

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'99 NOV -3 P3:01

OFFICE
OF THE
ADJUTANT

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 THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK FOR LEAVE TO INTERVENE

I. INTRODUCTION

AmerGen Energy Company, LLC (AmerGen), one of the co-applicants in the above-captioned proceeding involving the proposed transfer of Operating Licenses No. DPR-63 and NPF-69 for the Nine Mile Point Nuclear Station, Units 1 and 2 (NMP 1 and NMP 2),^{1/} hereby submits the following Answer in Opposition to the Petition of the Attorney General of the State of New York for Leave to Intervene (Petition), dated October 20, 1999. In his petition, the Attorney General seeks to intervene in this proceeding and urges the Commission to condition the decision regarding the proposed license transfer upon the Attorney General's review and approval of the Application.

1/ On September 10, 1999, AmerGen, the Niagara Mohawk Power Corporation, and the New York State Electric & Gas Corporation (collectively the Applicants) filed a joint application (Application) requesting the consent of the Nuclear Regulatory Commission (NRC or Commission) to the transfer of the entire ownership interests in NMP 1 and 59% of the ownership interests in NMP 2 to AmerGen. The Applicants also requested the approval of certain conforming administrative license amendments associated with the transfer.

As shown below, the Attorney General's petition fails to establish standing and does not raise a valid issue for hearing in accordance with the pleading requirements set forth in the applicable NRC Regulations. Accordingly, AmerGen respectfully requests that the Commission deny the Attorney General's Petition to Intervene.

II. THE ATTORNEY GENERAL HAS FAILED TO ESTABLISH STANDING

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its interest may be affected by the proceeding, i.e., the petitioner must demonstrate standing.^{2/} North Atlantic Energy Service Corporation (Seabrook Station, Unit 1) CLI-99-06, 49 NRC 201, 214 (1999). Subpart M contains no provision similar to Subpart G (see 10 CFR 2.715(c)) which affords an interested state the opportunity to participate in proceedings without establishing standing or raising an admissible contention or issue. Therefore, the Attorney General must comply with the pleading requirements of Subpart M to intervene in this license transfer proceeding.

To establish standing in a license transfer proceeding, a petitioner must identify an interest in the proceeding by alleging a concrete and particularized injury that: (1) is fairly traceable to and may be affected by the challenged action, (2) is likely to be redressed by a favorable decision, and (3) arguably lies within the zone of interests protected by the governing

2/ See also 10 CFR § 2.1306(a) (intervention limited to “[a]ny person whose interest may be affected by the Commission’s action on the application”); Streamlined Hearing Process for NRC Approval of License Transfers, 63 FR 66721, 66723-724 (December 3, 1998) (“The 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.”).

statutes. Seabrook, CLI-99-06, 49 NRC at 214-15. Additionally, the petitioner must specify the facts pertaining to that interest. *Id.* at 215.

These requirements apply equally to the Attorney General of a State as they do any other party. The Commission has recognized that standing should not be automatic, and a State, like any other intervenor, must demonstrate that it will likely suffer injury that is “distinct, and palpable, particular and concrete, as opposed to being conjectural or hypothetical.” International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 145 (1998), quoting International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-06, 47 NRC 116, 117 (1998).

The Attorney General’s petition should be denied for failing to establish standing because the petition does not allege a concrete and particularized injury-in-fact. A party seeking to intervene must describe its interest and how that interest may be adversely affected in detail and with particularization. The Commission differs from Article III Courts in that the Commission does not permit notice pleadings. Shieldalloy Metallurgical Corp. (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 1999 WL 288137, *2 (April 26, 1999). Rather, the Commission insists on “detailed descriptions of the petitioner’s positions on issues” related to standing. *Id.* Furthermore, parties seeking to intervene are required to provide “some form of substantiating evidence” for their factual assertions regarding standing. *Id.* at *4.

Although the Attorney General explains the source of his general interest in this proceeding -- the innumerable investigatory and enforcement responsibilities . . . [in the areas of] environmental, public health, antitrust and consumer protection laws -- the Attorney General fails to identify a particular issue, let alone a dispute, with the proposed license transfer. The petition does no more than suggest that the sufficiency of funding is an area of general interest. It sets

forth no particular issue or dispute with regard to funding, only the Attorney General's desire to be assured of the accuracy of statements made in the application. In fact, the petition candidly acknowledges that the Attorney General has no recommendations to make at this time. Petition at 3-4.

