented in this particular transfer proceeding. As with technical requirements for operation of the plant, the transferee takes the plant as it exists, including the projected costs and associated assumptions used to establish the amount of

(continued...)

Montaup's promise to prepay considerably more than the minimum amount currently prescribed by the NRC financial assurance formula leaves NEP without any plausible decommissioning funding grievance, and (particularly in view of Montaup's minuscule share of the plant) gives us no reason to think that the public health and safety might in any respect be left unprotected. Prepayment is in fact the strongest and most reliable of the various decommissioning funding devices set out in section 50.75(e)(1). We conclude here, as a matter of law, that Montaup's prepayment provides sufficient assurance for its share of decommissioning costs and that there exists no genuine issue of material fact or law necessitating a hearing on decommissioning funding assurance. See 10 C.F.R. § 2.1306(b)(2)(iv).

2. Financial Qualifications for Meeting Operating Expenses

NEP meets the requirements set out in Subpart M regarding the admissibility of the "operating expenses" issue. See 10 C.F.R. §§ 2.1306, 2.1308. Its petition and reply clearly set out the claim that Little Bay will lack sufficient financial resources to fulfill its obligations for operating expenses. NEP's pleadings, and the applicants' own vigorous responses, demonstrate that a genuine dispute exists regarding this issue. NEP's arguments are certainly relevant and material. Indeed, they go to the very heart of the question whether applicants' financial qualifications are adequate to pass statutory and regulatory muster. When promulgating Subpart M a few months ago, we expressly recognized that NRC review of license transfer applications "consists largely of assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC

---

[10](...continued)
decommissioning funding required.

regulations." See 63 Fed. Reg. at 66,724. NEP's claims, in short, lie at the core of the NRC's license transfer inquiry.

The applicants argue that NEP's proposed issue lacks the specificity and factual support demanded by NRC rules. Our recently-issued Subpart M, like its counterparts applicable to other types of Commission proceedings (e.g., 10 C.F.R. § 2.714), does not permit "the filing of a vague, unparticularized contention," unsupported by affidavit, expert, or documentary support. Calvert Cliffs, 48 NRC at 349. See 10 C.F.R. § 2.1306. Nor does our practice permit "notice pleading," with details to be filled in later. Instead, we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them. See Yankee Atomic Electric Co (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 n.7 (1996).

In our view, NEP's initial pleadings in this case provide sufficient allegations and information to trigger further inquiry under Subpart M on the financial qualification issue. NEP maintains that Little Bay will prove incapable of meeting its financial obligations to Seabrook, and supports its view with ample references to the NRC decisions and other documents on which it intends to rely, with excerpts from filings by affiliates of Little Bay with the Securities and Exchange Commission, and with two affidavits from a senior NEP corporate officer who is clearly familiar with the electricity market in New England. While applicants are correct that NEP bases much of its argument on speculation that future electric market conditions in New England and at Seabrook may preclude Little Bay from meeting its revenue projections, NEP rests its speculation on factual assertions regarding the current electricity market in New England, on proposed expansions in electricity production capacity in New England, on premature closure rate of nuclear plants in the region, and on Little Bay's own financial

condition. "Speculation" of some sort is unavoidable when the issue at stake concerns predictive judgments about an applicant's future financial capabilities.

Little Bay maintains that NEP impermissibly attacks NRC regulations when it contends that Little Bay is too thinly financed to meet its obligations to Seabrook. As NEP acknowledges, an NRC rule, 10 C.F.R. § 50.33(f)(2), specifies what information a license applicant must submit to show its financial qualification for operating expenses, and Little Bay has submitted what the rule contemplates, a five-year cost-and-revenue projection. See NEP's Intervention Petition at 2, 6, 7. NEP, however, argues that it will suffer harm despite Little Bay's satisfaction of the methodological requirements of the regulation -- both because current market conditions in New England undermine the effectiveness of section 50.33(f)(2) (id. at 2-3, 7-8) and because assumptions underlying applicants' cost-and-revenue estimates are flawed (id. at 3, 7, 8).

