

RAS-1513

DOCKETED
USNRC

**UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION**

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March 6, 2000

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| In the Matter of |) |
| |) |
| Vermont Yankee Nuclear Power Corporation |) |
| |) |
| and |) |
| |) |
| AmerGen Vermont, LLC |) |
| |) |
| (Vermont Yankee Nuclear Power Station) |) |

**Docket No. 50-271-LT
License No. DPR-28
(License Transfer)**

**APPLICANTS' ANSWER TO
VERMONT DEPARTMENT OF PUBLIC SERVICE'S
PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING**

INTRODUCTION

AmerGen Vermont, LLC (AmerGen Vermont) and Vermont Yankee Nuclear Power Corporation (VYNPC) (hereinafter jointly referred to as Applicants) submit this Answer to the Vermont Department of Public Service's "Petition for Leave to Intervene and Request for Hearing in the Consideration of Approval of Transfer of Vermont Yankee Nuclear Power Station Operating License to AmerGen Vermont LLC" (Petition). In the Petition, the Vermont Department of Public Service (Petitioner), acting as "the State of Vermont's public advocate,"^{1/} submits three numbered contentions regarding AmerGen Vermont's financial qualifications.

^{1/} Petition, p. 3.

Template = SECY-037

SECY-02

As discussed below, Petitioner's issues do not satisfy the requirements of 10 CFR § 2.1306. Accordingly, the Petition should be denied pursuant to 10 CFR § 2.1308.^{2/}

BACKGROUND

On January 6, 2000, AmerGen Vermont^{3/} and VYNPC submitted a joint "Application for Order and Conforming Administrative License Amendments for License Transfer (Facility Operating License No. DPR-28)" (Application). A notice of the Application was published on February 3, 2000. *Notice of Consideration of Approval of Transfer of Facility Operating License and Conforming Amendment, and Opportunity for a Hearing*, 65 Fed. Reg. 5376 (2000). The notice offered an opportunity for interested persons to request a hearing on the license transfer, and specifically stated that any requests for hearing and petitions to intervene must comply with the requirements of 10 CFR § 2.1306, which sets forth the requirements for hearing requests and petitions to intervene. The notice also referenced 10 CFR § 2.1308(a), which identifies the particular factors the Commission will consider to evaluate a hearing request or intervention petition. Petitioner has sought a hearing and intervention in its Petition dated February 23, 2000.

2/ Applicants are not contesting the standing of Petitioner to intervene. The Petitioner states that if the Nuclear Regulatory Commission (NRC or Commission) does not admit Petitioner's contention, "and nonetheless a hearing is granted," Petitioner requests to participate pursuant to 10 CFR § 2.715(c). (Petition, p. 1). Although Subpart M does not contain a regulation similar to § 2.715(c), Applicants do not object to such participation by the Petitioner if another party is admitted into this proceeding and if a hearing is otherwise held.

3/ AmerGen Vermont is a wholly-owned subsidiary of AmerGen Energy Company, LLC (AmerGen), and was organized under the laws of Vermont to own and operate the Vermont Yankee Nuclear Power Station (Vermont Yankee). AmerGen, in turn, 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 own 50% of AmerGen.

ARGUMENT**THE PETITION DOES NOT SATISFY SUBPART M PLEADING REQUIREMENTS REGARDING THE ISSUES RAISED****A. Legal Standards**

Pursuant to 10 CFR § 2.1306, a petitioner must, for each of the issues it seeks 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 on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue; and
- (4) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

Failure to comply with any of these requirements requires dismissal of the issue. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 117-18 (1994) (applying Subpart L principles). *See also*, 65 *Fed. Reg.* 5376 (requests for a hearing "must comply with the requirements set forth in 10 CFR § 2.1306").

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, 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)).

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). An issue that does not *directly* controvert a position taken in the application is subject to dismissal. See *Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 181 (1998). See also *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2)*, LBP-92-37, 36 NRC 370, 384 (1992). It is also 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 Co. of New Hampshire (Seabrook Station, Units 1 & 2)*, LBP-82-106, 16 NRC 1649, 1656 (1982); accord *Private Fuel Storage*, LBP-98-7, 47 NRC at 179. See also *Arizona Public Service Co. (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).

