UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of **Niagara Mohawk Power Corporation,** **New York State Electric & Gas Corporation,** **and** **AmerGen Energy Company, LLC** **(Nine Mile Point, Units 1 & 2)**	**Docket Nos. 50-222 & 50-410** **License Nos. DPR-63 and NPF-69**

ANSWER OF AMERGEN ENERGY COMPANY, LLC TO THE PETITION OF CENTRAL HUDSON GAS AND ELECTRIC CORPORATION, LONG ISLAND POWER AUTHORITY, AND ROCHESTER GAS AND ELECTRIC CORPORATION FOR LEAVE TO INTERVENE AND REQUEST FOR A HEARING

INTRODUCTION

On October 20, 1999, Central Hudson Gas & Electric Corporation, Long Island Power Authority, and Rochester Gas and Electric Corporation ("Petitioners"), petitioned the Commission for leave to intervene and requested that a hearing be held in the above-captioned license transfer proceeding ("Petition"). In their Petition, Petitioners: (1) request that the Commission defer its review of the license transfer request; (2) request a full evidentiary hearing using the procedures set forth in Subpart G of 10 CFR Part 2 rather than the Commission's streamlined hearing process for license transfers as required under Subpart M; and (3) submit five issues in support of their hearing request.

As set forth below, the extraordinary relief requested by the Petitioners is not only inappropriate and unjustified under the circumstances presented, but would serve to undermine the very purpose of Subpart M. In addition, none of the issues proffered by the Petitioners is sufficient to require a hearing and, therefore, they have not satisfied the Commission's

requirements for intervention under 10 CFR § 2.1306. Accordingly, the Petition should be denied in its entirety pursuant to 10 CFR § 2.1308.

BACKGROUND

On September 10, 1999, Niagara Mohawk Power Corporation ("NMPC"), New York State Electric & Gas Company ("NYSEG"), and AmerGen Energy Company, LLC[1/] ("AmerGen"), submitted a Joint Application for Order and Conforming Administrative License Amendments for License Transfers ("Application"). The Application consisted of two separate requests. First, NMPC and AmerGen requested that the NRC consent to the transfer of the Facility Operating License No. DPR-63 for Nine Mile Point Unit 1 ("NMP 1") to AmerGen. Second, NMPC, NYSEG, and AmerGen requested that the NRC consent to the transfer of NMPC's and NYSEG's interests in, and NMPC's operating authority under, Facility Operating License No. NPF-69 for Nine Mile Point Unit 2 ("NMP 2") to AmerGen. Following the transfers, AmerGen would become the licensed operator of both NMP units, operating the units under essentially the same conditions and authorizations included in the existing NMP licenses. AmerGen would become the sole owner of NMP 1, and a 59 percent owner of NMP 2. Petitioners' combined 41 percent ownership interests in NMP 2 would be unaffected by the transfer.

On September 30, 1999, the NRC noticed the Application in the Federal Register Application, and invited members of the public whose interest may be affected by the proposed transfers to file petitions for intervention and requests for hearing no later than October 20, 1999.

1/ AmerGen is owned by PECO Energy Company ("PECO") and British Energy, Inc. ("BE Inc."), a wholly owned subsidiary of British Energy plc. ("British Energy.") PECO and BE Inc. each hold a 50 percent ownership interest in AmerGen.

On October 20, 1999, Petitioners, the non-selling co-owners of NMP 2, submitted a Petition requesting leave to intervene in the NMP license transfer proceeding and asking the NRC to hold a hearing on the merits of the transfer prior to issuing an order granting or denying the transfer. Petitioners request two extraordinary forms of relief from the NRC. First, Petitioners request that the NRC defer its review of the Application until the New York State Public Service Commission ("NYPSC") completes its independent review of the NMP sale. Petition at 4. Second, Petitioners request that the NRC hold a formal evidentiary hearing pursuant to the procedures set forth in Subpart G instead of the streamlined hearing process for license transfers required under Subpart M. Petition at 5.

As the bases for their hearing request, Petitioners submit the following five issues to be set for oral hearing pursuant to 10 CFR § 2.136:

1. Whether the Application is insufficient for filing;

2. Whether AmerGen has demonstrated adequate financial qualifications to ensure safe operation of NMP;

3. Whether AmerGen has demonstrated adequate financial assurance to ensure safe decommissioning of the site;

4. Whether AmerGen has demonstrated adequate technical qualifications to own and operate NMP; and

5. Whether adequate provisions have been made for ensuring an available source of off-site power to the facility.

Petition at 13.

