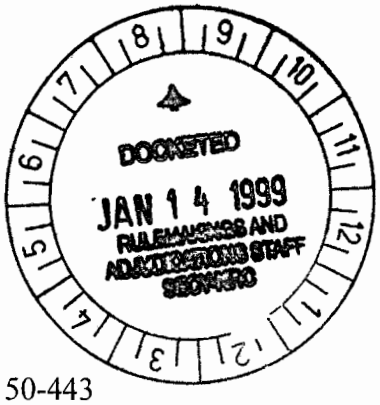
January 13, 1998



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NORTH ATLANTIC ENERGY SERVICE	)	
CORPORATION and	)	Docket No. 50-443
MONTAUP ELECTRIC COMPANY	)	
	)	(License No. NPF-86)
(Seabrook Station, Unit No. 1)	)	
	)	

ANSWER OF LITTLE BAY POWER CORPORATION TO MOTION OF NEW ENGLAND POWER COMPANY FOR LEAVE TO INTERVENE, AND PETITION FOR SUMMARY RELIEF OR, IN THE ALTERNATIVE, FOR A HEARING

I. INTRODUCTION

In a filing dated December 31, 1998, New England Power Company ("NEP") moved to intervene in the captioned proceeding and petitioned "either for summary relief or for a hearing."[1] NEP's petition was presumably submitted in response to the NRC's "Notice of Consideration of Approval of Transfer of Facility Operating License . . ." in the above docket published in the Federal Register on December 14, 1998. That notice reflected the September 29, 1998 request by Montaup Electric Company ("Montaup"), a minority owner of approximately 2.9% of the Seabrook Station, Unit No. 1, and Little Bay Power Corporation ("Little Bay") for authorization to transfer Montaup's ownership and license interests in Seabrook to Little Bay.

[1] See Motion of New England Power Company for Leave to Intervene, and Petition for Summary Relief or, in the Alternative, for a Hearing, dated December 31, 1998 (hereinafter "Petition"). The supporting affidavit of James S. Robinson was not filed and served until January 4, 1999.

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At the outset, NEP's petition should be denied because NEP has failed to establish its standing, in that the harm NEP asserts it will suffer is wholly conjectural in nature. Further, as Little Bay demonstrates in this answer, the petition should not be granted because:

1. The petition impermissibly attacks Commission rules and regulations by advocating stricter requirements than those imposed by its regulations. The petition is in reality nothing more than a petition for rulemaking, which is not allowed in this proceeding.

2. The petition fails to set forth facts or expert opinion in support of its alleged concerns, as required by NRC pleading requirements, its claims being based instead wholly on speculation and conjecture.[2]

II. BACKGROUND

By letter dated September 29, 1998, North Atlantic Energy Services Corporation ("North Atlantic"), the operator of the Seabrook Station, transmitted Montaup and Little Bay's License Transfer Application requesting the Commission's consent to the transfer of Montaup's interest in the Operating License for Seabrook Station, Unit No. 1 to Little Bay.[3] The transfer is being undertaken by Montaup as part of the divestiture of all of its generating assets pursuant to the restructuring of the electric utility industry in conformance with agreements with the regulatory authorities in Massachusetts and Rhode Island.

As part of the agreement to sell its 2.9% ownership interest in Seabrook, Montaup will transfer to Little Bay its interest in the Seabrook Decommissioning Trust Fund and prepay the balance of its decommissioning obligation into the Seabrook Trust Fund such that the total amount attributable to its 2.9% ownership interest at the time of closing will be $11.8

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[2] As a result of these deficiencies, the petition also fails to provide information to show that a genuine dispute exists on a material issue of law or fact relevant to whether the NRC should approve the transfer. Since this deficiency is derivative of the two above, we do not discuss this issue separately.

[3] License Transfer Application Requesting Consent for Transfer of Montaup Electric Company's Interest in Operating License NPF-86 for Seabrook Station, Unit No. 1 to Little Bay Power Corporation (September 29, 1998) (hereinafter "License App.").

million. License App. at 10. Assuming a 1.73% annual real rate of return on this $11.8 million (which is more conservative than the 2% real rate of return allowed by the NRC in its Final Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Reactors), this amount will grow by the year 2026 (the current expiration date of the Seabrook Operating License) to the amount required to decommission Montaup's 2.9% ownership share of Seabrook. Id. at 11-12. Such prepayment of decommissioning obligations is specifically allowed for in the Commission's regulations. 10 C.F.R. § 50.75(e)(1).

To demonstrate reasonable assurance of funds necessary to cover estimated operating costs at Seabrook, Little Bay submitted estimates for total annual operating costs attributable to Montaup's current 2.9% ownership share of Seabrook for the first five years of its ownership and the sources of funds to cover those costs, as called for by 10 CFR § 50.33(f)(2). License App. at 8-9.

There is no question that the September 29, 1998 request for authorization meets the NRC requirements in 10 CFR § 50.75 and § 50.33(f)(2) concerning Little Bay's financial qualifications for decommissioning funding and operational costs attributable to its prospective 2.9% ownership interest in Seabrook. Indeed, the NEP Petition concedes as much. See Petition at 2, 6.

Both Montaup and Little Bay entered into this transaction believing it is good for the operation and decommissioning of Seabrook as well as the surrounding region. By dedicating a prepaid fund for decommissioning, it provides greater than normal assurance that funds will be available for decommissioning at no risk to ratepayers. Further, the transaction promotes deregulation and electric utility restructuring, i.e., divestiture of nuclear generating assets, in furtherance of the restructuring goals of the region. If NEP's proposed retained con-

tingent liability by the selling utility is mandated, it could complicate or make less likely sales or divestiture of nuclear generating assets by other utilities now undertaking restructuring initiatives.