As we noted above (note 8), participants in individual adjudications are precluded from collaterally attacking our generic regulations. Little Bay asks us to reject NEP's "operating expenses" argument as a collateral attack on section 50.33(f)(2). Little Bay essentially argues that the NRC in section 50.33 found generically that five-year cost-and-revenue projections suffice, without more, to satisfy NRC financial qualification rules. Therefore, the argument goes, NEP's demand for additional protection amounts to an impermissible challenge to the adequacy of NRC rules.

Little Bay's argument founders on the text of the rule itself. Section 50.33(f)(2) nowhere declares that the proffering of five-year projections will, per se, prove adequate in any and all cases. To the contrary, the rule contains a "safety-valve" provision explicitly reserving the possibility that, in particular circumstances, and on a case-by-case basis, additional protections may be necessary. See 10 C.F.R. § 50.33(f)(4) (to ensure adequate funds for safe operation, NRC may require "more detailed or additional information" if appropriate). As we detail below,

NEP is entitled to argue that this case calls for additional financial qualification measures beyond five-year projections and that the applicants therefore have not met their burden under section 50.33(f)(2) to satisfy Commission financial qualification requirements.

The burden of proof under section 50.33(f)(2) is to "demonstrate [that] the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license." In addition, section 50.33(f)(2) imposes certain filing requirements on the applicant -- that it submit operating cost estimates for the next five years and indicate the source of funds to cover these costs. Little Bay's "collateral attack" argument conflates these two portions of section 50.33(f)(2) by assuming that the applicants have met their burden of proof merely by complying with the filing requirements. Although satisfaction of those requirements is necessary to the grant of a license transfer application, such satisfaction cannot be deemed always sufficient to satisfy the applicant's burden of proof, else the NRC be irrevocably bound by applicants' own estimates and left without authority to look behind them.

Always in question under section 50.33(f)(2) is whether the applicant's cost and revenue estimates are reasonable. The adequacy of those estimates is challengeable (as here) by a petition for intervention under 10 C.F.R. § 2.1306 or by an NRC request for more detailed information. See 10 C.F.R. § 50.33(f)(4) (the Commission "may request an ... entity ... to submit additional or more detailed information respecting its financial arrangements and status of funds if [we] consider[] this information appropriate"). Accord 10 C.F.R. Part 50, Appendix C, section IV.

In sum, NEP does not claim that five-year cost-and-revenue projections are per se inadequate to meet financial qualification requirements -- such a claim would be precluded as a collateral attack on NRC rules. Rather, NEP simply contends that, as NRC rules themselves

contemplate, the circumstances of this particular transfer call for more detailed or extensive financial protection. We thus conclude that NEP's petition for a hearing does not constitute an impermissible collateral attack on section 50.33(f)(2) but instead raises an admissible issue for a hearing under Subpart M.

C. Scope of Proceeding

For the reasons set forth above, we grant NEP's intervention petition and hearing request. The scope of the hearing will be limited to the following issue: whether the Montaup-to-Little Bay license transfer application meets NRC rules for financial qualification regarding Seabrook's operating expenses (10 C.F.R. § 50.33(f)). Given the early stage of the proceeding and the existence of outstanding factual questions, however, we will hold in abeyance NEP's alternative request for the imposition of conditions.

Our grant of NEP's hearing request by no means suggests that NEP necessarily will succeed in its challenge to the transfer application. It faces a formidable task in persuading us that factors peculiar to Seabrook call for modification or rejection of what NEP acknowledges are financial qualification plans of the type ordinarily found acceptable by the Commission. See, e.g., NEP's Intervention Petition at 2. Some aspects of NEP's position seem to us particularly troublesome. We will set out our concerns to guide the parties as they proceed to a hearing in this case.