ARGUMENT

I. PETITIONERS ARE NOT ENTITLED TO THE EXTRAORDINARY RELIEF REQUESTED IN THEIR PETITION

As discussed more fully below, the Petitioners' request for extraordinary procedures is improper and lacks merit. There is simply no reasonable basis for delaying NRC's review of the

pending Application, including any hearing proceedings, even if a hearing were warranted. Furthermore, the additional adjudicatory procedures requested by Petitioners are wholly inappropriate for the pending application. Granting Petitioners' requests would undermine the very purpose of Subpart M's streamlined process for resolving issues associated with license transfer proceedings. In promulgating Subpart M, the Commission confirmed that "[t]he procedures are designed to provide for public participation in the event of requests for a hearing under these provisions, while at the same time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases." "Streamlined Hearing Process for NRC Approval of License Transfers," 63 FR 66721, 66722 (Dec. 3, 1998) ("NRC Notice"). Significantly, Petitioners themselves "fully support the policy behind the Commission's reform of the NRC hearing process for license transfers" and "applaud the Commission's efforts to streamline the process." Petition at 7 n.3. However, Petitioners implausibly suggest that their request for application of Subpart G procedures to the instant matter should be distinguished from license transfers that are "uncontested," and other routine license transfers. Id. This position is belied by the fact that Subpart M is a process designed to efficiently resolve issues in contested cases, such as the pending hearing request. The very premise underlying Subpart M is the desirability of prompt and efficient resolution of any contested issues.

For the reasons set forth below, the NRC should deny Petitioners' request for extraordinary procedures.

A. Petitioners Request for a Deferral Directly Contradicts the Commission's Policy Against Delay in Acting on License Transfer Requests

Petitioners request that the NRC halt its review of the Application and postpone any hearing on the Application until the NYPSC completes its independent review of the sale of the

NMP facility to AmerGen. As support for their request, Petitioners assert that going forward with the NRC's review and hearing process at this time would be premature and unduly burdensome, because: (1) issues similar to those raised here also will be decided by other agencies; (2) Petitioners would be unduly burdened by having to litigate simultaneously before the NRC, the Federal Energy Regulatory Commission ("FERC"), and NYPSC, and (3) it is premature for the NRC to rule on the Application prior to the expiration of Petitioners' right of first refusal over the sale of NMPC and NYSEG's ownership interests to AmerGen.

Petitioners' request should be denied because it is a direct challenge to the Commission's stated policy opposing delay in license transfer proceedings. Subpart M expressly directs the NRC staff to "promptly issue approval or denial of license transfer requests." 10 CFR § 2.1316(a). The Commission re-emphasized the policy underlying section 2.1316(a) when promulgating Subpart M stating that "staff action on license transfer requests should not be delayed except for sound reasons." "NRC Notice," 63 FR 66721, 66725-26.[2/]

Moreover, Petitioners conveniently ignore NRC decisions holding that the NRC's independent statutory obligation to rule on issues within its jurisdiction in a timely and effective manner continues notwithstanding the existence of similar issues arising during the simultaneous

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2/ Indeed, the Commission's policy of avoiding unnecessary delay in its proceedings is well established. *See e.g., Baltimore Gas & Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52 (1998) ("We have a regulatory responsibility which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings."); *Nuclear Fuel Services, Inc, and New York State Atomic and Space Development Authority* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975) ("[F]airness to all parties . . . and the obligation of administrative agencies to conduct their functions with efficiency and economy require that Commission adjudication be conducted without unnecessary delays," *quoting* 10 CFR Part 2, Appendix A.)

proceedings of another agency.[3/] *See e.g., Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985); *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984). Because the sale of a nuclear facility necessarily requires multiple regulatory approvals making simultaneous review and consideration by multiple agencies not only efficient, but also necessary in order to resolve the issues presented in a timely and fair manner.[4/]

Because Subpart M has no provision for deferring NRC review of a license transfer application or a hearing, Petitioners' request can only be granted if Petitioners satisfy all of the requirements for a waiver of a Subpart M procedure. *See* 10 CFR § 2.1329. However, Petitioners fail to address, let alone meet, the NRC's requirements for a waiver making their request inadequate as a matter of law. In this regard, Petitioners do not identify the particular rule which should be waived, do not explain why abiding by the (unspecified) rule would be detrimental to the underlying purposes of Subpart M, and do not support their showing by affidavit. *See* 10 CFR § 2.1329(c). Even had Petitioners made the showing required under 10 CFR § 2.1329(c), which they have not, Petitioners also have not demonstrated how the circumstances they suggest justify a deferral relate to the subject matter of NRC's review of the

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3/ Moreover, Petitioners' assumption that similar issues are properly raised before both the NRC and NYPSC is incorrect. As discussed herein, the multiple issues Petitioners raise in their Petition that relate to the present and future business relationships between Petitioners and the Applicants are beyond the scope of this proceeding.

4/ Moreover, to the extent that Petitioners argument involves potential duplicative review of matters before FERC and the NRC, that issue is now moot. FERC has already completed its review of, and issued an order approving, the sale of NMP to AmerGen and rejected Petitioners' arguments challenging the sale. *See Niagara Mohawk Power Corp.*, et al., Docket Nos. EC99-98-000, et seq. (Draft Order Issued October 27, 1999) ("Order Approving Sale of Jurisdictional Facilities and Conditionally Accepting for Filing Proposed Agreements and Granting Waiver of Order Nos. 888 and 889") (FERC Order).

