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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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. 50-220 & 50-410 – LT License Nos. DPR-63 and NPF-69

CLI-99-30

MEMORANDUM AND ORDER

This proceeding involves a September 10, 1999, license transfer application by AmerGen Energy Company ("AmerGen"),[1] Niagara Mohawk Power Corporation (Niagara Mohawk) and the New York State Electric and Gas Corporation ("New York Electric") regarding Units 1 and 2 of the Nine Mile Point nuclear generating facility in Oswego County, NY. Specifically, Niagara Mohawk and New York Electric ("the applicants") seek the Commission's authorization to sell AmerGen their 41-percent and 18-percent ownership interest (respectively) in Unit 2, and also for Niagara Mohawk to sell AmerGen its 100-percent ownership interest in Unit 1. Under the proposed transfers, AmerGen would also become the operator of both units.

[1] AmerGen is a limited liability corporation co-owned in equal shares by Philadelphia Energy Company and British Energy Inc. (itself a wholly-owned subsidiary of British Energy plc, a Scottish corporation).

PDR ADOCK

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Commission authorization is required under Section 184 of the Atomic Energy Act of 1954 ("AEA")[2] and section 50.80 of our regulations.[3]

The applicants also seek conforming license amendments reflecting AmerGen's new ownership interest and adding license conditions that would (1) give AmerGen decisionmaking authority over safety issues, (2) limit the foreign membership of AmerGen's Management Committee, (3) assign to AmerGen's Chief Executive Officer and Chief Nuclear Officer the responsibility and authority for ensuring that AmerGen's business activities with respect to Units 1 and 2 are conducted consistent with the protection of the public health and safety and the common defense and security of the United States, and (4) require AmerGen to report to the Commission the filing of any Schedules 13D or 13G with the United States Securities and Exchange Commission that discloses beneficial ownership of a registered class of Philadelphia Electric Energy Company stock.

BACKGROUND

The Commission published the notice of this application on September 30, 1999, in the Federal Register, and invited interested parties either to seek intervention and a hearing or to file comments which the NRC staff would consider outside the context of any hearing. 64 Fed. Reg. 52,798. In response to the Federal Register notice, the Commission received two petitions to intervene and three comments. The NRC staff, as is its usual practice in license transfer cases, chose not to participate as a party in the adjudicatory portion of the proceeding.

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[2] 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing).

[3] This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders.

The three remaining co-owners of Unit 2 (Long Island Lighting Company, Rochester Gas and Electric Company, and Central Hudson Gas and Electric Company -- collectively "co-owners") seek to intervene in opposition to the application. Co-owners initially suggest that the instant hearing be deferred pending completion of an ongoing hearing in which the New York State Public Service Commission is currently considering whether the proposed transfer is in the public interest. See Co-owners' Petition to Intervene, dated Oct. 20, 1999, ("Co-owners' Petition") at 2-5.[4] According to co-owners, the Public Service Commission is currently considering many of the same issues that the instant proceeding will present to the Nuclear Regulatory Commission -- e.g., adequacy of decommissioning funding, adequacy of AmerGen's financial resources to operate the plant and meet its other responsibilities, the qualifications of AmerGen to operate the plant and the existence of an operating agreement that would offer sufficient protection of the co-owners' and customers' rights if the plant is transferred to a non-utility, majority owner-operator. Id. at 4.

Co-owners also offer a second justification for a deferral: they have a right of first refusal under which they are entitled to make "a preemptive offer to purchase [applicants'] shares of [Unit 2] upon terms at least as favorable as those contained in [AmerGen's] offer." Id. at 4-5. According to co-owners, these rights of first refusal have not yet expired. Id.

In addition, co-owners request the Commission to establish a full evidentiary hearing rather than use the procedures provided in 10 C.F.R. Part 2, Subpart M. Co-owners suggest that the Commission either add procedures allowing direct and cross-examination or convene a formal hearing before the Licensing Board pursuant to Subpart G. Id. at 5-6. According to co-

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[4] The applicants must also obtain a ruling from the Federal Energy Regulatory Commission ("FERC") that the transfer is in the public interest. See id. at 3, 5, citing Application at 4. However, AmerGen claims that the FERC has already completed that proceeding. See Answer of AmerGen to Co-owners' Petition to Intervene, dated Nov. 1, 1999, at 6 n.4.

owners, Subpart M did not contemplate the issues raised in this proceeding -- in particular, issues associated with the creation of a new majority interest in Unit 2 and the replacement of Unit 2's operator.