First, as a general matter, NEP cannot insist that applicants provide the impossible: absolutely certain predictions of future economic conditions. To be sure, safe operation of a nuclear plant requires adequate funding, but the potential safety impacts of a shortfall in funding are not so direct or immediate as the safety impacts of significant technical deficiencies. Generally speaking, then, the level of assurance the Commission finds it reasonable to require regarding a licensee's ability to meet financial obligations is less than the extremely high

assurance the Commission requires regarding the safety of reactor design, construction, and operation. The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected. Thus, the mere casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance.

At the same time, though, funding plans that rely on assumptions seriously at odds with governing realities will not be deemed acceptable simply because their form matches plans described in the regulations. Relying on affidavits and various forms of financial data, NEP asserts that Little Bay's cost-and-revenue estimates fail to provide the required assurance because they do not reflect a realistic outlook for Little Bay itself or for the nuclear power industry in New England. As in other cases (e.g., River Bend, 40 NRC at 51-53), we cannot brush aside such economically-based safety concerns without giving the intervenor a chance to substantiate its concerns at a hearing, but we note that NEP's arguments ultimately will prevail only if it can demonstrate relevant uncertainties significantly greater than those that usually cloud business outlooks.

Finally, we cannot accede to NEP's seeming view that Little Bay inherently cannot meet our financial qualification rules because its rates are not regulated by a state utilities commission. This view runs counter to the premise underlying the entire restructuring and economic deregulation of the electric utility industry, i.e., that the marketplace will replace cost-of-service ratemaking. In our view, unregulated electricity rates are not incompatible with maintaining sufficient financial resources to operate a nuclear power reactor.

II. United's Late-Filed Petition to Intervene

United filed its petition for a hearing seven days after the deadline for filing such petitions. Section 2.1308(b) of our Subpart M regulations provides that untimely intervention

petitions may be granted if the petitioner proffers good cause for the tardiness of its filing. The regulation further provides that the Commission will consider both the availability of other means by which petitioner's interest could be protected or represented by other participants and the extent to which the admission of the late-filing petitioner would broaden the issues or delay final action on the license transfer application.

As good cause, United claims it was under a misimpression that its intervention petition would be due thirty rather than twenty days after publication of the December 14th Federal Register notice. It further argues that its different recommendations as to remedy and its different view of the New England electricity market preclude NEP from effectively protecting or representing United's interests. Finally, it asserts that its issues are ultimately the same as those already raised by NEP and that its seven-day tardiness will therefore not delay the ultimate resolution of the proceeding.

We cannot agree that United's failure to read carefully the governing procedural regulations constitutes good cause for accepting its late-filed petition. This failure appears especially egregious in light of the receipt by two senior corporate officials on December 16th of faxes from NAESCO notifying United that it had until January 4th to seek intervention and a hearing. The faxes even provided a copy of the Federal Register Notice that set the filing deadline. See Attachment "A" to Montaup's Answer to United's Intervention Petition, dated Jan. 21, 1999. United thus had both constructive notice (through the Federal Register Notice) and actual notice (through the two faxes) of the due date for its intervention petition.

We likewise disagree that United's participation would cause no delay in the resolution of this proceeding. United has offered an entirely new suggestion for relief. See p. 6, supra. Consequently, United's participation would have the effect of broadening this proceeding. We also disagree that United's interest cannot be protected or represented by another party.

United's interest as a co-owner of Seabrook are, by United's own description, identical to those of its fellow co-owner NEP. This identity of interests is further reflected in the fact that, with the exception of the new suggestion for relief, United presents no merits arguments not already proffered by NEP. (Although United asserts in conclusory fashion that its view of the New England electricity market differs from NEP's, its pleadings nowhere identify these alleged differences.)