Application (*i.e.*, AmerGen's qualifications to own and operate the NMP facility) as required by 10 CFR § 2.1329(b). Indeed, the circumstances Petitioners suggest support a deferral are wholly unrelated to the findings the NRC must make regarding AmerGen's qualifications to own and operate NMP.

B. Petitioners Provide No Basis for the Commission to Abandon Its Streamlined Hearing Process and Conduct a Full Evidentiary Hearing

Petitioners also request that the NRC abandon Subpart M's streamlined hearing process in reviewing AmerGen's qualifications and, instead, conduct a full evidentiary hearing pursuant to Subpart G. This request must be denied. Although Subpart M envisions certain circumstances justifying "additional procedures . . . [including] a formal hearing," the plain language of the regulations make it clear that such relief is unavailable to Petitioners. 10 CFR § 2.1332(d) ("neither the Commission nor the Presiding Officer will entertain motions from the parties that request such special procedures or formal hearings.")

Nonetheless, it is notable that each of the circumstances Petitioners claim support a full evidentiary hearing are in direct contradiction to the findings made by the NRC when it promulgated Subpart M. Thus, Petitioners err in their claim that the NRC did not contemplate license transfers which involved changes to a facility's operating authority or ownership interests when promulgating Subpart M:

> In general, license transfers do not involve any technical changes to plant operations. Rather, they involve changes in ownership or partial ownership of facilities at a corporate level. . . . Transfers falling within the foregoing provision include indirect transfers which might entail, for example, the establishment of a holding company over an existing licensee, as well as direct transfers, such as transfer of an ownership interest held by a non-operating minority owner, and the complete transfer of the ownership and operating authority of a single or majority owner.

"NRC Notice," 63 FR at 66722.

Similarly, Petitioners' claim that issues "central to the operation of the facility" are present in this case and justify discarding Subpart M processes is both factually and legally incorrect. The transfer of operating authority to AmerGen will have practically no effect upon NMP's on-site organization since, with the exception of only the most senior-level corporate oversight, the same organization currently operating the facility will continue to do so after the transfer. In contrast, the NRC concluded that Subpart M procedures would be entirely sufficient even in cases in which a license transfer resulted in a significant changeover of critical plant personnel, which is clearly not the case here. "NRC Notice," 63 FR at 66723 ("the Commission perceives no potential inadequacy" in the use of Subpart M for transfers involving "a significant loss and replacement of critical plant personnel").

The NRC also previously considered, and rejected, the claim Petitioners repeat here that the record created during a Subpart M hearing would not be sufficient for the Commission's required determinations. In response to a comment that "the Subpart M informal procedures . . . will not be adequate to deal with the complex inquiry that could arise in a license transfer proceeding," the NRC stated: "[The Subpart M procedures] provide ample opportunity for the parties to raise appropriate issues and build a sound evidentiary record for decision." "NRC Notice," 63 FR at 66723 (emphasis added).[5/]

Finally, Petitioners' claim that the potential for a majority ownership interest in NMP 2 was not contemplated when the facility was licensed has absolutely no bearing on the sufficiency

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5/ Petitioners' request for cross examination "to ensure full development of a record" is also misplaced. As referenced above, the NRC concluded that Subpart M's procedures will produce a full record under all but the most unusual of circumstances. Cross examination would only assist the decisionmaker in circumstances in which the issues rest upon the credibility of a testifying witness. Petitioners have not suggested that the credibility of any witness or potential witness is at issue here.

of Subpart M procedures in this proceeding. Moreover, the NMP 2 Ownership Agreement's right of first refusal referenced by the Petitioners necessarily confirms that the owners contemplated transfers of ownership interests including the potential that any one of the existing owners might obtain a majority ownership interest.

II. PETITIONERS DO NOT SATISFY SUBPART M PLEADING REQUIREMENTS

Pursuant to 10 CFR § 2.1306, Petitioners must, for each of the issues they seek to have admitted:

(1) Demonstrate that the issue is within the scope of the proceeding on the license transfer application;

(2) Demonstrate that the issue is relevant to the findings the NRC must make to grant the application for license transfer;

(3) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue and 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 issue; and

(4) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[6/]

Failure to comply with any of these requirements requires dismissal of the issue. *Sequoyah Fuels Corp.* (Gore Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-9, 39 NRC 116, 117-18 (1994) (applying Subpart L principles); *see also* "Notice of Consideration

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6/ In order to intervene in a Subpart M proceedings, Petitioners must also demonstrate they have legal standing to do so. 10 CFR § 2.1308(a)(1)-(3). The NRC recently set forth the showing that non-operating co-owners of a nuclear facility must make in order to have standing in a Subpart M proceeding. *See North Atlantic Energy Service Corp.*, (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201 (1999). AmerGen does not contest that Petitioners have made such a showing. However, as set forth below, because none of the issues set forth in Petitioners' Petition meet the NRC's requirements for intervention, the Petition should be dismissed.

and Approval of Transfer of Facility Operating Licenses and Conforming Amendments, and Opportunity for a Hearing", 64 FR 52798, 52799 (Sep. 30, 1999) ("requests for a hearing must comply with the requirements set forth in 10 CFR § 2.1306"); 10 CFR § 2.1306(b) (Subpart M requirements are mandatory).

