

October 30, 1998

SECY-98-252

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: PRELIMINARY STAFF VIEWS CONCERNING ITS REVIEW OF THE FOREIGN OWNERSHIP ASPECTS OF AMERGEN, INC.'S PROPOSED PURCHASE OF THREE MILE ISLAND, UNIT 1

PURPOSE:

To inform the Commission about the staff's preliminary views concerning whether the proposed purchase of Three Mile Island, Unit 1 (TMI-1), by AmerGen, Inc. (AmerGen), would cause the Commission to know or have reason to believe that the license for TMI-1 would be "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."

BACKGROUND:

On July 17, 1998, AmerGen and GPU, Inc., the parent company of the various companies licensed to own and operate TMI-1, entered into a Letter of Intent to negotiate a Definitive Agreement for AmerGen's acquisition of TMI-1. A definitive Asset Purchase Agreement among the parties was announced on October 19, 1998. AmerGen and GPU, Inc., expect to file a license transfer application pursuant to 10 CFR 50.80 shortly.

Because of the expedited NRC review schedule developed for this license transfer in response to AmerGen's request, the staff encouraged AmerGen and GPU, Inc. to send the staff as much relevant information as possible in advance of the application. In response, on September 15, 1998, counsel for AmerGen, Morgan, Lewis and Bockius, LLP, submitted a paper entitled "Foreign Ownership Issues Relating to the Transfer of the TMI-1 License From GPU to AmerGen in Light of British Energy's Participation in AmerGen" (the MLB paper). On September 17, 1998, the staff held a public meeting to meet with representatives of AmerGen, GPU, Inc., concerning the transfer of the TMI-1 operating license. The minutes of this meeting, including the discussion of questions relating to foreign ownership, domination, or control, were transcribed and docketed.

Consistent with the Commission's direction that it be kept informed of significant developments

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related to industry restructuring, the staff is providing its preliminary views. See NRC memorandum dated August 14, 1996, "Staff Requirements — Briefing on Status of Staff Actions on Industry Restructuring and Deregulation (SECY-96-148)."

DISCUSSION:

AmerGen's Ownership and Organization

AmerGen is a limited liability company (LLC) formed to acquire and operate nuclear power plants in the United States. AmerGen is organized under the laws of the State of Delaware pursuant to an agreement among PECO Energy Company (PECO) (a Pennsylvania corporation), British Energy, plc (BE, plc) (a Scottish corporation), and British Energy Inc. (BE Inc.) (a Delaware corporation that is a wholly owned subsidiary of BE, plc). PECO and BE Inc. own 50 percent of AmerGen. BE, plc, as the owner of BE Inc., is the ultimate parent company of 50 percent of AmerGen.

Relevant Provisions of the Atomic Energy Act and Issue To Be Resolved

Section 104d of the Atomic Energy Act of 1954, as amended (the AEA), prohibits the Commission from issuing a license for a nuclear power plant to "an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."¹ The Commission's regulations at 10 CFR 50.38 contain virtually identical language to implement this prohibition. In the staff's view, a major issue related to review of the anticipated application will be whether the 50 percent ownership of AmerGen by BE, plc, through its ownership of BE, Inc., falls within the Section 104d prohibition.

Previous Commission Decisions Relevant to the Issue of Foreign Control

The Commission has had limited experience with license transfer applications that involve the issue of foreign ownership, control, or domination. The limited Commission precedent was discussed comprehensively in a memorandum and its attachments dated July 15, 1997,

¹TMI-1 was licensed under Section 104d of the AEA.