In analogous situations in the past, our hearing tribunals have regularly rejected late-filed petitions submitted without good cause for the lateness and without strong countervailing reasons that override the lack of good cause. See, e.g., Private Fuels Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 172-75 (1998) (collecting cases). We similarly reject United's effort to enter this case late. United is free, however, to monitor the proceeding and to file a post-hearing amicus curiae brief at the same time the parties to the proceeding file their post-hearing submissions. See 10 C.F.R. § 2.1322(c) (written "post-hearing statements of position" due twenty days after close of the oral hearing).

III. NAESCO's Status in this Proceeding

NAESCO assumes a peculiar posture in this proceeding. It asserts, on the one hand, to be one of the applicants for the license transfer (as Seabrook's licensed operator, it forwarded the Montaup-to-Little Bay license transfer application to the Commission) and therefore entitled to participate in this proceeding. Yet, on the other hand, it expressly claims neutrality regarding Little Bay's financial qualifications, the adequacy of Montaup's decommissioning funding assurance, the standing and interest of NEP, and the nature of any Subpart M proceedings; it even dissociates itself from the other two applicants. It is therefore difficult to understand what exactly NAESCO intends to contribute as a party to this proceeding.

Although we are sympathetic to NAESCO's apparently awkward situation of being caught in the middle of a disagreement among various of the owners of the plant it operates, NAESCO cannot have its cake and eat it too by claiming applicant status yet not supporting its own application. At most, its party status appears to be nominal. We therefore instruct NAESCO to inform us within seven calendar days of the date of this order whether it indeed supports the application which it has co-submitted. If it does, we will consider it an applicant with full rights to participate in this proceeding. If not, we will not consider NAESCO a party. However, under the latter circumstances, NAESCO would still be free (like United) to submit a post-hearing amicus curiae brief.

PROCEDURAL MATTERS

I. Designation of Issues

As noted above, the hearing will be limited to the following issue: whether the Montaup-to-Little Bay license transfer application meets NRC rules for financial qualification under 10 C.F.R. § 50.33(f). NEP should be prepared to offer pre-filed testimony and exhibits containing specific facts and/or expert opinions in support of its view that Little Bay's five-year cost-and-revenue projections are inadequate under NRC rules. All parties should keep their pleadings as short, and as focused on the admitted issue, as possible. Redundant, duplicative, unreliable or irrelevant submissions are not acceptable and will be stricken from the record. See 10 C.F.R. § 2.1320(a)(9). We also direct NEP to state explicitly what remedial measures (if any) it believes the Commission should take in addition to those specified in NEP's intervention petition.

II. Designation of Presiding Officer

The Commission designates Judge Thomas S. Moore as the Presiding Officer in this license transfer proceeding under Subpart M.

III. Notices of Appearance

To the extent that they have not already done so, each counsel or representative for each party shall, not later than 4:30 p.m. on March 15, 1999 (within ten days from the issuance date of this order), file a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b). In each such notice of appearance, the counsel or representative should specify his or her business address, telephone number, facsimile number, and Internet e-mail address. Any counsel or representative who has already entered an appearance but who has not provided one or more of these pieces of information should do so not later than the date and time specified above.

IV. Filing Schedule

If the parties unanimously agree to a non-oral hearing, they must file their joint motion for a "hearing consisting of written comments" no later than 4:30 p.m. on March 22, 1999, (i.e., within seventeen days of the date of this order).[11] No later than that same date, the parties should complete any necessary negotiations on a protective order regarding the proprietary data which accompanied the license transfer request and should submit a joint protective order to the presiding officer. If the parties are unsuccessful in negotiating such an order, they should inform the presiding officer by that date and indicate any areas in which they were able to agree. We also direct the parties to confer promptly on whether their dispute might be settled amicably without conducting a hearing.