The requirements for admission of issues under Subpart M are essentially the same as the Subpart G requirements for the admission of contentions, *compare* 10 CFR § 2.714(b)(2) (NRC pleading requirements under Subpart G), and the Commission refers to precedent decided under Subpart G on the admissibility of contentions when reviewing the admissibility of issues under Subpart M. *See e.g., North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-27, 49 NRC __, slip op. at 6, n.5 (Oct. 21, 1999) *citing Metropolitan Edison Co.* (Three Mile Island Nuclear Generating Station, Unit 1), CLI-83-25, 18 NRC 327 (1983).

An issue sought to be admitted pursuant to Subpart M must be confined to the subjects delineated by the hearing notice, and issues concerning matters that are not within that defined scope cannot be admitted. *Northeast Nuclear Energy Company* (Millstone Nuclear Power Station, Unit 3) LBP-98-28, 48 NRC 279, ___, 1998 WL 817407, *3 (1998). It is well-established that an issue that "advocate[s] stricter requirements than those imposed by the regulations" will be rejected as "an impermissible collateral attack on the Commission's rules." *See e.g., Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *accord Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998); *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).

Moreover, an issue will be found to lack sufficient basis if it amounts to, without more, a petitioner's differing opinion with the NRC as to what applicable regulations should require. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 303, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 11 (1995). In this regard, the mere citation of an alleged factual basis for an issue is not sufficient. Rather, a petitioner is obliged "to provide the [ ] analyses and expert opinion" or other information "showing why its bases support its [issue]." *Id* at 306. Similarly, the NRC will not accept an expert opinion as an adequate basis for an issue if it "merely states a conclusion (*e.g.*, the application is "deficient," "inadequate," or "wrong,") without providing a reasoned basis or explanation for that conclusion." *Independent Spent Fuel Storage Installation*, 47 NRC at 181.

Subpart M requires a petitioner to "[p]rovide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 CFR § 2.1306(b)(2)(iv). If the petitioner does not believe that the application addresses a relevant issue, the petitioner is required to "explain why the application is deficient." *Arizona Public Service Company* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). An issue that does not directly controvert a position taken in the application is subject to dismissal. *Independent Spent Fuel Storage Installation*, 47 NRC at 181, *see Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Further, an allegation that some aspect of an application is "inadequate" or "deficient" must be supported by facts and a reasoned explanation of why the application is deficient and how the deficiency is material to the proceeding. *Florida Power and Light Company* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 512

(1990). As the following makes clear, Petitioners fail to meet their burden under 10 CFR § 2.136 for any of the issues they submit for admission.

A. Petitioners Fail To Provide Sufficient Factual Basis or Show a Material Dispute With Regard to the Sufficiency of the Application

Petitioners assert as their Issue 1 that the pending Application is "insufficient as a matter of law," because: (1) the Application incorrectly states that NMPC is acting as agent for the Petitioners in seeking the proposed transfer; (2) Applicants had no basis for seeking protection for certain financial information withheld from public disclosure; (3) the Application "effectively abrogate[s] Co-tenants' rights to participate in the oversight of NMP 2 and protect their interests in the facility," and "effectively abrogates Petitioners' right of first refusal." Petition at 15. Petitioners' Issue 1 should not be admitted.

Petitioners claim that the Application incorrectly states that NMPC is acting as agent for the Petitioners in seeking the proposed transfer. Petition at 14. Petitioners provide no facts, documents, or expert opinion to support this claim. Indeed, Petitioners acknowledge that NMPC is authorized pursuant to the NMP Operating Agreement, of which they are parties, to act as their agent in seeking regulatory approvals from the NRC or other regulatory bodies. *Id.* Significantly, the NMP 2 Operating License itself specifically notes that "Niagara Mohawk Power Corporation is authorized to act as agent for the other listed owners." License No. NPF-69, n.*. There is therefore no doubt regarding NMPC's authority.

Moreover, this issue relates solely to the contractual relationship between the parties, and therefore, it falls outside the scope of this proceeding. *See Gulf States Utilities Company, et al.* (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 39 n.5 (1994). ("Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license

conditions, contractual disputes between co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court.") Similarly, Petitioners' claims that the Application abrogates the current operating agreement and Co-tenants' right of first refusal under the NMP 2 Basic Agreement also relate solely to the contractual relationship between the parties and should be rejected pursuant to the holding of *River Bend Station*, 39 NRC at 39, n.5.

The Commission also should reject Petitioners' assertion that the Application is deficient because it does not provide adequate basis for the proprietary addendum to be withheld from public disclosure. First, Petitioners do not identify any particular inadequacies with AmerGen's request for proprietary treatment. Indeed, AmerGen complied with the applicable NRC requirements for requesting proprietary treatment of confidential information. *See* 10 CFR § 9.17(a)(4), 10 CFR § 2.790, and the Affidavit of Gerald R. Rainey, AmerGen Chief Executive Officer (Application, Enclosure 15). Second, Petitioners do not explain how Applicants' request for proprietary treatment of certain financial information is material to this proceeding given that AmerGen provided Petitioners with a copy of the Applications' proprietary Addendum under appropriate confidentiality arrangements soon after it was filed with the NRC. *Turkey Point Nuclear Generating Plant*, 31 NRC at 512.

