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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'99 FEB -2 P2:58

In the Matter of )  
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)  
North Atlantic Energy Service Corporation )  
Montaup Electric Company )  
)  
)  
(Seabrook Station, Unit No. 1) \_\_\_\_\_ )

OFFICE OF THE )  
Docket No. 50-443 )  
ADJUTANT )  
(License No. NPF-86)

**RESPONSE OF THE UNITED ILLUMINATING COMPANY  
TO THE ANSWERS OF  
MONTAUP ELECTRIC COMPANY  
AND  
LITTLE BAY POWER CORPORATION**

On January 11, 1999 The United Illuminating Company ("UI") filed a Motion for Leave to Intervene and Petition to Allow Intervention Out-of-Time (the "UI Motion and Petition") in the captioned proceeding. Answers to the Motion were filed by Montaup Electric Company ("Montaup Answer") and Little Bay Power Corporation ("Little Bay Answer"). UI files this Response to those Answers.

**Late Filing**

UI recognizes that under applicable Commission regulations and case law, overlooking or missing a Federal Register notice does not equate to good cause, and UI does not make such a claim here. Unlike several of the cases cited in the Little Bay and Montaup Answers, UI does not seek to justify the untimely filing here on any failure to receive the Federal Register notice of December 14, 1998. Hence, the basis for the claim of good cause for late filing by UI in the present case is not, as suggested by both the Little Bay and the Montaup Answers, because UI "merely overlooked a Federal Register notice". Little Bay Answer, p. 7. Rather, the basis for good cause which UI asserts here is that under the totality of the circumstances surrounding this particular Federal Register notice and its

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interplay with newly adopted Commission regulations, unusual circumstances are present which give rise to good cause.

The license amendment application filed in this proceeding on September 29, 1998 pre-dated by more than two months the Federal Register notice of December 14, 1998. At the time of the application, the time period applicable to interventions was thirty days from the date of a Federal Register notice. This period was shortened to twenty days for these types of proceedings by new Commission regulations adopted less than two weeks before the Federal Register notice in the instant case appeared. Although that notice set January 4, 1999 as the filing date, and although several days after it appeared that notice was sent to two executives of UI, the time period for intervention of twenty days set forth in the notice, appearing as it did soon after the change in Commission regulations and just prior to the holiday period, caused the lapse here. After discovery of its error on or about January 6, 1999, UI acted expeditiously in notifying counsel for the parties of its intention to file and in filing its Motion and Petition within a week. In these unusual circumstances, where there is the initial use of a new Commission regulation, where the new regulation shortened a previous Commission time for filing, where the new regulation was applied to an application which predated the adoption of the regulation and where prompt action was taken and the filing was made within a week, UI submits that good cause exists for the late filing.

In determining whether an untimely request for intervention should be granted, 10 CFR §2.1308(b)(1) and (2) states that in addition to considering good cause, the Commission also will consider: (1) the availability of other means by which Petitioner's interest will be protected or represented; and (2) the extent to which the issues will be broadened or final action delayed. As noted in the UI Motion and Petition, although the issues sought to be raised by UI are substantially the same as those raised by New England

Power Company ("NEP"), UI has a view of the New England electricity market that differs in some respects from that of NEP. Thus, UI will present evidence, based on its experience as a New England utility, which will differ from that of NEP with respect to the future of the market for electricity and the effect of deregulation on the Seabrook facility.

Moreover, UI proposes remedies different from those proposed by NEP. If the remedy suggested by NEP is adopted, Montaup will have a contingent liability for the life of the Seabrook plant. If the remedies suggested by UI are adopted, Little Bay and BayCorp Holdings would be required by license condition to maintain additional reserves, and it will be Little Bay and its related entities which would have continuing obligations, rather than Montaup. This is a position which UI, as a result of its discussions with Great Bay<sup>1</sup>, will be able to develop, and represents an interest different from that put forth by NEP as its proposed remedy.

With respect to determining the extent to which granting of an untimely intervention will broaden and delay the proceeding, the appropriate test is the measure of delay directly attributable to the tardiness of the petition. See, e.g. South Carolina Electric & Gas Company (*Virgil C. Sumner Nuclear Station, Unit 1*) 13 NRC 420, 425 (1981). Here virtually no delay can be attributable to the tardiness of the UI Motion and Petition, since the Motion and Petition was filed only seven days after the January 4, 1999 due date, and since NEP already had filed a timely petition for relief or for a hearing.