All initial written statements of position and written direct testimony (with any supporting affidavits) must be filed no later than 4:30 p.m. on April 5, 1999 (31 days from the issuance date

---

[11] See 10 C.F.R. § 2.1308(d)(2), providing for a fifteen-day filing period. However, here the fifteenth day falls on Saturday, March 20th, so the deadline is postponed until Monday, March 22nd, pursuant to 10 C.F.R. § 2.1314(a).

of this order).[12] All written responses to direct testimony, all rebuttal testimony (with any supporting affidavits) and all proposed questions directed to written direct testimony must be filed no later than 4:30 p.m. on April 26, 1999 (52 days from the issuance date of this order).[13] All proposed questions directed to written rebuttal testimony must be submitted to the Presiding Officer no later than 4:30 p.m. on May 5, 1999 (61 days from the issuance date of this order).[14]

Assuming that the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral hearing beginning at 9:30 a.m on May 20, 1999 (15 days from the submittal of rebuttal testimony and 76 days from the issuance date of this order), in the Hearing Room of the Commission's Atomic Safety and Licensing Board, Room 3-B-45 of the Commission's "Two White Flint" building, 11545 Rockville Pike, Rockville, MD. The subject of the hearing will be the issue designated above. Any party submitting pre-filed direct testimony should make the sponsor of that testimony available for questioning at the hearing. Each party will be allotted 30 minutes for its oral argument on the issues specified above and 15 minutes for any rebuttal argument it wishes to offer. See 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b). The hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party.

---

[12] See 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1), providing for filings within thirty days of the issuance date of this order. However, here the thirtieth day falls on Sunday, April 4th, so the deadline is postponed until Monday, April 5th, pursuant to 10 C.F.R. § 2.1314(a).

[13] See 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3), the last two of which regulations provide for filings within 20 days of the filing of initial written statements of position and written testimony with supporting affidavits. However, here the twentieth day falls on Sunday, April 25th, so the deadline is postponed until Monday, April 26th, pursuant to 10 C.F.R. § 2.1314(a).

[14] See 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4). The seven-day filing period specified in the last two of these regulations is, pursuant to 10 C.F.R. § 2.1314(b), extended by two days, because the period includes a Saturday and Sunday.

Finally, all written concluding statements of position must be filed no later than 4:30 p.m. on June 9, 1999 (20 days from the date of the oral hearing and 96 days from the issuance date of this order). See 10 C.F.R. § 2.1322(c). The Commission expects to issue a final memorandum and order on the merits of this proceeding by August 13th, 65 days after the record closes.

The Commission is confident that the proceeding can be resolved fairly and efficiently within the prescribed time schedule. If Judge Moore anticipates any delay in the schedule, he should promptly notify the Commission of the reason for the delay and his anticipated new schedule.

V. Participants in the Hearing and the Proceeding; Service List

The three participants at the hearing will be:

New England Power Company
c/o Edward Berlin, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, DC 20007-5116
phone: (202) 424-7504
fax: (202) 424-7643
e-mail: eberlin@swidlaw.com

John F. Sherman, Esq.
Associate General Counsel
(508) 389-2971
AND
James S. Robinson
Vice President and Director of
Generation Investments
(508) 389-2643
New England Power Company
25 Research Drive
Westborough, Mass. 01582
fax: (508) 389-2463
e-mail:

Little Bay Power Corporation
c/o Gerald Charnoff, Esq.
Shaw Pittman Potts & Trowbridge
2300 N Street, N.W.
Washington, DC 20037
phone: (202) 663-8000
fax: (202) 663-8007
e-mail:

Montaup Electric Company
c/o Thomas G. Dignan, Jr., Esq.
Ropes & Gray
One International Place
Boston, MA 02110-2624
phone: (617) 951-7511
fax: (617) 951-7050
e-mail: TDIGNAN@ROPESGRAY.COM

In addition, the following two entities are currently neither parties to this case nor participants in the hearing but are nevertheless entitled to submit amicus curiae briefs in this proceeding, and should therefore be included on the service list for this proceeding:

North Atlantic Energy Service Corporation
c/o David A. Repka, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005
phone: (202) 371-5726
fax: (202 371-5950
e-mail: drepka@winston.com