B. The Financial Information Provided by AmerGen Fully Complies with NRC Requirements and is of a Type That the NRC Previously Found Sufficient to Support a License Transfer

Petitioners assert as their Issue 2 that AmerGen failed to demonstrate the requisite financial qualifications to own and operate NMP 1 and 2 as required by 10 CFR § 50.33(f). In support of this issue, Petitioners claim that: (1) AmerGen failed to provide a projected income statement or cost and revenue projections out to the end of the NMP 1 and 2 licenses;

(2) AmerGen's opening balance sheet does not provide sufficient tangible assets to ensure safe operation; (3) AmerGen does not demonstrate cash or cash equivalents sufficient to pay for a six-month NMP outage; (4) AmerGen does not adequately explain its financial and legal relationships with its owners; and (5) the Application does not explain how a foreign parent impacts AmerGen's financial qualifications. Each of Petitioners' claims fail to stand up to scrutiny.

First, AmerGen complied fully with the NRC's "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," NUREG-1577, Rev. 1 ("SRP") in submitting information related to its financial qualifications and Petitioners do not claim otherwise.

Second, the NRC has previously found that the same type of financial information submitted by AmerGen here was sufficient for it to make an informed and reasoned decision and find AmerGen's financially qualified to own and operate a nuclear facility. *See GPUN, Inc., et al to AmerGen*, (Three Mile Island, Unit No. 1), "Order Approving Transfer of License and Conforming Amendment," 64 FR 19202 (April 19, 1999) ("TMI-1 Order"); *Boston Edison Company* (Pilgrim Nuclear Power Station, Unit No. 1), "Order Approving Transfer of License and Conforming Amendment," 64 FR 24426 (May 6, 1999) ("Pilgrim Order"); *Safety Evaluation by the Office of NRR, Transfer of Facility Operating License from GPUN, Inc., et al to AmerGen*, (Three Mile Island, Unit No. 1), Docket No. 50-289 at 21 (April 12, 1999) ("TMI-1 Safety Evaluation"). Petitioners are therefore asserting here that AmerGen must provide financial information beyond that which is required by NRC's regulations and prior Commission decisions. Petitioners' claim, therefore, should be dismissed as a matter of law. *Seabrook Station*, 16 NRC at 1656; *accord Independent Spent Fuel Storage Installation*, 47 NRC at 179;

see also Palo Verde Nuclear Generating Station, 33 NRC at 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). Nevertheless, AmerGen hereby responds to each of the Petitioners' claims about alleged deficiencies in the information provided by AmerGen.

1. AmerGen Was Not Required To Provide Projections of Operating Costs and Income Beyond the Five-Year Period After the Transfer

Petitioners do not challenge AmerGen's cost and revenue estimates for the five-year period after the proposed license transfer takes effect. However, they nonetheless claim that AmerGen is not financially qualified to own and operate NMP because it did not provide a projected income statement for the entire period of the NMP Units' licenses. Petition at 17. In other words, Petitioners assert that a five-year cost and revenue projection is *per se* inadequate to meet the NRC's financial qualifications submission requirements. As the Commission recently ruled in *Seabrook Station*, 49 NRC at 221, such a claim must be rejected as a matter of law. Indeed, 10 CFR § 50.33(f)(2), states that an applicant must demonstrate a reasonable assurance of adequate funds for the life of the license, but requires submission of detailed financial projections covering only the first five years after the license transfer. Therefore, the regulation plainly implies that cost and revenue information which covers the first five years is sufficient to make a financial qualifications evaluation for the entire period of the license. If any further information were *per se* required, the regulation would require that all applications provide such information.

2. AmerGen Provided Sufficient Information Regarding Its Assets for the NRC to Review AmerGen's Financial Qualifications

Petitioners allege that AmerGen provided the NRC with inadequate information regarding AmerGen's assets claiming: (1) AmerGen's opening balance sheet does not include the source of working capital or the level of capital contributions that may be made by PECO and British Energy; (2) AmerGen failed to describe, or provide documentation describing, the disposition of retained earnings from NMP operations; and (3) AmerGen does not explain why the NRC should accept goodwill as an asset for a newly formed entity. Petitioners, however, ignore the fact that in finding AmerGen financially qualified to own and operate TMI-1, the NRC judged the financial information supplied by AmerGen -- clearly comparable to the financial information AmerGen has submitted in support of the pending Application -- sufficient in order to evaluate AmerGen's financial qualifications. Petitioners provide no facts or expert opinion which suggests that the NRC's review process in TMI-1 was flawed, or that the NRC is now obliged to review AmerGen's assets against a higher standard than it used in approving the TMI-1 transfer.