Prefunding of decommissioning obligations has long been regarded as a more stringent requirement to assure adequate decommissioning funding than reliance on the rate setting authority of state regulatory bodies to assure that ratepayers over time would generate such funds. Oddly, NEP here argues otherwise speculating that current estimates of decommissioning costs may be lower than future actual costs. The NEP Petition is singularly deficient in failing to support such speculation with any factual basis or citation.[4]

III. APPLICABLE LEGAL STANDARDS

A. General Legal Requirements for Standing

In promulgating Subpart M, the Commission expressly stated that "[t]he new Subpart M does not alter the Commission's usual requirement for standing to intervene in a proceeding that a person show an interest which may be affected by the outcome of the proceeding."[5] When determining standing, harm to a petitioner's interest is not to be presumed. Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). Rather, "a petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable de-

[4] Indeed, just recently the NRC issued a revised version of NUREG-1307 (Report on Waste Disposal Charges, Changes in Decommissioning Waste Disposal Costs at Low-Level Waste Burial Facilities, NUREG-1307, Rev. 8 (December 1998)) which implicitly recognizes that current estimates of decommissioning costs based on its formula in 10 C.F.R. § 50.75(c) may be substantially overstated by revising the low level waste cost escalator for the formula. Under the revised NUREG, the costs of low level waste disposal associated with decommissioning could be reduced for a plant the size of Seabrook by as much as $200 million. See NUREG-1307 at 6, Examples 2 and 3.

[5] Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,723-24 (1998); see also 10 C.F.R. § 2.1306(a) (intervention limited to persons "whose interest[s] may be affected by the Commission's action on the application").

cision." Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998). The petitioner's asserted injury must be "distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical." International Uranium (USA) Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998). If a petitioner claims standing on the basis of an asserted future injury, the injury must be "imminent." Quivira Mining, CLI-98-11, 48 NRC at 6.

B. General Limitations on the Admission of Issues

In addition to demonstrating standing, a petitioner must also submit at least one valid "issue" that meets the requirements of 10 C.F.R. § 2.1306(b)(2) in order to be permitted to participate as a party in a licensing proceeding. For a petitioner's issues to be admitted, the petitioner must:

> (i) Demonstrate that such issues are within the scope of the proceeding on the license transfer application,
>
> (ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,
>
> (iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and
>
> (iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

10 C.F.R. § 2.1306(b)(2). The failure of an issue to comply with any one of these requirements is grounds for dismissing the issue.[6]

[6] See Notice of Consideration of Approval of Transfer of Facility Operating License and Issuance of Conforming Amendment, and Opportunity for a Hearing; North Atlantic Energy Service Corporation, et al., 63 Fed. Reg. 68,801, 68,802 (1998) ("requests [for a hearing] must comply with the requirements set forth in 10 CFR 2.1306"); 10 C.F.R. § 2.1306(b) (requirements are mandatory).

The requirements for the admission of issues under Subpart M are essentially the same as the Subpart G requirements for the admission of contentions. Compare 10 C.F.R. § 2.714(b)(2). Both sets of requirements serve to maintain the efficiency of proceedings by eliminating litigation over issues that simply have no bearing on the Commission's ultimate decision under its regulations. As stated by the Appeal Board in Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), the purpose of 10 C.F.R. § 2.714 is to ensure "that the proposed issues are proper for adjudication in the particular proceeding." The same consideration applies with equal or greater force in Subpart M proceedings which was promulgated specifically to increase the efficiency and speed of license transfer proceedings. See 63 Fed. Reg. at 66,722. Therefore, precedent under Subpart G on the admission of contentions should generally apply to Subpart M proceedings regarding the admission of issues.

Directly relevant to considering NEP's petition are the second requirement of 10 C.F.R. § 2.1306(b)(2), set forth above, as it relates to the general proscription that bars challenges in license proceedings to established NRC rules and regulations (discussed first below), and the third criterion requiring a factual basis for the admission of issues.[7]

1. Issues May Not Challenge Statutory or Regulatory Requirements

Commission regulations and precedent establish that issues put forth for consideration may not attack Commission rules or regulations. This requirement is subsumed in 10 C.F.R. § 2.1306(b)(2)(ii) of Subpart M, which states expressly that a petitioner's issues must be

[7] As noted earlier, by virtue of challenging NRC regulations and failing to provide a factual basis, the NEP petition also fails to "[p]rovide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact" as required by 10 C.F.R. § 2.1306(b)(2)(iv). See Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 512, 521 n.12 (1990).

"relevant to the findings the NRC must make to grant the application for license transfer," 10 C.F.R. 2.1306(b)(2)(ii) (emphasis added). Subpart G similarly requires that contentions or issues must be "material" to the granting or denial of a license application -- that is their "resolution . . . would make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. 33,168, 33,172 (1989) (10 C.F.R. Part 2, Statements of Consideration) (emphasis added). This requirement of materiality precludes the litigation of arguments over what NRC requirements or policy ought to be, for such arguments are irrelevant to whether an application meets the existing requirements for the issuance of the license. See Peach Bottom, ALAB-216, 8 AEC at 21, n.33 (quoting Duke Power Company (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 401 (1973)).[8]

Therefore, Commission precedent has long held that a licensing contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process." Peach Bottom, ALAB-216, 8 AEC at 20. Similarly, "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." Douglas Point, ALAB-218, 8 AEC at 85. Accord Duke Power Company

[8] In fact, Subpart M requires a party seeking a waiver of a rule to follow the express procedures for obtaining one. See 10 C.F.R. § 2.1329. Section 2.1329(b) states that "[t]he sole ground for a waiver [of a rule or regulation] shall be that, because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted." Such is a high standard. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 238-39 (1998) (emphasis added).

(Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85-86 (1985). This policy avoids wasteful duplication of effort, id., and also avoids regulatory inconsistency.

Thus, a contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected.[9] Likewise, contentions may not challenge a generic determination established by Commission rulemaking.[10] As stated recently in this regard by the Commission in conjunction with the decommissioning of Yankee Rowe:

> Despite the NRC's 1988 generic review of the DECON-SAFSTOR choice, Petitioners seek to revisit that choice case-by-case, basing their objections on essentially the same factors that the Commission weighed when concluding that either SAFSTOR or DECON was a reasonable decommissioning choice. But Petitioners' approach unreasonably "would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding. Significantly, the Supreme Court has found [that] agency reliance on prior determinations to be perfectly acceptable, even when the statute before it plainly calls for individualized hearings and findings."

Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996) (citations, quotations and footnotes omitted).

2. Issues Must Be Supported by Sufficient Factual Basis

Subpart M also requires a petitioner seeking to intervene to:

> Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together

[9] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); accord Private Fuel Storage, LBP-98-7, 47 NRC at 179; see also Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991).

[10] Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plants, Units 1 and 2), LBP-93-1, 37 NRC 5, 30 (1993).

> with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues.

10 C.F.R. § 2.1306(b)(2)(iii). This requirement is virtually identical to that of section 2.714(b)(2)(ii) of Subpart G. 10 C.F.R. § 2.714(b)(2)(ii).

Under these rules, a petitioner may not file vague, unparticularized contentions or issues. Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Station, Units 1 and 2), CLI-98-25, 48 NRC __, __, slip op. at 25 (1998). Nor may it base a contention on mere speculation, see Yankee Atomic Electric Company, CLI-96-7, 43 NRC at 267, or a bald, conclusory allegation. Private Fuel Storage, L.L.C, supra, note 8, LBP-98-7, 47 NRC at 180 (citing Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)). Thus, a statement "that simply alleges that some matter ought to be considered" is also not sufficient. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), review decl., CLI-94-2, 39 NRC 91 (1994).

Furthermore, the mere citation of an alleged factual basis for a contention or issue is not sufficient. Rather, a petitioner is obligated "to provide the [technical] analyses and supporting evidence" or other information "showing why its bases support its contention." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 284, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff'd in part, CLI-95-12, 42 NRC 111 (1995). Where a petitioner has failed to do so, "the licensing board may not make factual inferences on [the] petitioner's behalf." Id., citing Palo Verde, supra, note 9, CLI-91-12, 34 NRC 149. Similarly, expert opinion alleged to provide the basis for a contention "is not to [be] accept[ed] uncritically:"

> [A]n expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is

> inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

Private Fuel Storage, LBP-98-7, 47 NRC at 181.

IV. NEP LACKS STANDING TO RAISE ITS CLAIMS

At the outset, NEP's petition must be dismissed for lack of standing in that the harm NEP claims it will suffer as a result of this license transfer is merely speculative or conjectural as opposed to being imminent, particular and concrete. See International Uranium, CLI-98-6, 47 NRC at 117; Quivira Mining, CLI-98-11, 48 NRC at 6. NEP fears that Little Bay may be unable to pay plant operating and decommissioning costs. Petition at 4-5. However, NEP has done nothing more than to speculate that conditions in the New England electric power market make it difficult to project Little Bay's future revenues, see Petition at 8 (discussed at Section V.B, infra); that decommissioning costs might be higher than now estimated, see Petition at 2, 6 (discussed at Section V.A, infra); and that Seabrook might shut down early because other nuclear plants in New England have shut down early and because some developers are planning to build new power plants in New England, see Petition at 2-3, 6-8 (discussed at Sections V.A and B, infra). Contrary to Subpart M's express requirements, NEP provides no facts to support such conjecture or to show any imminent harm whatsoever that it may suffer. See 10 C.F.R. § 2.1306(b)(3) (petitions must "[s]pecify both the facts pertaining to the petitioner's interest and how the interest may be affected, with particular reference to the factors in § 2.1308(a)"); accord Nuclear Engineering, ALAB-473, 7 NRC at 743 ("[t]here must be a concrete demonstration that harm to the petitioner . . . will or could flow from a result unfavorable to it . . . "). NEP has made no such "concrete demonstration" here and thus lacks standing to intervene in this proceeding.

Moreover, NEP's petition is really premised on the argument that NEP will suffer harm even if Little Bay complies with all the appropriate license transfer regulations. See Petition at 2 (recognizing that "decommissioning prefunding and cost and revenue projections are alternative means of satisfying financial qualifications for entities that do not qualify as 'electric utilities' under 10 C.F.R. § 50.2"); id. at 3, 6-7. Thus, NEP does not assert that Little Bay's decommissioning prefunding and revenue projections are insufficient under the Commission's regulations but instead seeks to impose more stringent requirements on Little Bay. See Sections V and VI infra. Failing to even assert that Little Bay's application is inadequate under the Commission's regulations, NEP certainly has not demonstrated a legally recognized injury sufficient to establish its standing in this proceeding. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (injury in fact must involve the "invasion of a legally protected interest").