As the following makes clear, Petitioner does not meet its burden under 10 CFR § 2.1306 with respect to any of the issues it seeks to raise.

B. Petitioner’s Challenge of the Adequacy of AmerGen’s Parental Guarantee of \$110 Million is an Impermissible Collateral Attack on NRC Regulations

Petitioner’s first issue alleges that “the \$110 million pledged by AmerGen’s members is not sufficient to pay the full costs of a six-month outage at Vermont Yankee considering scenarios which might reasonably occur.” (Petition, p. 3). As discussed below, this issue is an impermissible collateral attack on NRC regulations and should be denied.

The Commission's regulations in 10 CFR § 50.33(f)(2) govern the financial qualifications of applicants. This section requires financial data for the first five years of operation and does not require a showing of financial capability to have funds sufficient to pay the fixed costs of a six-month outage at a nuclear plant. AmerGen Vermont's submission of information related to its financial qualifications (Application, pp. 20-22) fully complies with Section 50.33(f)(2) and the NRC's "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," NUREG-1577, Rev. 1 (SRP). Although not required by the regulations, AmerGen Vermont provided supplemental information related to the availability of \$110 million in additional funds to its parent, AmerGen, from British Energy and PECO, to further support its financial qualifications. This information exceeds the requirements of the NRC regulations.

Petitioner does not raise any issue challenging the information submitted by AmerGen Vermont that is required by Section 50.33(f)(2). Petitioner only challenges the supplemental financial information. Since the NRC does not need to rely upon this additional information, there is no basis for a hearing regarding this information. Finally, to the extent that Petitioner is seeking to impose financial assurance requirements greater than those required by Section 50.33(f)(2), such requests are an impermissible collateral attack on this regulation. *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 NRC at 201, 220. *See also Public Service Company of New Hampshire*, 16 NRC at 1656.

Moreover, Petitioner's argument does not adequately address the information in the Application to show there is a genuine material issue or dispute. In addition to the \$110 million guarantee from PECO and British Energy to AmerGen, AmerGen itself has guaranteed that it

will provide funding to AmerGen Vermont whenever the AmerGen Vermont Management Committee determines that such funds are needed to protect the public health and safety or comply with NRC requirements. *See* Section C, *infra*. This obligation is significant, since AmerGen itself (separate from PECO and British Energy) is a substantial company. As discussed in the Application (pp. 5-6), AmerGen is currently the owner and operator of two other nuclear plants—Three Mile Island, Unit 1, and the Clinton Power Station—which have an installed capacity of more than 1700 MWe. A commitment of financial support from a company, such as AmerGen, with substantial revenues and assets provides even greater assurance of the financial qualifications of AmerGen Vermont.

Finally, the operation of Vermont Yankee will provide AmerGen Vermont with a substantial source of operating revenues. According to the Petitioner's own calculations, AmerGen Vermont will generate a profit of almost \$21 million in the first five years of operation based upon projected market rates for electrical power provided by NERA (which are lower than the rates projected by Petitioner itself).^{4/} Even if the market rates are 10% lower than projected by NERA, Petitioner still estimates that AmerGen Vermont will generate a profit of more than \$3.5 million during the first five years. (Petition, Exhibit WKS-3). By focusing solely on the \$110 guarantee from PECO and British Energy and not addressing the adequacy of the other sources and funds upon which AmerGen Vermont's financial qualifications are based, Petitioner has not established the existence of a genuine dispute concerning a material issue.

4/ Petition, Affidavit of William H. Sherman Regarding Financial Qualification, ¶¶ 7 and 9.

C. Petitioner's Challenge of AmerGen's Performance Guarantee for AmerGen Vermont Misinterprets the Guarantee

Petitioner's second issue alleges that:

the funding arrangements described by the joint Applicants are not adequate because the [*sic*] AmerGen's Performance Guarantee for AmerGen Vermont creates a funding gap between the end of operation and the beginning of decommissioning such that sufficient funds would not be available to maintain the plant safely.