In establishing AmerGen's financial qualifications in the TMI-1 proceeding, NRC relied upon AmerGen's assurances of adequate capitalization from its parents, and it did not require AmerGen to specify the precise level of capital contributions that may be made by PECO and British Energy as Petitioners suggest here. Similarly, the NRC did not reject AmerGen's inclusion of goodwill as an asset in its opening balance sheet, or challenge the value provided. Finally, the NRC did not require AmerGen to provide additional documentation describing the disposition of retained earnings from NMP operations, but rather accepted the statements made

in the application together with the description of the use of retained earnings that AmerGen provided in its response to an NRC Request for Additional Information (RAI):

> AmerGen plans to retain a portion of its net income to fund its working capital. Beyond such amounts, earnings will be distributed as dividends to PECO Energy and British Energy. To the extent there are shortfalls in revenue, AmerGen will obtain the funds necessary to meet AmerGen's needs from PECO Energy and British Energy or from other sources, if available. If necessary, AmerGen could always resort to the commitments provided by PECO Energy and British Energy under the terms of the letter agreements . . . . However, . . . AmerGen does not anticipate that this will be necessary.

Supplemental information submitted by letter from GPUN and AmerGen dated January 11, 1999.

Moreover, Petitioners' claim that AmerGen did not provide sufficient information regarding "how distribution of earnings will be made to the parent companies," is contradicted by Petitioners' quotation of the Application and AmerGen's prior response to an NRC RAI in which AmerGen provides the allegedly missing information. Petition at 18 and n.9. Simply put, AmerGen has repeatedly made clear that it intends to distribute earnings to its parents whenever it is appropriate or desirable to do so and to obtain funds from its parents whenever it faces a shortfall. Nothing in NRC's regulations or guidance requires that AmerGen retain earnings, and the imposition of a requirement to do so could adversely affect the economics of AmerGen's operations. Similarly, NRC's regulations do not establish any specific capital requirements, and in a competitive environment licensees need the flexibility to make appropriate capital adjustments. There is no need for the NRC to review and approve a licensee's periodic adjustments to its working capital or other business decisions relating to its capital needs, and it would be inappropriate for the NRC to attempt to do so.

3. Although Not Required, AmerGen Provided Sufficient Information to Demonstrate Availability of Adequate Funds to Cover Six-Months Fixed O&M Costs at NMP

Petitioners claim that AmerGen cannot be found financially qualified to own and operate NMP unless it provides sufficient information to demonstrate adequate funds for a six-month outage at NMP. However, neither the NRC's regulations, nor the SRP, require the submission of such information as a prerequisite for a financial qualification determination. *See* 10 CFR § 50.33(f), SRP at 10. Petitioners' suggestion that such a showing is required under NRC regulations must be rejected as an impermissible collateral attack on NRC regulations, because their position is premised on the imposition of stricter requirements than those provided by the regulations. *Seabrook Station*, 16 NRC at 1656; *accord Independent Spent Fuel Storage Installation*, 47 NRC at 179; *see also Palo Verde Nuclear Generating Station*, 33 NRC at 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991).

Although clearly not required for a financial qualification determination, AmerGen nevertheless provided the NRC with information sufficient to demonstrate it possesses adequate funds to cover six-months' fixed operating costs at the two NMP units, namely letter agreement commitments of PECO and British Energy which make up to $110 million available to AmerGen. Petitioners assert, however, that $110 million "appears inadequate" and should be increased suggesting that (1) average six-month expenses are greater than $110 million; (2) there is no assurance that the guaranteed funds would be available if needed; and (3) based on the operating history of certain plants owned and operated by Unicom Corporation, which will be merging with PECO, an outage greater than six months may be a more credible scenario.

Petitioners cite to the opinion of John Reed attached to their Petition in which he asserts:

> Operating costs for six months at NMP would appear to be at least approximately $[**xxx**] million, based on the Applicant's own estimate of average O&M costs in the range of $[**xxx**] million per year. Accordingly, it is not clear whether the proposed $110 million guarantee, which is available for all AmerGen plants, would be sufficient to cover the costs of a six-month outage.

As he acknowledges, Mr. Reed's sole basis for his opinion is AmerGen's own figures. However, an expert's reliance upon an applicant's own figures, without more, is not a sufficient basis for an admissible issue since it is, in essence, nothing more than the expert's claim that the Application is "deficient, "inadequate," or "wrong." *Independent Spent Fuel Storage Installation*, 47 NRC at 180. As the NRC made clear in *Independent Spent Fuel Storage Installation*, an expert is required to provide an independent basis for his opinion which, in turn, permits the NRC to make the "necessary reflective assessment of the opinion." *Id.*

Moreover, Mr. Reed is incorrect in relying on AmerGen's figure for total operating expenses in support of his opinion. The larger amount cited by Mr. Reed is one-half (six months) of AmerGen's estimate of NMP's average annual total operating expenses. However, in evaluating adequate funding for a six-month outage, the NRC reviews a facility's fixed operating costs -- not total operating costs. See SRP at 10. AmerGen's $110 million figure cited in the pending Application correctly refers to six months of NMP's fixed operating expenses.[7/]

7/ To the extent Petitioners claim that AmerGen should provide more than $110 million can be interpreted as a requirement that AmerGen demonstrate it has sufficient resources to cover fixed operating expenses for more than six months, such a requirement would exceed what is required under NRC's guidance and regulations. An issue premised on such a requirement would be inadmissible as a matter of law. *Seabrook Station*, 16 NRC at 1656; *accord Independent Spent Fuel Storage Installation*, 47 NRC at 179; *see also Palo Verde Nuclear Generating Station*, 33 NRC at 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991).