Co-owners raise three general issues: (1) the impact on co-owners (particularly in the event of AmerGen's default) of designating as the licensed facility operator a limited liability company with few tangible assets of its own, (2) the change in management of a co-owned facility when minority interests are shifted to create a new majority owner/operator and the consequent need for a new operating agreement, and (3) public policy and decisionmaking in collateral State [and federal] proceedings. Id. at 2-3. They also raise more specific questions concerning both AmerGen's financial qualifications to operate the plant and AmerGen's ability to maintain safety in the event of an extended shutdown of the plant. Co-owners claim that "[t]hese questions require an examination of AmerGen's initial capitalization, its policy for the distribution of profits to its parent companies, and the precise terms of the parent company guarantees being offered." Id. at 7.

In addition, the Attorney General for the State of New York ("New York Attorney General") seeks intervention to "review the evidence and to develop recommendations to the NRC" regarding issues such as the sufficiency of AmerGen's funds to pay for operation and maintenance expenses during a simultaneous six-month outage at both plants, the sufficiency of AmerGen's decommissioning funding mechanism, and AmerGen's qualifications to operate the plants. The New York Attorney General asserts that his interest in this proceeding arises from his office's investigatory and enforcement responsibilities regarding various federal and state environmental, public health, antitrust, and consumer protection laws, as well as his office's responsibility to represent the people of New York in matters concerning the provision of public utility services. See New York Attorney General's Petition to Intervene, dated Oct. 20, 1999, ("New York Attorney General's Petition") at 2-3.

DISCUSSION

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., it must demonstrate "standing." See AEA, § 189a, 42 U.S.C. § 2239(a). The Commission's rules also require that a petition to intervene raise at least one admissible contention or issue. The standards for meeting these two requirements in license transfer cases come both from our Subpart M procedural regulations and from judicial cases on standing (to which we look for guidance).

A. Co-owners' Standing

To show standing in a license transfer proceeding, a petitioner must

(1) identify an interest in the proceeding by

> (a) alleging a concrete and particularized injury (actual or threatened) that
> (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
> (c) is likely to be redressed by a favorable decision, and
> (d) lies arguably within the "zone of interests" protected by the governing statute(s).

(2) specify the facts pertaining to that interest.[5]

Co-owners claim that they may suffer financial harm and harm to their property if AmerGen provides insufficient financial resources to support safe and efficient operation and eventual decommissioning of the plant. See Co-owners' Petition to Intervene at 8-10. None of the applicants contests petitioners' standing. See Niagara Mohawk and New York Electric's Answer to Petition for Review of Central Hudson ..., dated Nov. 1, 1999, ("Niagara Mohawk's

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[5] See 10 C.F.R. §§ 2.1306, 2.1308; North Atlantic Energy Serv. Corp. and Northeast Nuclear Energy Co. (Seabrook Station, Unit 1 and Millstone Station, Unit 3), CLI-99-27, 50 NRC ___, slip op. at 4 (Oct. 21, 1999); North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 214-15 (1999). See generally Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-96 (1998).

Answer to Co-owners") at 4 n.2; AmerGen's Answer to Petition for Review of Central Hudson, dated Nov. 1, 1999, at 9 n.6.

Co-owners advance an injury claim similar to that which we accepted in two other license transfer proceedings, i.e., "the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing ... [their] risk of being forced to assume a greater-than-expected share of Seabrook's [and Millstone-3's] operating and decommissioning costs." Seabrook, CLI-99-6, 49 NRC at 215. See also Seabrook & Millstone, CLI-99-27, 50 NRC at ___, slip op. at 4. As we stated in Seabrook, "it is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee whose costs may rise ... as a result of an ill-funded license transfer. This kind of situation justifies standing based on 'real-world consequences that conceivably could harm petitioners and entitle them to a hearing.'" CLI-99-6, 49 NRC at 215, quoting Yankee Atomic, CLI-98-21, 48 NRC at 205; Seabrook & Millstone, CLI-99-27, 50 NRC at ___, slip op. at 4-5.

Co-owners' allegations regarding increased risk are supported by affidavit and are sufficiently concrete and particularized to pass muster for standing. The threatened injury is fairly traceable to the challenged action (here, the grant of the license transfer application) because the alleged increase in risk associated with AmerGen taking over a majority interest in Unit 2 could not occur without Commission approval of the application. Similarly, the threatened injury can be redressed by a favorable decision because the Commission's denial of the application would prevent the indirect transfer of interest. Seabrook & Millstone, CLI-99-27, 50 NRC at ___, slip op. at 5. Cf. Seabrook, CLI-99-6, 49 NRC at 215.

Likewise, the risk to petitioners' ownership interest in the Nine Mile Point units are among the interests protected by the AEA. "[T]he AEA protects not only human health and safety from radiologically-caused injury, but also the owners' property interests in their facility.... Persons or entities who own (or co-own) an NRC-licensed facility plainly have an AEA-protected

interest in licensing proceedings involving their facility." Seabrook & Millstone, CLI-99-27, 50 NRC at ___, slip op. at 5; Seabrook, CLI-99-6, 49 NRC at 216 (and cited authority). For all these reasons, we conclude that the co-owners have standing to intervene in this proceeding.