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prepared by the Office of the General Counsel (OGC) (the OGC memorandum).² Previous Commission decisions involving the limitation on foreign ownership, control, or domination have focused on protection of common defense and security (e.g., requiring that only U.S. citizens be responsible for handling special nuclear material). The Commission has never adopted any hard and fast criteria, such as the cutoff percentage of foreign stock ownership, for determining whether a particular corporate arrangement will violate the statutory foreign domination/control limitation. The Commission has indicated that, rather than apply any set rule of stock ownership percentages, it will look at the many aspects of corporate existence and activity in which control or domination by another would be normally manifested. Notwithstanding the Commission's reluctance to specify limitations of percentages of stock ownership by foreign entities, the few agency precedents indicate that the Commission has generally approved license transfer requests resulting in up to 50 percent foreign ownership of the licensee, depending on measures taken to ensure common defense and security and public health and safety.³

A 1973 Atomic Energy Commission (AEC) decision relating to the transfer of several licenses issued under Section 104d of the AEA appears to be particularly analogous to the situation of AmerGen. This decision was cited in the MLB paper. The Commission approved a request by the Gulf Oil Corporation (Gulf), a U.S. corporation, to transfer three TRIGA research reactors and the Barnwell spent fuel reprocessing plant then under construction to a newly formed partnership, the General Atomic Company, that was 50 percent owned by Gulf and 50 percent

owned, ultimately, by foreign entities. In approving these transfers, the AEC imposed several conditions to ensure that control over common defense and security issues would remain with

²Note: The OGC memorandum was prepared under attorney-client privilege. The memorandum, references to it in this Commission paper, and any attachments to the memorandum not previously released should not be released publicly unless the Commission determines otherwise. The Commission precedents themselves are public documents.

³The Commission has generally focused on foreign control or domination as opposed to foreign ownership, per se. However, the Commission has disapproved transfers involving 100 percent foreign ownership of the licensee, even where all licensee activities relating to common defense and security considerations would be controlled exclusively by U.S. nationals. This raises the issue of just how much of AmerGen's total ownership is foreign as a result of a percentage of PECO's stock being owned by foreign investors. As a company with widely held stock, it is likely but probably not readily subject to confirmation that PECO's stock is owned to some small degree by foreign individuals or entities. Until it receives any information to the contrary, the staff is working under the assumption that the Commission's previous decisions that foreign ownership, per se, is not prohibited by the AEA when it does not lead to foreign control or domination still hold. The staff will request AmerGen to submit any relevant information that it can obtain with respect to this issue. Recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock.

U.S. citizens.

The staff does not believe that the agency's approach to the foreign ownership issue in the context of the privatization of the United States Enrichment Corporation (USEC) is controlling here. The Office of Nuclear Material Safety and Safeguards (NMSS) recently issued Standard Review Plan (SRP) Section 1.4, "Determination of Foreign Ownership, Control, or Domination, Common Defense and Security, and Reliable and Economical Source of Domestic Enrichment Services." SRP Section 1.4.4.3 indicates that foreign interests can own no more than 10 percent of the outstanding voting securities of the applicant and that foreign sourced financing of an acquisition of USEC can be no more than 10 percent of the purchase price. There are significant differences with respect to foreign ownership considerations relative to providers of domestic uranium enrichment services and nuclear power plants. These differences relate both to the expressed goal of Congress to maintain a reliable and economical domestic source of enrichment services and to non-proliferation concerns that are not germane to the TMI-1 license transfer. Thus, the staff believes that there are logical reasons why a lower threshold for determining foreign control issues are relevant to its review of USEC, but not to TMI-1. Therefore, the staff believes that Commission precedent in decisions on Part 50 licensees is more appropriately applicable to the TMI-1 case than is the USEC precedent.

AmerGen's Proposed Measures To Minimize Foreign Control Concerns

The MLB paper outlines several steps that AmerGen has taken and intends to take to ensure that "all [s]afety issues" will be under the control of U.S. citizens. The property, business, and affairs of AmerGen are directed and controlled by a Management Committee. PECO, through the PECO Energy Member Group, appoints and may remove four of the members of the Management Committee, and BE, Inc., through the BE Member Group also appoints and may remove four of the members of the Management Committee. The PECO Energy Member Group appoints the Chairman of the Management Committee. The Chairman can only be removed by the PECO Energy Member Group. The Chairman of the Management Committee has a tie-breaking vote on the Management Committee regarding "all [s]afety issues." The staff concurs with the assessment in the MLB paper that this definition broadly encompasses all issues involving common defense and security as well as public health and safety that are under NRC jurisdiction.