Further, the Commission has stated in the notice of opportunity for a hearing 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." 63 Fed. Reg. at 68,802. As set forth in the Seabrook Joint Ownership Agreement, the obligations of the joint owners are "several and not joint," so NEP cannot incur any liability from Little Bay as a result of this transaction.[11] In short, NEP's claim that it will suffer harm from the granting of this license transfer is purely hypothetical at best and does not suffice to establish NEP's standing in this proceeding.

[11] See Agreement for Joint Ownership, Construction and Operation of New Hampshire Nuclear Units (May 1, 1973), ¶ 6.1.

V. NEP'S ISSUES AND SUPPORTING BASES FAIL TO MEET NRC PLEADING REQUIREMENTS

NEP's petition seeks to raise two issues in accordance with the requirements of 10 C.F.R. § 2.1306. These are:

1. whether "the proposed level of funding for decommission[ing] is likely to be adequate," and
2. whether "the proposed licensee, Little Bay, is likely to have adequate financial resources to ensure the continued safe operation of the Seabrook Fund."

Petition at 4-5. These issues sought to be raised by NEP must be dismissed for improperly challenging NRC regulatory requirements and for lack of adequate factual basis. These deficiencies are discussed in turn below with respect to each of NEP's proposed issues.

A. Alleged Inadequacy of Decommissioning Funding

NEP claims that the Commission "is in no position to find that Little Bay is capable of discharging its responsibility for the decommissioning of Seabrook" in that, according to NEP, decommissioning prefunding is not an adequate means to assure the availability of decommissioning funding in this case. Petition at 6-7. In support of its position, NEP offers two arguments: (i) actual decommissioning costs may prove to be greater than the current estimates of those costs and (ii) the Seabrook unit may cease operations earlier than 2026. Id. NEP, however, provides no factual basis in support its position, which, moreover, is an impermissible collateral attack on the NRC's prefunding decommissioning regulations.

1. Impermissible Challenge to NRC Regulations

NEP's claim that prefunding will be an insufficient means to meet Little Bay's decommissioning obligations is a direct challenge to the decommissioning funding requirements the NRC has imposed on non-rate regulated licensees to ensure adequate funding. Compare 10 C.F.R. § 50.75(e)(1)(i) with 10 C.F.R. § 50.75(e)(1)(ii) (external sinking fund

available only to licensees with guaranteed income streams). The NRC's decommissioning regulations identify the minimum amount of decommissioning funding required to show reasonable assurance that sufficient funds will be available for decommissioning, 10 C.F.R. §§ 50.75(b)(3) and (c), and expressly provide that prepayment is one of the "acceptable" methods of providing this funding, 10 C.F.R. §§ 50.75(b)(3) and (e)(1)(i). Indeed, prefunding has long been recognized by the Commission as a more stringent requirement than setting aside monies over time from ratepayers of regulated electric utilities.[12]

As described above, as part of the transfer Montaup will prepay the balance of its decommissioning obligation into the Seabrook Trust Fund such that the amount attributable to its 2.9% ownership at the time of closing will be $11.8 million, which will grow by the time the Seabrook license expires in 2026 to an amount greater than that required to decommission Montaup's current ownership interest in Seabrook, assuming a 2% real rate of return as allowed under the Commission's new decommissioning funding rules, 10 C.F.R. § 50.75(e)(1)(i).[13] NEP does not take issue with the fact that this prepayment is in accordance with the NRC's regulatory provisions providing for the prepayment of decommissioning funds. In fact, NEP specifically acknowledges that NRC regulations provide that "decommissioning prefunding" is an "alternative means" of satisfying NRC decommission funding.

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[12] E.g., Regulatory Analysis on Decommissioning Financial Assurance Implementation Requirements for Nuclear Power Reactors, in SECY-98-164 (July 2, 1998), at 34-35; see also Policy Options for Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility Industry, SECY-97-253 (October 24, 1997), at 2-3.

[13] The $11.8 million prepayment will grow by the year 2026 to the amount required to decommission Montaup's 2.9% ownership share assuming an annual real rate as low as 1.73%. See Section II, supra. Another conservatism built into the prepayment is that NRC's prefunding requirements would allow the fund to increase through the end of the decommissioning period, 10 C.F.R. § 50.75(e)(1)(i), which for Seabrook is anticipated, at the earliest, to be 2037. See License App. at 12 n.17. Little Bay and Montaup did not take credit for this 11 year period of time between scheduled plant shutdown in 2026 and the projected end of decommissioning in determining the amount of prefunding required. Id.

Petition at 2; see also id. at 6 ("'prefunding' of anticipated decommissioning obligations has been an accepted means by which to satisfy . . . a licensee's financial obligation" for providing reasonable assurance of decommissioning funding). Thus NEP's claim is simply a disagreement with current Commission regulations and cannot serve as the basis for an admissible issue in a license transfer hearing. See Section III, supra.

Further, the concerns raised by NEP with respect to the general adequacy of decommissioning cost estimates and premature plant shutdown have been expressly addressed by the Commission. The NRC includes a 25% contingency factor in its baseline decommissioning cost estimate which underlies its minimum formula amount in 10 C.F.R. § 50.75(c) in order to account for uncertainty and unforeseen changes in costs.[14] The NRC also requires its licensees to adjust their decommissioning cost estimates annually and to file biennial reports with the NRC to show that their plant decommissioning funds are likely to be sufficient at the time of decommissioning. 10 C.F.R. §§ 50.75(b) and (f)(1).