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<sup>1</sup> Montaup seems puzzled why UI mentions discussions attempting to settle this matter. (Montaup Answer, p.4.) The purpose was not to suggest any lulling or false sense of security, as speculated by Montaup. Rather, the purpose was to suggest to the Commission the importance of this issue to UI, its direct interest in the outcome, its attempts to reach an early resolution of this matter and its ability to contribute to the development of a record in this matter.

Thus, both of the additional considerations set forth in Commission regulations favor the granting of the UI Motion and Petition.

### **Standing**

In its Answer to the UI Motion, Little Bay raises the issues of standing. Little Bay seems to be arguing that unless an injury is imminent and concrete, there can be no standing. The Little Bay argument on the standing of UI is the same as its argument on the standing of NEP. NEP, in the Response of New England Power Company to the Answers of Montaup Electric Company and Little Bay Power Corporation fully refutes the position on standing argued by Little Bay. UI sees no need to add to the NEP discussion. Little Bay's argument on standing misconstrues the law and is just plain wrong.

### **Alleged Attack on Commission Regulations**

Both Little Bay and Montaup claim that the UI Motion is an attack on Commission regulations. Little Bay thus claims that the petition is an attack on NRC rules because UI is advocating stricter requirements than those imposed by Commission regulations. Similarly, Montaup claims the petition is an attack on Commission regulations which allow prepayment of decommissioning costs, and that in its allegations relating to the Little Bay cost projections, UI is seeking a degree of certainty that the law does not require.

The problem with these positions of Little Bay and Montaup is that they twist the applicable regulations almost beyond recognition and they misunderstand the position of UI. For example, in arguing that the UI position challenging the amount of the decommissioning funding prepayment is an impermissible direct challenge to Commission regulations, Little Bay states that "the regulations identify the minimum amount of decommissioning funding required to show reasonable assurance that sufficient funds will be available for decommissioning, 10 CFR §50.75(b)(3) and (c), and expressly provide that prepayment is

one of the "acceptable" methods of providing this funding, 10 CFR §§50.75 (b)(3) and (e)(1)(i)." (Little Bay Answer, p. 12, emphasis in original). Little Bay correctly has stated a portion of the regulations but misses the point. Little Bay seems to confuse the statements in the regulations that decommissioning prefunding is an alternative means to satisfy financial assurance requirements for decommissioning with the issue of whether or not the amount of such prefunding is adequate. The regulation cited by Little Bay identifies the "minimum" amount required, but does not state that such minimums are sufficient in all cases. If the regulations were meant to set the absolute amount, they would read "Table of amounts required" rather than "Table of minimum amounts required."

The key regulation applicable here — the one that sets the standard — is 10 CFR §50.75 (e)(1)(i), which Little Bay cites but understandably does not discuss. That regulation requires, with respect to prepayment, the deposit of "cash or liquid assets such that the amount of the funds would be sufficient to pay decommissioning costs." Thus, the real test is — what will be sufficient to pay the decommissioning costs. What UI challenges here is not the validity of prepayment as a method of funding - clearly it is a valid method. Rather, what UI challenges is the adequacy of the proposed deposit by Montaup. Contrary to the argument of Little Bay and Montaup, there is no attempt by UI to impose stricter requirements here than those provided for in Commission regulations. Rather, there is an attempt to have the Commission undertake a review of whether the proposed deposit is sufficient and thus whether it meets Commission requirements.

Similarly, with respect to financial qualifications for operations, Little Bay and Montaup cite Commission regulations which provide that the applicant is to submit estimates for total annual operating costs for each of the first five years of operation, and indicate the source of the funds. 10 CFR §50.33(f)(2). The immediately preceding sentence of the

regulation, omitted by the Little Bay and Montaup, states that "the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated operation costs for the period of the license". That is what is required to be demonstrated, not merely the five year projection.

Moreover, Little Bay and Montaup do not discuss §50.33(f)(4) which specifically provides that "The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a licensee's ability to continue the conduct of the activities authorized by the license and to decommission the facility." UI does not, as suggested by Little Bay, challenge the Commission regulation regarding the submittal of a five-year projection.

Rather, UI is seeking to have the Commission implement the other portion of its regulation - ignored by Little Bay and Montaup - and seek and consider additional information. Little Bay is a new entity with no revenue producing asset other than Seabrook. In such circumstances, UI suggests the Commission should not be satisfied with the five-year projections submitted by Little Bay. Rather, the Commission should determine whether Little Bay has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license.