B. Admissibility of Co-owners' Issues

To show admissible issues, a petitioner must

> (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
>
> (2) demonstrate that those issues fall within the scope of the proceeding,
>
> (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
>
> (4) show that a genuine dispute exists with the applicant regarding the issues, and
>
> (5) 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.

See 10 C.F.R. § 2.1308; Seabrook & Millstone, CLI-99-27, 50 NRC at ___, slip op. at 6; Seabrook, CLI-99-6, 49 NRC at 215. See generally Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998).

Co-owners raise numerous issues involving the application's sufficiency (Petition at 13-16), financial qualifications for operation (Petition at 16-25), decommissioning funding assurance (Petition at 26-30), technical qualifications (Petition at 30-33), and provision of off-site power (Petition at 33-34).[6] Many of the arguments focus on the ramifications of AmerGen's impending majority interest in Unit 2.

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[6] We note that the commenters raised many of the same issues, especially concerning AmerGen's financial assurances for the continued operation and decommissioning. See Comments of Multiple Intervenors [sic], dated Nov. 1, 1999, at 4-7; Comments of New York Public Service Commission, dated Nov. 1, 1999, at 2-4; Comments of Oswego County and the Oswego City School District, dated Nov. 1, 1999, at 4-7.

We conclude that it is premature to address the admissibility of issues proffered by the co-owners. If any or all of the co-owners exercise their asserted right of first refusal under the Basic Agreement to buy Niagara Mohawk's and New York Electric interest in Unit 2, some or all issues would be rendered moot. See §§ 13.04, 13.05 of Basic Agreement (Sept. 25, 1975), appended as Exhibit B to Co-owners' Petition; Reply of Co-owners to Answers of AmerGen, Niagara Mohawk and New York Electric, dated Nov. 8, 1999, at 4 ("While no decision has been reached, the exercise of the right of first refusal remains a viable option"). For instance, if one or more of the co-owners purchase collectively an additional nine-percent interest in Unit 2, AmerGen could not hold the majority interest in that unit.

We therefore suspend this proceeding pending the co-owners' determination whether to avail themselves of their purchase rights under the operating agreement. We instruct the co-owners to inform us, within five working days of the issuance date of this order, of (1) the deadline by which each of them must decide whether to exercise this right of first refusal and (2) whether any of them has declined to exercise its right of first refusal.[7] We further instruct each co-owner to notify us of its decision within two working days of the date on which it is made.

We do not view a temporary suspension of this proceeding as contravening our stated policy of expedition in Subpart M proceedings. See Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998) (Subpart M "procedures are designed to provide for public participation ... while at the same time

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[7] Co-owners indicated in their Petition that the deadline for Rochester Gas and Electric Corporation expires "January 4, 2000 at the earliest." See Reply of Co-owners to Answers of AmerGen, Niagara Mohawk and New York Electric, dated Nov. 8, 1999, at 4. However, it is not clear why the precise deadline is ambiguous, and whether this deadline applies to AmerGen's purchase offers to New York Electric, to Niagara Mohawk, or to both. Nor did co-owners specify the deadlines for Central Hudson Gas and Electric Corporation and Long Island Lighting Company. We expect that co-owners' responses will resolve these questions.

providing an efficient process that recognizes the time-sensitivity normally present in transfer cases"). We believe it would not be sensible of us to require the expenditure of both public and co-owner funds on a proceeding, part or all of which may well be rendered moot in the immediate future.[8]

However, we decline to adopt the co-owners' suggestion that we further suspend this proceeding until conclusion of the proceeding currently pending before the New York Public Service Commission. In support of this suggestion, the co-owners allege that simultaneous litigation in multiple forums imposes a "tremendous burden" on all parties. See Co-owners' Petition at 5. We fail to see how the burden on the co-owners is any greater than that placed on numerous other parties in our proceedings -- parties who are regularly participants in proceedings concurrently conducted by other state and federal agencies.

This multi-forum situation is especially common in license transfer proceedings involving nuclear power plants. In these cases, the transfer is often the subject of simultaneous regulatory proceedings before one or more appropriate state public utility commissions, the FERC, the Securities and Exchange Commission, the Internal Revenue Service, the Department of Justice and/or Federal Trade Commission, and the NRC -- in addition to which the parties to those proceedings may be involved in court litigation with plant co-owners. As we stated many years ago:

> [E]ven assuming that the City [of Chicago] can properly exercise ... licensing authority over Kerr-McGee, the potential for an action by a state or local regulatory authority that will affect a facility seeking an NRC license normally is not sufficient reason for this agency to stay its licensing action pending the outcome of any proceeding to impose additional requirements.... Rather it is the

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[8] Earlier today, Rochester Gas and Electric Company issued a press release indicating that it was exercising its right of first refusal. We recognize that this may render the proceeding moot. However, until we hear from the co-owners regarding the implications of this recent information, this proceeding will remain active and we expect the participants to follow the procedures outlined in this order.