In addition, the NRC specifically considered the possibility that power plants might shut down early when it promulgated its new decommissioning funding regulations. 62 Fed. Reg. 47,588, 47,591-92 (1998) (Financial Assurance Requirements for Decommissioning Nuclear Power Reactors, Proposed Rule). The Commission rejected a proposed alternative requiring accelerated funding for utility licensees to cover the possibility of early shutdown, but stated that non-rate regulated licensees would, in effect, "have to 'accelerate' funding by getting 'up-front' forms of financial assurance." Id. at 47,592. The Commission was also aware that some plants had not operated for their full 40-year license terms but nonetheless thought its current regulations governing plant shutdowns, 10 C.F.R. § 50.82, "[struck] the

[14] See NUREG-1307 at 4, Table 3.1.

best balance between level of assurance and cost." Id. Thus, under the regulations, the possibility of early shutdown is adequately addressed by non-rate regulated licensees providing up-front decommissioning funding. In fact, the regulations put non-rate regulated licensees, like Little Bay, which have prepaid their decommissioning obligations, in a stronger position regarding potential early shutdown than rate regulated licensees making annual deposits into an external sinking fund.[15]

In short, the Commission has established prepayment as one of the acceptable methods for providing reasonable assurance of decommissioning funding and, in the course of doing so, has made policy determinations concerning the specific concerns raised by NEP in its petition. Therefore, under the long line of precedent discussed in Section III, supra, NEP cannot use this license transfer proceeding as a forum to challenge the regulation allowing prepayment or the related policy determinations. Hence, this issue must be dismissed.

2. Lack of Factual Basis under 10 C.F.R. § 2.1306(b)(2)(iii)

This issue must also be dismissed for lack of factual basis. For a petitioner's challenge to a licensee's decommissioning cost estimate to be admissible, the petitioner must not only provide a factual basis to challenge the adequacy of the estimate, but a sufficient factual basis to claim as well that "there is [no] reasonable assurance that the amount will be paid." Yankee Atomic Energy Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996); see also Yankee Nuclear, CLI-96-7, 43 NRC at 260. Here, NEP has done neither.

[15] As discussed infra, even if Seabrook were to shut down early, decommissioning need not commence at that time and the prepayment for decommissioning Little Bay's prospective 2.9% ownership share could continue to grow to fully cover – without any additional payments – Little Bay's share of Seabrook's decommissioning costs. Such would not be the case for the other licensees which had not prepaid their decommissioning obligations.

First, NEP provides no basis to support its allegation that actual decommissioning costs may be higher than the current estimates of those costs. NEP merely asserts that "it is not now possible accurately to predict the financial requirements associated with . . . decommissioning of a unit that is licensed to operate until 2026," Petition at 2, and speculates that "[i]f today's estimate were to prove lower than actual . . . the prepayment could prove seriously deficient." Petition at 6. Nowhere is there even a shred of factual or expert opinion support for NEP's claim that "today's estimate" is too low. Indeed, as noted above, the NRC includes a 25% contingency factor in its baseline decommissioning cost estimate to account for uncertainty and unforeseen changes in costs. NEP presents no facts to suggest that this contingency may be insufficient to cover any changes in the decommissioning costs for Seabrook.[16] Thus, in fact, the prefunding commitment in the Montaup/Little Bay transaction is highly conservative. No facts to the contrary – none – are presented in the NEP petition.

Nor has NEP provided any factual basis to claim a lack of reasonable assurance that Little Bay would not pay any shortfall should the current estimate prove low at some later date. As also discussed above, the NRC requires licensees to adjust their decommissioning cost estimates annually and to file biennial reports with the NRC to show that the plant's decommissioning fund is likely to be sufficient at the time of decommissioning. In this regard, Little Bay has committed that it will "annually conduct a 'prefunding true-up' review under which it will review the sufficiency of accumulated funds (the initial $11,800,000 and subsequent earnings) to cover decommissioning funding requirements for its prospective

[16] Moreover, the proposed decommissioning prefunding level is keyed to the current decommissioning cost estimate for Seabrook of $489 million based on the NRC's cost formula set forth in the regulations. 10 C.F.R. § 50.75(c); see License App. at 11. Just last month, however, as noted the NRC issued a revision to NUREG 1307 showing that the cost for low level waste disposal might be significantly decreased for a plant the size of Seabrook.

2.9% ownership interest in Seabrook (assuming a 2% real earnings rate) and will deposit, if necessary, additional funds in the Seabrook Decommissioning Trust as required to maintain the prefunded status of its decommissioning obligation." License App. at 13 n. 20. In short, NEP's claimed inadequacy of using the current cost estimate as a basis for prepayment is utter speculation that does not begin to approach the Commission's standard for challenging decommissioning funding estimates. See Yankee Nuclear, CLI-96-1, 43 NRC at 9; Yankee Nuclear, CLI-96-7, 43 NRC at 260, 267. Hence this issue is patently inadmissible.