ALSO: P.O. Box 300
Seabrook, NH 03874

The United Illuminating Company
c/o Barton Z. Cowan, Esq.
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
phone: (412) 566-6029
fax: (412) 566-6099
e-mail:

ALSO: c/o James F. Crowe
157 Church Street
P.O. Box 1564
New Haven, CT 06506-0901
fax: (203) 499-3664
e-mail:

Pursuant to 10 C.F.R. § 2.1316(b)-(c), the NRC staff has indicated that it will not be a party to this proceeding. Notwithstanding this fact, the staff is still expected both to offer into evidence its Safety Evaluation Report ("SER") and to proffer one or more sponsoring witnesses for that document. See 10 C.F.R. § 2.1316(b).

VI. Service Requirements

Although the parties have a number of options under 10 C.F.R. § 2.1313(c) by which to serve their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Electronic copies should be in WordPerfect format (in a version at least as recent as 6.0).

Service will be considered timely if sent not later than 11:59 p.m. of the due date under our Subpart M rules. However, the Commission's electronic filing system is not yet operational and will probably not be until October 1999. Therefore, until the system is operational, we will also require the parties to submit a single signed hard copy of any such filings[15] to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. The fax number for this office is (301) 415-1101 and the e-mail address is secy@nrc.gov.

Finally, we share Montaup's confusion regarding the service list used during much of this proceeding. The service list should include only the entities specified in Section V above, together with the Office of the Secretary, the Presiding Officer, the Commission's General Counsel -- all of whom are listed in the service list attached to this order -- and also any counsel who enter their appearances pursuant to Section III above. To the extent that any of those wish service to be made upon people other than those listed above, they should notify the Commission's Office of the Secretary and all others currently on the service list no later than 4:30 p.m. on March 15, 1999 (ten days of the issuance date of this order).

CONCLUSION

For all the reasons set forth above, NEP's intervention petition and hearing request are granted and its alternative petition for summary relief is deferred. United's untimely intervention petition is denied. The hearing process shall move forward under the terms set out above.

---

[15] We draw the attention to the difference between this requirement and that of Subpart G, which provides that any service whether by fax or e-mail on the Secretary should be followed with an original and two conforming copies of the service by regular mail in accordance with 10 C.F.R. § 2.708(d).

IT IS SO ORDERED.

For the Commission[16]

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of March, 1999.

[16] Commissioner McGaffigan would have preferred that the Commission, or a part thereof, be the presiding officer in this transfer proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of NORTH ATLANTIC ENERGY SERVICES CORP. AND MONTAUP ELECTRIC COMPANY (Seabrook Station, Unit No. 1)	Docket No.(s) 50-443-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM MEMO & ORDER (CLI-99-6) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas S. Moore
Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John Ritsher, Esq.
Thomas G. Dignan, Jr., Esq.
Ropes & Gray
One International Place
Boston, MA 02110

Lillian M. Cuoco, Esq.
William J. Quinlan, Esq.
Northeast Utilities Service Company
107 Selden Street
Berlin, CT 06037

David A. Repka, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005

Barton Z. Cowan, Esq.
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

Edward Berlin, Esq.
Swidler Berlin Shereff Friedman
3000 K Street, NW, Suite 300
Washington, DC 20007

Northeast Utilities Service Company
P. O. Box 300
Seabrook, NH 03874

Docket No.(s)50-443-LT
COMM MEMO & ORDER (CLI-99-6)

James F. Sherman, Esq.
Associate General Counsel
James S. Robinson, Vice President
New England Power Company
25 Research Drive
Westborough, MA 01582

James F. Crowe
The United Illuminating Company
157 Church Street
P. O. Box 1564
New Haven, CT 06506

Gerald Charnoff, Esq.
Paul A. Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, NW
Washington, DC 20037

Dated at Rockville, Md. this
5 day of March 1999

Kris Cater
Office of the Secretary of the Commission