AmerGen indicates that the Chairman of the Management Committee and the Chief Executive Officer (CEO) of AmerGen, who is elected by the Management Committee and is responsible for the day-to-day operations of AmerGen, are U.S. citizens. The president of AmerGen is a U.K. citizen. AmerGen indicated in the September 17, 1998, meeting with NRC staff that the president will not have decision-making authority with respect to TMI-1 operations. Rather, the president's duties will be directed toward business decisions, such as future acquisitions of

AmerGen. Although decision-making authority on safety-related issues is currently vested with U.S. citizens, the staff notes that the provisions of the LLC Agreement do not specifically require that AmerGen's CEO and Chairman of the Management Committee must be U.S. citizens. Absent substantial reasons to the contrary, the staff intends to implement such requirements as conditions of any license issued to AmerGen to own and operate TMI-1.

AmerGen has also indicated that the current site personnel at TMI-1 (approximately 700 employees) and selected headquarters employees will be transferred to AmerGen from GPU Nuclear, Inc., the current TMI-1 licensee. These people will be augmented by qualified AmerGen employees and contractors. Additionally, AmerGen expects that both PECO Nuclear (a division of PECO) and British Energy will also provide various support services.

The MLB paper also recommends that substantial weight should be given to the fact that BE, plc, is a corporate citizen of the United Kingdom. The U.K. is, of course, a close ally of the United States to the degree that the U.S. and the U.K. have had an often-cited "special relationship" since World War II. The U.K. is also a signatory to the Treaty on Non-Proliferation of Nuclear Weapons, supports the International Atomic Energy Agency (IAEA) safeguards, is a member of the European Atomic Energy Community (EURATOM), and adheres to other international nuclear safety and safeguards guidelines. BE, plc, as a U.K. corporation, is subject to the laws of the U.K. and the international conventions and treaties to which the U.K. adheres. The staff believes that substantial weight should be given to these facts in making a non-inimicality finding with respect to protecting the common defense and security of the U.S. However, such facts are not dispositive of the prohibition of foreign ownership, control, or domination under Section 104d of the AEA. Previous Commission decisions with respect to foreign ownership, control, or domination did not distinguish among the home countries of the ultimate owners of the applicants. Thus, the staff does not intend to use considerations of the home country of BE, plc, in its determinations of foreign ownership, control, or domination.

Staff's Preliminary Assessment

The staff has evaluated both the Commission's previous decisions with respect to foreign ownership, control, or domination and AmerGen's proposed operating structure. The staff believes that the Commission's 1973 Gulf decision most closely fits the factual situation of AmerGen. As a result, based on a preliminary assessment the staff believes that, in the absence of additional information to the contrary, the transfer of the operating license for TMI-1 to AmerGen would not violate the prohibitions in the AEA pertaining to foreign ownership, control, or domination, provided that AmerGen agrees to conforming license conditions and requirements. The staff will reach a final determination on the basis of its review of the transfer application and other relevant information.

The Commissioners

- 6 -

COORDINATION:

The Office of the General Counsel has no legal objection to this paper.

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for Operations

The Commissioners

October 26, 1999

C O R R E C T I O N N O T I C E

TO ALL HOLDERS OF

SECY-98-252 - PRELIMINARY STAFF VIEWS CONCERNING ITS REVIEW OF THE
FOREIGN OWNERSHIP ASPECTS OF AMERGEN, INC.'S PROPOSED PURCHASE OF
THREE MILE ISLAND, UNIT 1

PLEASE REPLACE PAGE 3 OF SECY-98-252 WITH THE ATTACHED REPLACEMENT
PAGE. THIS CORRECTION MAKES CHANGES TO FOOTNOTE 3 AS DIRECTED BY THE
SRM ON SECY-98-246.

ATTACHMENT:
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THE SECRETARIAT