NEP's claims that Seabrook might shut down early also lack factual basis. NEP provides speculative analogies with other nuclear plants and speculation regarding future power plant construction to support its claim that Seabrook might shut down early and that New England is somehow to be distinguished from other parts of the country. But NEP presents no specific facts concerning Seabrook to suggest that it will shut down early. NEP states only that four older, smaller, and less economic nuclear units in New England -- each of which also had associated costly regulatory compliance problems -- have been shut down, but NEP does not demonstrate in any way (aside from being located in New England) that Seabrook is like any of those plants. Petition at 2-3, 6-8.[17] If a petitioner contends that an application is inadequate on the basis of an analogy between the applicant's facility and a proposed benchmark facility, the petitioner must establish that the benchmark is valid to show that the analogy raises a genuine dispute on a material issue of fact with the applicant. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8,

[17] As an aside, five other nuclear units have already applied for license extensions and others are preparing such applications. See, e.g., Calvert Cliffs, CLI-98-25, 48 NRC __; Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC __ (1998); Wayne Barber, Nuclear Key to Utility Group's Future, Southern Says in Talks on Renewal, Inside N.R.C., August 31, 1998, at 12.

32 (1996); Yankee Nuclear, CLI-96-7, 43 NRC at 267 (petitioner must show "logical relationship" with alleged analogy). NEP has not come close here, in that it has not even made a factual comparison between Seabrook and the shutdown plants.[18] Hence, this speculative claim must be dismissed. See id.

NEP also states that developers are proposing to build new generating units in New England, but again NEP does not say how the new generating units will force Seabrook to shut down early. Petition at 2-3, 6-8. NEP states that developers have "plans" to build 60 new units in New England; that "it must be assumed that much of that capacity is being planned for the load within New England;" and that "[w]hile surely not every announced project will achieve commercialization, it must also be assumed that a good deal of existing capacity will be displaced." Id. at 8 (emphasis added). This is again rank speculation lacking any factual basis. The economic viability of a power plant in a competitive market depends on its revenues compared to its operating costs, relative to those of its competitors.[19] NEP presents no data to show that Seabrook would be at a competitive disadvantage vis-a-vis any new power plants that might be built in New England. See Petition at 2-3, 6-8.[20]

Thus, NEP's claim regarding early shutdown is again entirely speculative, see Yankee Nuclear, CLI-96-7, 43 NRC at 267, and does not show a lack of reasonable assurance that the required amount will be paid. See Yankee Nuclear, CLI-96-1, 43 NRC at 9. Moreo-

[18] NEP's affiant, Mr. Robinson, states that the fact that four nuclear plants in New England have shut down early indicates that Seabrook may shut down early, without providing any reasoned basis for his conclusion. Robinson Aff. ¶¶ 6, 9. Such is not sufficient to support the admission of an issue. Private Fuel Storage, LBP-98-7, 47 NRC at 181. Nor does Mr. Robinson seem to recognize that other nuclear units are not being shut down early but are the subjects of license renewals or extensions.

[19] Standard and Poor's Platt's, Electricity Market Deregulation: Implications for Nuclear Power, at 20, 22-23 (1998).

[20] The Affiant's conjecture in this regard, see Robinson Aff. ¶¶ 7, 9, also provides no basis for this issue. See Private Fuel Storage, LBP-98-7, 47 NRC at 181.

ver, even if Seabrook were to shut down early, decommissioning need not commence at that time,[21] and the decommissioning fund could continue to grow and be available for any decommissioning that takes place after 2026. In this regard, the NRC regulations expressly allow the credit for projected earnings using a 2% annual real rate of return "through the projected decommissioning period." 10 C.F.R. § 50.75(e)(1)(i). Hence, NEP's claim that Little Bay might not meet its decommissioning funding obligations -- despite its full compliance with NRC regulations -- is based on utter speculation and must be dismissed.

B. Alleged Inadequacy of Financial Qualifications for Operations

NEP claims that the Commission is in no position to find that "Little Bay is likely to have the financial capability to meet ongoing capital and expense obligations associated with the ownership share of Seabrook that Montaup would transfer to it." Petition at 7. In the September 29, 1998 application Little Bay set forth the expenses associated with its prospective 2.9% ownership interest in Seabrook for the first five years of its ownership and further identified the sources of revenues that would be used to cover these costs. License App. at 8-9. This showing was made in accordance with the express provision of 10 C.F.R. § 50.33(f)(2) which requires a non "electric utility" license applicant to demonstrate that it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs. Specifically:

> The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs.

10 C.F.R. § 50.33(f)(2).

[21] Decommissioning must be completed within 60 years of permanent shutdown, i.e., by 2059 if Seabrook were to shut down today. 10 C.F.R. § 50.82(a)(3).

Again, NEP readily acknowledges that "cost and revenue projections" such as those provided by Little Bay in the Application "are alternative means of satisfying financial qualification for entities that do not qualify as electric utilities" under 10 C.F.R. § 50.2. Petition at 2; see also id. at 7. But despite its acceptability under NRC regulations, NEP goes on to claim that such a showing is not sufficient here. Id. at 7-8. Therefore, like NEP's proposed issue on decommissioning funding, this issue must also be dismissed as an impermissible collateral attack on Commission regulations for advocating stricter requirements than those imposed by the regulations.[22]

Specifically, the regulations as reflected above, provide for non-electric utility applicants to establish financial qualifications by five year cost and revenue projections, such as those provided by Little Bay here. This interpretation of the regulation is confirmed by the NRC's recently approved Standard Review Plan.[23] It is further confirmed by NRC

[22] Moreover, the entire tenor of NEP's petition, that Little Bay is not financially qualified because it is not backed by state rate setting authorities, challenges the very premise underlying the restructuring of the electric utility industry, which presumes the eventual demise of traditional cost-of-service ratemaking, and its acceptance could essentially preclude nuclear plants from such restructuring. The Commission has, however, determined after thoroughly considering the impact of restructuring on its financial qualification requirements that "its regulatory framework is generally sufficient, at this time, to address restructurings and reorganizations that will likely arise as a result of electric utility deregulation." See Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071, 44,076 (1997).