Petitioners' claim that AmerGen failed to provide assurance that the funds guaranteed by PECO and British Energy would be available to AmerGen, if necessary, is in direct contradiction of Commission precedent. *See* TMI-1 Order. In approving the transfer of the TMI-1 license to AmerGen, the NRC reviewed letter agreements essentially identical to those cited in the NMP Application as well as "documentation of the financial ability of PECO Energy and British Energy to provide adequate funding to AmerGen," and concluded there was reasonable assurance of adequate funding. TMI-1 Safety Evaluation at 8. Moreover, AmerGen has committed in the pending Application, as it did in connection with the TMI-1 transfer, that:

> AmerGen will take no action to cause PECO Energy or British Energy to void, cancel, or diminish the financial commitments to AmerGen. Neither will AmerGen cause PECO Energy or British Energy to fail to perform or impair their performance under the commitments, or remove or interfere with AmerGen's ability to draw upon the commitments.

Application at 21-22. Petitioners provide no basis to challenge the NRC's prior finding that there was reasonable assurance that the funds guaranteed by PECO and British Energy would be available to AmerGen when, and if, necessary.[8/]

4. AmerGen Adequately Described Its Legal and Financial Relationships With PECO and British Energy

Petitioners also claim that AmerGen failed to explain the financial and legal relationships it has with its owners. Petition at 22-23. However, the Application incorporated by reference

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8/ NRC should also reject Petitioners' suggestion that because of the operating experience of plants owned by Unicom, the company with whom one of AmerGen's parents may merge in the future, the NRC should require AmerGen to provide assurances that it would be able to fund outages at NMP of greater than six months duration. The operating experience of plants that may be owned by one of AmerGen's parents provides no principled basis for evaluating future operations at NMP and is, in any event, outside the scope of the present proceeding. *See Millstone Nuclear Power Station, Unit 3*, 48 NRC at __, 1998 WL 817407 at *3.

voluminous materials, previously provided to the NRC, describing the legal and financial relationships between AmerGen and PECO, BE Inc., and British Energy including: (1) various agreements that commit financial support from AmerGen's parents to AmerGen; (2) the Certificate of Formation of AmerGen Energy Company, LLC, dated August 14, 1997; (3) the Limited Liability Agreement of AmerGen Energy Company, LLC among PECO Energy Company, British Energy, and BE, Inc., dated August 18, 1997; and (4) numerous annual reports of British Energy and PECO Energy. The NRC previously reviewed this information and concluded that it adequately described the specific legal and financial relationships between AmerGen and its owners. *See* TMI-1 Safety Evaluation at 7-8. This same information was either referenced or provided to the NRC in connection with the NMP Application, and there is no basis to suggest that the NRC's prior review was flawed or otherwise incomplete.

Petitioners also seek to have the NRC require that AmerGen obtain a guarantee from its parents to bear financial responsibility for the safe decommissioning of the plant after shutdown. Petitioners provide no legal or regulatory basis for their request, and there is none. In effect, Petitioners request that the NRC require an ironclad guarantee of AmerGen's funding of its prospective financial obligations for NMP. However, the NRC rejected this argument in *Yankee Atomic Electric Company*, (Yankee Nuclear Power Station),CLI-96-7, 43 NRC 235, 262 (1996), holding that the NRC's regulation requiring reasonable assurance of decommissioning funds "does not contemplate" an "iron-clad" or "absolute guarantee of such funds," 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 CFR § 50.33(f) is one of "reasonable assurance," not "absolute certainty" or "assurance beyond doubt." 10 CFR § 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). Petitioners' request, therefore, must be denied as an attempt to have the NRC impose financial qualifications requirements beyond that contemplated by NRC policy and regulation. *Seabrook Station*, 16 NRC at 1656.[9/]

C. AmerGen Meets or Exceeds the NRC's Requirements for Decommissioning Funding of NMP

Petitioners assert as their Issue 3 that AmerGen failed to demonstrate that it meets the NRC's decommissioning funding requirements. Because AmerGen's response includes information that AmerGen had requested in the pending Application to be withheld from public disclosure pursuant to 10 CFR § 9.17(a)(4) and 10 CFR § 2.790, it is being provided as Proprietary Enclosure A. AmerGen requests that Proprietary Enclosure A be similarly withheld from public disclosure as described in the attached 10 CFR § 2.790 Affidavit of Todd D. Cutler.

D. AmerGen Provided Sufficient Information for the NRC to Evaluate AmerGen's Technical Qualifications to Operate NMP

Petitioners assert as their Issue 4 that Applicants did not provide sufficient information to support a finding that AmerGen is technically qualified to operate NMP. Petitioners' claim should be denied as a matter of law as it would require AmerGen to provide technical information beyond that required by NRC regulations and guidance.