> prerogative of the other governmental entity asserting jurisdiction to take whatever action it deems appropriate to enforce its regulatory authority.

Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982) (footnote and citations omitted), aff'd, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). See also Southern Calif. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974) ("it would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval").

Finally, co-owners have not explained why suspension of our proceeding pending completion of the New York Public Service Commission's case would reduce the financial burden which this litigation places on the parties. The burden would appear the same, whether incurred simultaneously or sequentially. Moreover, to the extent the two commissions are considering the same issues, the New York Public Service Commission is reviewing the transfer under a different statutory mandate than ours, see New York Public Service Law, § 70, and its conclusions would therefore not be dispositive of the issues before us. A fortiori, to the extent the two commissions are considering different issues, suspension would serve no purpose whatever.

For all these reasons, we deny co-owners' request that we suspend this proceeding pending conclusion of the New York Public Service Commission's proceeding.

C. Status of the New York Attorney General

We do not need to reach the issue of whether the Attorney General has established standing in this proceeding, because he has clearly raised no issues with the level of specificity required under Subpart M. See 10 C.F.R. § 2.1306(b)(2)(iv) (requiring a petitioner to "provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact"). He alludes in the most general terms to the adequacy of funding for the

operation and decommissioning of the units and to AmerGen's qualifications to operate the plant, and indicates merely that he wishes to intervene in order "to review the evidence and to develop recommendations." However, the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc. We believe that the Attorney General's involvement in the New York Public Service Commission's proceeding may provide him with insights that may be useful to us. We therefore permit him to participate in a manner analogous to a participating government under 10 C.F.R. 2.715(c), should a hearing be granted in this proceeding.

D. Other Procedural Matters

1. Co-owners' "Suggestion" to Use Subpart G Procedures

We deny co-owners' "suggestion" that we substitute formal trial-type Subpart G procedures for those of Subpart M. Our regulations make quite clear that "[neither the Commission or the Presiding Officer will entertain motions from the parties that request ... formal hearings." 10 C.F.R. § 2.1322(d). We consider co-owners' "suggestion" as a poorly-disguised effort to sidestep the above regulatory prohibition. Our rules specify only one ground on which a party may seek waiver of any (or all) of Subpart M's regulations -- "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." 10 C.F.R. § 2.1329(b). Co-owners fail even to cite this standard, much less satisfy it. Their only proffered justification is the claim that Subpart M did not contemplate the issues raised in this proceeding. We disagree. When promulgating Subpart M, we were well aware that most license transfer issues would be, like co-owners' issues, financial in nature. At this early stage of the proceeding, it is by no means clear that the informal Subpart M process will not suffice to resolve any issues that require litigation.

2. Filing Requirements

Although the participants have a number of options under 10 C.F.R. § 2.1313(c) by which to serve their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Filing by e-mail will be considered timely if sent not later than 4:30 p.m. of the due date under our Subpart M rules. Filings served by other means must be received no later than 4:30 on the due date. We will also require the parties to submit a single signed hard copy of any such filings[9] to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. The e-mail address for this office is SECY@nrc.gov.

CONCLUSION

(1) Co-owners are granted standing.

(2) The New York Attorney General may participate in a manner analogous to a participating government under 10 CFR 2.715(c), if a hearing is granted in this proceeding.

(3) Co-owners' request to suspend this proceeding is granted in part.

(4) Co-owners' "suggestion" that the Commission use Subpart G procedures is denied.

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[9] We draw the attention to the difference between this requirement and that of Subpart G, which provides that any service whether by fax or e-mail on the Secretary should be followed with an original and two conforming copies of the service by regular mail in accordance with 10 C.F.R. § 2.708(d).

IT IS SO ORDERED.

For the Commission[10]

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of December, 1999.

[10] Commissioner Diaz was not available for the affirmation of this Memorandum and Order. Had he been present, he would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NIAGARA MOHAWK POWER CORP.,	)	Docket Nos. 50-220-LT
NEW YORK STATE ELECTRIC & GAS CORP.,	)	50-410-LT
	)	
and	)	
	)	
AMERGEN ENERGY COMPANY, LLC	)	
(Nine Mile Point Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-99-30) have been served upon the following persons by U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

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Docket Nos. 50-220-LT
50-410-LT
COMMISSION MEMORANDUM AND
ORDER (CLI-99-30)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of December 1999