(Petition, p. 5).

Applicants believe that Petitioner has misinterpreted the performance guarantee because the current performance guarantee shows that there is no "funding gap."^{5/} Under the guarantee, AmerGen agrees to "provide funds to AmerGen Vermont to assure that AmerGen Vermont will have sufficient funds to meet its expenses in connection with the operation, maintenance and decommissioning of VYNPS [Vermont Yankee Nuclear Power Station]." It then continues:

AmerGen represents and warrants that it will provide funding to AmerGen Vermont, *at any time* that the Management Committee of AmerGen Vermont determines that, in order to protect the public health and safety and/or to comply with NRC requirements, such funds are necessary to meet the ongoing expenses at VYNPS or such funds are necessary to safely maintain VYNPS.

This agreement *shall take effect upon the transfer of VYNPS to AmerGen Vermont, as approved by the NRC, and will remain in effect and remain irrevocable until such time as decommissioning is completed.* (Emphasis added).

^{5/} The performance guarantee was included as Enclosure 8 to the Application in the form of a "Letter Agreement Assuring Financial Obligations of AmerGen Vermont," dated January 6, 2000. It was supplemented, clarified, and replaced by a similar Letter Agreement, dated February 17, 2000, transmitted to the NRC under cover of a separate letter from John E. Matthews, dated February 18, 2000. (Attached hereto). Petitioner was apparently aware of the updated Enclosure 8 (Affidavit of William K. Sherman Regarding Financial Qualification, ¶ 18), but may not have appreciated the clarifications.

In sum, the current performance guarantee "take[s] effect upon the transfer of VYNPS to AmerGen Vermont," and remains in effect and irrevocable "until such time as decommissioning is completed." Thus, there is no "gap," either "between the end of operation and the beginning of decommissioning," or otherwise.

Petitioner mistakenly reads language from the first full paragraph of the second page of the guarantee as implying that the agreement is suspended between the time fuel has been permanently removed from the reactor vessel and the commencement of decommissioning. A reading of the entire paragraph of the current agreement, however, reveals that it simply memorializes AmerGen's right to have AmerGen Vermont shut down the plant should operation prove uneconomic. It is, by its very own terms, "in no way intended to limit AmerGen Vermont's right to continue to obtain funds under this Agreement until such time as decommissioning is completed." Since there is no "gap," there is no issue and the Petitioner's request for additional funding prior to decommissioning should be denied.

D. The Petitioner's Arguments Related to the Price-Anderson Act Constitute an Impermissible Collateral Attack on NRC's Regulations

The Petitioner argues that the funding arrangements for AmerGen Vermont are not adequate because the \$110 million guarantee by the parents of AmerGen is not sufficient to pay the potential costs of \$88 million per reactor that AmerGen may incur under the Price-Anderson Act in the event of a severe nuclear accident at a nuclear plant. (Petition, pp. 6-7). Petitioner's argument constitutes an impermissible collateral attack on the Commission's implementing regulations for the Price-Anderson Act, and therefore should be rejected.

Under 10 CFR § 140.21, a licensee is only required to provide a guarantee for a deferred premium in the amount of \$10 million per reactor. The Application (pp. 34-35) demonstrates that AmerGen Vermont is able to satisfy this requirement, and the Petition does not contend to the contrary.

Nevertheless, Petitioner asserts that AmerGen Vermont should be required to provide such assurance of payment for the entire amount of the potential liability for deferred premiums under the Price-Anderson Act. This issue must be rejected as it seeks assurances beyond that required by the regulations and, therefore, is an impermissible collateral attack on the adequacy of NRC's existing regulatory requirements. *See Seabrook Station*, LBP-82-106, 16 NRC at 1656; *accord Private Fuel Storage*, LBP-98-7, 47 NRC at 179. *See also Palo Verde Nuclear Generating Station*, LBP-91-19, 33 NRC at 410.