[23] In an SRM dated December 9, 1998, the Commission approved issuance of the "Standard Review Plan on Power Licensee Financial Qualifications and Decommissioning Funding Assurance." See "Staff Requirements -- SECY-98-153 -- Update of Issues Related to Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility Industry," December 9, 1998. Although not yet released in final form, the Draft SRP expressly provides for the submission of five-year cost-revenue projections which constitute one of several acceptable methods by which non-electric utility applicants can demonstrate financial qualifications under 10 C.F.R. § 50.33(f)(2). See Draft SRP at 9-10, attached to SECY-98-153, "Update of Issues Related to Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility Industry," June 29, 1998. The December 9, 1998 SRM did not make any substantive change to these provisions of the Draft SRP.

Interestingly, the Commission's approval of the SRP with its focus on five-year cost-revenue projections for non-electric utilities comes at a time when NEP claims "[r]etail access is . . . a reality," which NEP suggests should somehow affect how the Commission reviews the financial qualifications of non-electric utility applicants. See Petition at 7. Clearly, the "reality" of retail access – which in any event does not directly affect Little Bay/Great Bay who operate in the wholesale, not the retail, market – did not change the Commission's view on how its financial qualification requirements should be applied to non-electric utility applicants.

precedent, specifically with respect to Great Bay. In evaluating whether Great Bay has shown sufficient financial qualifications for operations in connection with the recent formation of BayCorp, the NRC reasoned and concluded as follows:

> Great Bay is required to meet the existing financial qualifications review requirements of 10 CFR 50.33(f)(2). This section requires that "the applicant shall submit estimates for the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs." Seabrook has an established operating history and associated costs that are now a matter of record. Based on a review of Great Bay's current financial statements submitted with its May 8, 1996, submittal, and supplemental projections submitted on October 18, 1996, the staff has concluded that Great Bay has complied with the essential requirement of the existing standard, which is to demonstrate reasonable assurance of obtaining its share of Seabrook operating costs. Great Bay has projected operating income and cash flow based on what appear to be reasonable projections of the spot market price of and demand for power from Seabrook for the foreseeable future . . . . Thus, Great Bay has demonstrated that it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license as required by 10 CFR 50.33(f)(2).[24]

Thus, NRC regulations, guidelines and practice all point to the fact that cost and revenue projections such as those provided by Little Bay are sufficient to establish financial qualifications for operations. Indeed, Little Bay's ongoing financial costs will be less than Great Bay's (which the NRC has previously determined is financially qualified under 10 C.F.R. § 50.33(f)(2) based on analogous cost-revenue projections) in that Little Bay will have prefunded its decommissioning costs. By seeking to require a greater showing here,

[24] North Atlantic Energy Services Corporation and Great Bay Power Corporation (Seabrook Station, Unit No. 1), Docket No. 50-443, Exemption Order at 3-4 (January 22, 1997), 62 Fed. Reg. 5,492, 5,493 (1997); see also North Atlantic Energy Services Corporation and Great Bay Power Corporation (Seabrook Station, Unit No. 1), Docket No. 50-443, Exemption Order at 5 (July 23, 1997), 62 Fed. Reg. 40,549, 40,550 (1997). The NRC considered the financial qualifications of Great Bay because it initially determined for the first time in evaluating the application for establishing a holding company that Great Bay was not an electric utility.

NEP is collaterally attacking NRC regulations, contrary to the long lines of NRC precedent discussed in Section III above. Accordingly, this proposed issue must be dismissed.

Moreover, NEP again provides nothing more than pure speculation to support its claim of inadequacy in the financial showing provided by Little Bay in the Application. NEP claims that the competitive situation in New England makes "any revenue projections . . . difficult and, depending on assumptions and analyses, very uncertain even for the first five years and quite speculative thereafter." Petition at 8. NEP, however, provides no facts or expert opinion to support its claim. NEP refers to 60 new units under consideration for the New England area but it provides no facts or information to show that these potential new units would adversely affect the capability of Little Bay to recover its costs of generating Seabrook power through the sale of that power. See Petition at 7-8. For example, NEP provides no fact or expert opinion to show to what extent such units will be constructed and, to the extent constructed, whether they would displace electrical generation by Seabrook. Indeed, the FERC opinion cited by NEP states that:

> [I]t is unlikely that all of these generation projects will be constructed and, if constructed, it is likely that many will displace more expensive resources in serving existing load.

New England Power Pool, 85 FERC ¶¶ 61,141, 61,551 (1998)

NEP does not claim – much less provide any supporting facts or expert opinion – that Seabrook is one of the "more expensive resources" that conceivably could be displaced by such new generation. NEP provides no information concerning Seabrook costs of generating power (of which it is certainly aware) or how Seabrook's costs compare to the costs of other existing New England generating resources (on which it certainly has information) or to the estimated costs of the new generation sources under consideration (on which it presumably

has at least some representative information). In fact, as NEP well knows, the cost of generating power at Seabrook compares very favorably with the operating costs of generating electricity from other sources of energy, such as coal, oil and natural gas, and indeed other nuclear units.