In short, the petition does no more than establish a general interest in some of the issues the Commission will address pursuant to its regulations. Such a general statement of interest is inadequate to establish the particularized and concrete injury required by the Commission to demonstrate standing. The Attorney General has failed to demonstrate a cognizable injury-in-fact, and thus, the Petition should be denied.

III. THE ATTORNEY GENERAL HAS FAILED TO RAISE A VALID ISSUE IN ACCORDANCE WITH THE PLEADING REQUIREMENTS SET FORTH IN NRC'S REGULATIONS

As already noted above, Subpart M nowhere suggests that an interested state may participate in a license transfer proceeding without raising an admissible "issue." Thus, the Attorney General's petition must be treated as any other party's. To intervene as of right in a Commission licensing proceeding, a petitioner must not only demonstrate standing but must also raise at least one admissible contention or issue. *Seabrook*, CLI-99-06, 49 NRC at 214. To establish an admissible issue in a license transfer proceeding under 10 CFR § 2.1306(b)(2), the petitioner must set forth the issues sought to be raised and:

- (1) demonstrate that those issues fall within the scope of the proceeding;
- (2) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application;

- (3) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely; and
- (4) show that a genuine dispute exists with the applicant on a material issue of law or fact.

See also Seabrook, CLI-99-06, 49 NRC at 215; Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998). As shown below, the Attorney General does not meet these criteria with respect to any of the issues raised in his petition. Moreover, the Attorney General's generalized statements of concern relate to issues that are being addressed in the New York Public Service Commission proceedings. These State proceedings are the appropriate forum for the resolution of the kind of issues the Attorney General vaguely suggests.

A. The Attorney General's Issues Are Not Supported by Sufficient Factual Bases

The Attorney General's petition should be dismissed because the issues it raises lack the specificity and support required under 10 CFR § 2.1306(b)(2)(iii). The absence of specificity and support is, without more, a sufficient ground for rejecting the proffered issues. Calvert Cliffs, CLI-98-25, 48 NRC at 349, Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328 (1999). The Attorney General seeks to be assured of the accuracy of several claims raised in the Application and to ensure that "AmerGen will have sufficient financial resources to satisfy its obligation to operate the plants safely and reliably and to decommission the plants at the end of their useful lives." Petition at 3.

The Attorney General implies that the application may be deficient, but provides no basis in fact or expert opinion to support his claims. A petitioner may not rely upon a broad, bald

conclusory allegation. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998). NRC regulations, including the recently-issued Subpart M, do not permit the filing of vague, unparticularized issues or contentions unsupported by affidavit, expert, or documentary support. Seabrook, CLI-99-06, 49 NRC at 219. Furthermore, Commission practice does not permit notice pleading with details to be filled in later. *Id.* Instead, the Commission requires a petitioner to come forward at the outset with sufficiently detailed grievances. *Id.* The Attorney General's petition fails to do so and therefore should be denied.

B. The Attorney General's Issues Do Not Show that a Material Dispute Exists with the Applicants

The Attorney General's petition should also be denied because the issues it raises do not show that a material dispute exists with the Applicants. 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). A proffered issue that does not directly controvert a position taken in the application is subject to dismissal. Private Fuel Storage, LBP-98-7, 47 NRC at 181. Furthermore, a proffered issue must include facts or documents that produce doubt about the adequacy of a specific portion of the application or that provide supporting reasons that tend to show some specific omission from the application. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 n.12 (1990). The Attorney General does not comment on the Application, let alone controvert any position taken by the Applicants.

C. The Attorney General's Issues Constitute an Impermissible Attack on Commission Regulations to the Extent that the Attorney General is Seeking Additional Decommissioning Funding

As a condition of the proposed license transfer, the Attorney General seeks to ensure that AmerGen will have sufficient resources to satisfy its obligation "to decommission the plants at the end of their useful lives." Petition at 3. However, as the NRC recently confirmed in several recent license transfer proceedings, a transferee is only required to demonstrate that it has sufficient funds to cover the radiological decommissioning cost estimate calculated using the NRC formula in 10 CFR § 50.75(c). See Seabrook CLI-99-06, 49 NRC at 201 (the NRC formula amount, utilizing NUREG-1307, Rev. 8, is sufficient to provide decommissioning funding assurance in license transfer cases); Safety Evaluation by the Office of NRR, Transfer of Facility Operating License from GPUN, Inc., et al to AmerGen, (TMI, Unit No. 1), Docket No. 50-289 at 8 (April 12, 1999); Boston Edison Co. (Pilgrim Nuclear Power Station, Unit No. 1), Order Approving Transfer of Licenses and Conforming Amendments, 64 FR 24426 (May 6, 1996).