#### **Alleged Lack of Factual Basis**

Little Bay and Montaup also claim that the UI Motion and Petition "must be dismissed for lack of a factual basis" (Little Bay Answer, pp. 14, 19; Montaup Answer, p. 7). However, Little Bay and Montaup both would require at the contention stage a showing far greater than that called for in Commission regulations and case law. In Georgia

Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia) CLI-95-12, 42 NRC 111 (1995), the Commission (speaking through Chairman Jackson) discussed the showing which must be made as follows (at p. 118):

"An intervenor need not, however, prove its case at the contention stage. The factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form, or be of the quality necessary to withstand a summary disposition motion. What is required is a 'minimal showing' that material facts are in dispute, indicating that a further inquiry is appropriate." (Footnotes omitted; emphasis added)

Montaup argues that UI presented "no affidavit giving facts or expert opinion" to support the UI Motion and Petition. (Montaup Answer, p. 7). Similarly, Little Bay suggests that UI presents no "facts or expert opinion" to support its claim (See, e.g. Little Bay Answer, p. 19). However, as the Commission decision cited above makes clear, no affidavits or other formal evidentiary form is required in order to make a showing in support of intervention, and there is no requirement for an expert opinion at this contention stage of a proceeding.

Both Little Bay and Montaup ignore or belittle the facts discussed in the UI Motion and Petition which give rise to a genuine dispute over the adequacy of the prepayment by Montaup and whether Little Bay will be able to carry out its financial obligations. Little Bay suggests these are assertions or unsupported conjecture. In effect, Little Bay and Montaup seem to be arguing that UI has not set forth facts which prove its case. However, there is no requirement that UI prove its case, or even have facts of a quality necessary to withstand summary disposition, at this contention stage.

The material facts identified in the UI Motion and Petition include the fact that there have been premature shutdowns of nuclear power plants, that the power situation in New

England is in a state of flux, that there is a difficult climate for nuclear power in New England and that new power plants are under consideration for New England which potentially may displace Seabrook capacity. Little Bay will be a single asset company, will not be a rate-regulated utility, and will have to rely on the marketplace for electricity to meet its financial obligations. All of these are matters well within the knowledge of UI and all bear on the central issue being raised by UI - the adequacy of the prepayments and submissions and whether Little Bay will be able to carry out its financial obligations. They go to the underlying assumptions on which the prepayment proposed by Montaup and the financial projections of Little Bay are based. These facts clearly meet the test of a "minimal showing" for a contention - indeed, they go beyond it - and thus clearly demonstrate that further inquiry by the Commission is needed.

#### Conclusion

This entire matter revolves around questions of the ability of Little Bay, an exempt wholesale generator, not an electric utility, to fulfil its financial obligations as a Commission licensee, both as to continuing operation and as to decommissioning funding. Montaup and Little Bay have proposed certain prepayments for future decommissioning costs and have submitted certain financial documents to the Commission. They claim that such prepayment and such financial submissions are all that are required by regulation. UI is suggesting that the test is the adequacy of the prepayments and submissions and whether Little Bay will be financially qualified to assume Montaup's obligations for funding safe operations and decommissioning. The proposals and submissions by Little Bay are the starting point for that inquiry, not the ending point. UI suggests that they must be subject to Commission review and that, in the end, such review will demonstrate that the funding provisions proposed by Little Bay and Montaup are inadequate to provide the assurance required under Commission



regulations. Thus, UI proposes that license conditions be added before the transfer of the license from Montaup to Little Bay is approved.

Respectfully submitted,

  
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January 28, 1998

Counsel for The United Illuminating Company

Certificate of Service

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I hereby certify that copies of the foregoing RESPONSE OF THE UNITED ILLUMINATING COMPANY TO THE ANSWERS OF MONTAUP ELECTRIC COMPANY AND LITTLE BAY POWER CORPORATION have been served upon the following persons in accordance with requirements of 10 CFR §2.1313.

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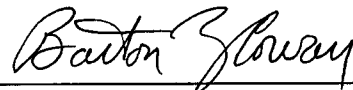
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North Atlantic Energy Service Corporation )  
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(Seabrook Station, Unit No. 1) )

Docket No. 50-445 )  
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