In short, NEP's claimed inadequacy of the cost-revenue projections provided by Little Bay with its Application is totally devoid of supporting facts or expert opinion. Thus, the petition is deficient, and must be dismissed based on the precedent discussed above holding that such speculative and conclusory allegations cannot support a contention. See Yankee Nuclear, CLI-96-7, 43 NRC at 267; Private Fuel Storage, LBP-98-7, 47 NRC at 180-81.[25]

VI. NEP'S REQUEST FOR SUMMARY RELIEF MUST BE DENIED

In lieu of acting on its request for a hearing – for which, as shown above, there is no basis – NEP asks for summary relief which in its view would obviate any need for a hearing. The relief that it requests is for the Commission to approve the license transfer "only on the condition that Montaup agree to remain contingently responsible for required safety and decommissioning expenditures in the event of default by Little Bay." Petition at 10. There is no basis for the granting of such relief and the Commission should deny it outright.

NEP suggests no legal or regulatory basis for its request, and there is none. In effect, NEP is looking for an ironclad guarantee of Little Bay's funding of its prospective financial obligations for the Seabrook plant. However, as recognized by the Commission in Yankee Nuclear, CLI-96-7, 43 NRC at 262, the NRC regulation requiring reasonable assurance of

[25] Again, the mere citation of an alleged factual basis in the petition and the supporting affidavit (the reference to 60 new units under consideration) does not suffice. The petitioner must provide information and analyses to show why its bases support its contention. Georgia Tech, LBP-95-6, 41 NRC at 284; Private Fuel Storage, LBP-98-7, 47 NRC at 181.

decommissioning funds "does not contemplate" an "ironclad" or "absolute guarantee of such funds."[26] Rather, the "regulation was intended only to require 'reasonable assurance of funds for decommissioning.'" Id. (emphasis in original). Similarly, the showing required for establishing financial qualifications under 10 C.F.R. § 50.33(f) is one of "reasonable assurance," not "absolute certainty" or assurance "beyond doubt."[27] Thus, NEP's requested relief is an attempt to challenge through this license transfer proceeding NRC policy and requirements concerning financial qualifications and decommissioning funding. Such is not permissible under longstanding NRC case precedent. Peach Bottom, ALAB-216, 8 AEC at 21 n.33; McGuire, ALAB-128, 6 AEC at 401.

Moreover, the Commission's granting of such relief could greatly disrupt the sale of nuclear power plants as part of the ongoing restructuring of the electric utility industry. NEP claims that "[t]o date, restructuring has proceeded, even where the divestiture of generation has been an essential component, upon the assumption that the [transferring] electric utility will continue to meet its responsibilities as a nuclear licensee." Petition at 9. However, that is clearly not the case in the two largest divestitures of nuclear generation identified to date, TMI-1 and Pilgrim. In both those cases, the existing electric utility licensee would retain no liability for nuclear costs upon completion of the transfer. Moreover, the transferees in both instances would be not be electric utilities.

The imposition of contingent liability on the current owners of nuclear plants could complicate and make less likely both ongoing transactions as well as future sales and dives-

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[26] In point of fact, prepayment as would occur in conjunction with the proposed transfer would provide greater assurance than reliance on future payments, even if made by a rate-regulated electric utility, as discussed earlier.

[27] 10 C.F.R. § 50.33(f)(1) and (2); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 18 (1988) (quoting Coalition for the Environment v. NRC, 795 F.2d 168, 175 (D.C. Cir. 1986))

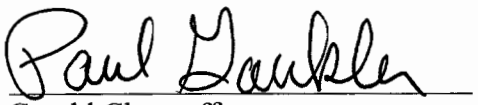
titures of nuclear plants. It would saddle former owners with potential liability over which they have little or no control, and discourage the sale and transfer of nuclear units.

In short, NEP's proposed summary relief should be rejected for being both contrary to Commission regulation and bad policy.

CONCLUSION

In consideration of the foregoing, Little Bay respectfully requests the Commission to deny NEP's petition for leave to intervene and for a hearing in that NEP (1) lacks standing and (2) has failed to submit a valid issue in accordance with the pleading requirements of 10 C.F.R. § 2.1306(b)(2).

Respectfully submitted,



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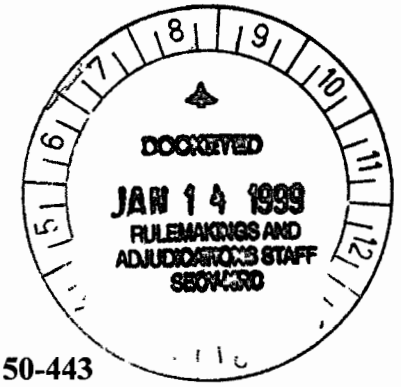
UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION



In the Matter of	)	
North Atlantic Energy Service	)	**Docket No. 50-443**
Corporation, et al.,	)	**(License No. NPF-86)**
	)	
(Seabrook Station, Unit No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January 1999 copies of the Answer of Little Bay Power Corporation to Motion of New England Power Company for Leave to Intervene, and Petition for Summary Relief or, in the Alternative, for a Hearing were served by facsimile and U.S. Mail on the following:

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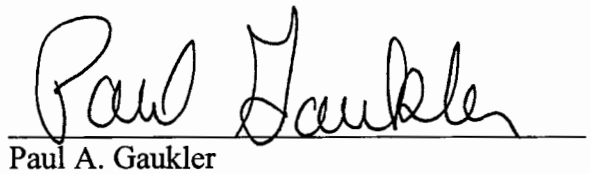

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