The Attorney General's generalized concerns regarding the amount of decommissioning funding provided ignores the undisputed fact that the proposed funding arrangements meet NRC's requirements. See 10 CFR § 50.75. Thus, the Attorney General appears to be advocating that the Commission impose stricter requirements on the Applicants in connection with the proposed license transfer than those imposed by the Commission's own regulations. Such an argument is an impermissible collateral attack on these regulations. Seabrook CLI-99-06, 49 NRC at 201, 220; see also 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. Therefore, the Attorney General's Petition should also be denied to the extent the Attorney General is seeking additional decommissioning funding.

IV. CONCLUSION

For all the foregoing reasons, AmerGen respectfully request that the Commission deny the Attorney General's Petition to Intervene since the Attorney General has failed to establish standing and has also failed to raise a valid issue for consideration in this license transfer proceeding in accordance with the pleading requirements set forth in 10 CFR § 2.1306(b)(2). AmerGen also respectfully requests that the Commission promptly consent to the license transfer, pursuant to 10 CFR § 2.1316(a), to minimize any impact on the present transfer schedule.

Respectfully submitted,



Kevin P. Gallen
John E. Matthews
Paul J. Zaffuts
Morgan, Lewis & Bockius LLP
1800 M Street, NW
Washington, DC 20036-5869
(202)467-7000
Facsimile: (202)467-7176
E-mail: jemathews@mlb.com

Dated: November 1, 1999

Counsel for AmerGen Energy Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the Answer of Amergen Energy Company, LLC
To the Petition of the Attorney General Of the State of New York for Leave to Intervene 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.

Office of the Secretary
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
Washington, D.C. 20555
(E-mail: secy@nrc.gov)

Office of the Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: hrb@nrc.gov)

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: ogclt@nrc.gov)

Maureen Leary, Esq.
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law
Justice Building
Albany, NY 12224
(E-mail: epamfl@oag.state.ny.us)

Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
(E-mail: mwetterh@winston.com)

Richard W. Golden, Esq.
Assistant Attorney General
Telecommunications and Energy Bureau
New York State Department of Law
120 Broadway
New York, NY 10271
(E-mail: cfnrwg@oag.state.ny.us)

Samuel Behrends IV, Esq.
LeBoeuf, Lamb, Greene & McRae, L.L.P.
1875 Connecticut Avenue, Suite 1200
Washington, D.C. 20009-5728
(E-mail: sbehrend@llgm.com)



Paul V. Zafuts

Counsel for AmerGen Energy Company, LLC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
US NRC

'99 NOV -3 P3:01

In the Matter of)

NIAGARA MOHAWK POWER)
CORPORATION, NEW YORK STATE)
ELECTRIC & GAS CORPORATION)

And)

AMERGEN ENERGY COMPANY, LLC)
(NINE MILE POINT NUCLEAR)
STATION, UNITS 1 AND 2))

OFFICE
OF THE
ADJUTANT

Docket Nos.
50-220-LT
50-410-LT

License Nos.
DPR-63
NPF-69

NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance as counsel on behalf of AmerGen Energy Company, LLC in any proceeding related to the above-captioned matter.



Kevin P. Gallen
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
Telephone: (202) 467-7462
Facsimile: (202) 467-7176
E-mail: kpgallen@mlb.com

Dated: November 1, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
15490

'99 NOV -3 P3:02

In the Matter of)

NIAGARA MOHAWK POWER)
CORPORATION, NEW YORK STATE)
ELECTRIC & GAS CORPORATION)

And)

AMERGEN ENERGY COMPANY, LLC)
(NINE MILE POINT NUCLEAR)
STATION, UNITS 1 AND 2))

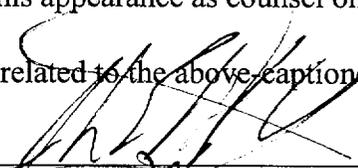
OFFICE OF)
GENERAL)
COUNSEL)
ADJUTANT)

Docket Nos.
50-220-LT
50-410-LT

License Nos.
DPR-63
NPF-69

NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance as counsel on behalf of AmerGen Energy Company, LLC in any proceeding related to the above captioned matter.



John E. Matthews

MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
Telephone: (202) 467-7524
Facsimile: (202) 467-7176
E-mail: jemattthews@mlb.com

Dated: November 1, 1999