9/ Similarly, Petitioners' request for a license condition which would limit their own financial responsibility as co-owners of NMP should similarly be rejected as an impermissible challenge on the NRC's statement of policy. *See* "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry," 62 FR 44071, 44074 (1997).

As AmerGen explained in the pending Application, NMPC's existing nuclear organization at NMP will be transferred to AmerGen intact with substantially all of NMPC's nuclear managers and employees at NMP becoming AmerGen employees. Application at 12. This wholesale organizational transfer to AmerGen includes all of the existing NMPC technical support organizations for NMP set out in the NMP 1 and 2 Final Safety Analysis reports ("FSARs"). *Id.* at 13. The existing organization's technical qualifications are consistent with Commission requirements and will remain so with the wholesale organizational transfer. Indeed, other than routine personnel turnover, the only change to the technical organization is that the NMP Senior Vice President will now report to AmerGen's Chief Nuclear Officer. Simply put, no further information regarding AmerGen's technical qualifications is required, because AmerGen is acquiring the existing organization, which is already technically qualified.

The Petitioners' concern over the proposed PECO Energy - Unicom merger is clearly not germane to the Commission's evaluation of AmerGen's technical qualifications. Petition at 31-32. This issue is inappropriate for evaluation in this proceeding as AmerGen would not own any of the Unicom plants under the proposed merger. In addition, Petitioners' concern with AmerGen's services contract with PECO and British Energy is similarly outside the scope of this proceeding. *River Bend Station*, 39 NRC at 39, n.5. Any such contract does not alter AmerGen's technical qualifications and is irrelevant to the NRC's evaluation of these qualifications. Indeed, such contracts are routinely entered into by other licensees, and any concerns regarding this generic practice in the industry are beyond the scope of this proceeding

For the reasons discussed above, Issue 4 should not be admitted.

E. AmerGen Will Have Complied Fully With NRC Requirements Pertaining to Off Site Power Before Taking Operational Control Over NMP

Petitioners' assert as their Issue 5 that the Application is deficient so long as the Interconnection Agreement ("ICA") for NMP-2 remains unexecuted.[10/] Curiously, the Petitioners ignore in their Petition that they have been in negotiations with NMPC and have repeatedly refused to authorize execution of the ICA for NMP-2 for reasons entirely outside of the NRC's jurisdiction.[11/] It is disingenuous for Petitioners to challenge the absence of an executed ICA for NMP 2 when the Petitioners themselves are responsible for the delay. Petitioners are apparently attempting to use this license transfer proceeding as a mechanism for extracting concessions from the Applicants to which they are not entitled, as recently confirmed by the FERC Order accepting the ICAs for both NMP 1 and NMP 2. FERC Order at 12.

Without regard to the current status of the NMP 2 Interconnection Agreement, AmerGen has expressly committed to comply with all applicable NRC regulations, including the requirements associated with off-site power. Application at 26. Therefore, an appropriate agreement providing for the NMP 2 interconnection will be in place prior to the time of transfer. Petitioners provide no facts or documents to support any suggestion that AmerGen will operate in a manner contrary to NRC regulations. Indeed, an issue founded on the premise that a licensee will not follow regulatory requirements will only be admissible if it is accompanied by a particularized demonstration that there is a reasonable basis to believe that the licensee would act contrary to the regulations. *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear

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10/ The Petitioners correctly point out that an ICA for NMP-1 has been executed. Petition at 33.

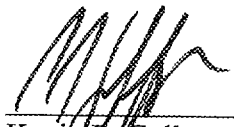
11/ The FERC recently accepted both the NMP 1 and NMP 2 ICAs for filing despite Petitioners' protests. FERC Order at 12.

Generating Station), LBP-96-23, 44 NRC 143, 146 (1996). Petitioners make no such showing here. Petitioners' issue, therefore, must be denied on this basis as well.

CONCLUSION

For the reasons set forth above, AmerGen respectfully requests that the Commission deny the Petition For Leave To Intervene and Request For Hearing filed by Central Hudson Gas & Electric Corporation, Long Island Power Authority, and Rochester Gas and Electric Corporation on the ground that Petitioners have failed to submit a valid issue in accordance with the pleading requirements of 10 CFR § 2.136. Although AmerGen does not believe that any hearing is warranted, AmerGen respectfully requests that if the Commission determines otherwise, any hearing should be initiated promptly in accordance with the procedures set forth in Subpart M.

Respectfully submitted,



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Counsel for AmerGen Energy Company, LLC

Dated: November 1, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the Answer of AmerGen Energy Company, LLC to the Petition of Central Hudson Gas and Electric Corporation, Long Island Power Authority, and Rochester Gas and Electric Corporation For Leave to Intervene and Request for a Hearing were served upon the persons listed below by e-mail or facsimile, with a conforming copy deposited in the U.S. mail, first class, postage prepaid, this 1st day of November, 1999.

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