Moreover, Petitioner's concerns are unfounded. AmerGen Vermont has already confirmed that it "will obtain all required nuclear property damage insurance pursuant to 10 CFR § 50.54(w) and nuclear energy liability insurance pursuant to Section 170 of the Act and 10 CFR Part 140." (Application, p. 35). Among the coverages AmerGen Vermont will obtain is the Nuclear Energy Liability Insurance (Secondary Financial Protection), which is administered by American Nuclear Insurers. *See* 10 CFR § 140.109, Appendix I. Therefore, there is no question that AmerGen Vermont's obligations under the Price-Anderson Act will be met.^{6/}

^{6/} In other license transfer proceedings, the NRC has required AmerGen to acquire "the appropriate amount of insurance" in the Orders approving the transfer of the TMI-1 and Clinton licenses. *See, e.g., GPUN, Inc., et al., to AmerGen, (Three Mile Island, Unit No. 1), Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 19202, 19204 (1999) (TMI-1 Order); Illinois Power Co. (Clinton Power Station), Order* (continued...)

Moreover, the indemnity agreement that AmerGen Vermont must enter into with the NRC provides an NRC guarantee of the deferred premiums, subject to reimbursement or liens on the licensee property. See 10 CFR § 140.22, 10 CFR § 140.92, App. B (Form of Indemnity Agreement), Article VIII. Accordingly, even if AmerGen Vermont were somehow unable to meet its deferred premium obligations, there would be no diminution in coverage under the Price-Anderson Act. Therefore, there will be sufficient funds to cover any deferred premiums required from Vermont Yankee.

Petitioner provides no discussion whatsoever of the comprehensive set of requirements, coverages, and guarantees available under the Price-Anderson Act, and no basis to suggest that there is any material issue to be set for hearing.^{7/} Therefore, this issue should be rejected.

6/ (...continued)

Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 67598, 67599 (1999) (Clinton Order). To the extent that Petitioner is implying that Applicants will intentionally violate the NRC regulations related to the administration of the Price-Anderson Act, the Commission should not accept such implications as the basis for an admissible contention. See generally, *Leroy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway Co.*, 232 U.S. 340, 349 (1914) (recognizing and applying the presumption that an individual "will obey the law"); *United States v. Norton*, 97 U.S. 164, 168 (1877) ("It is a presumption of law that officials and citizens obey the law and do their duty").

7/ To the extent that Petitioner has a generic concern about NRC's implementing regulations for the Price-Anderson Act, the appropriate forum in which to address such a concern would be a rulemaking proceeding.

CONCLUSION

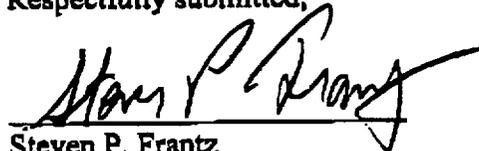
For the reasons set forth above, Applicants respectfully request that the Commission deny the Petition filed by the Vermont Department of Public Service on the ground that Petitioner has failed to submit a valid issue in accordance with the pleading requirements of 10 CFR § 2.1036.



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Respectfully submitted,



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February 17, 2000

AmerGen Vermont, LLC
185 Old Ferry Road
Brattleboro, VT 05301

Re: Letter Agreement Assuring Financial Obligations of AmerGen Vermont, LLC

Ladies and Gentlemen:

Reference is made to the Asset Purchase Agreement dated as of November 17, 1999 by and between Vermont Yankee Nuclear Power Corporation and AmerGen Energy Company, LLC ("AmerGen") involving the sale of Vermont Yankee Nuclear Power Station ("VYNPS"). AmerGen has assigned or will assign its rights in this agreement and certain other agreements to AmerGen Vermont, LLC ("AmerGen Vermont") under the terms of an Assignment and Assumption Agreement. Reference is also made to the Letter Agreement Assuring Financial Obligations of AmerGen Vermont, LLC dated January 6, 2000 by and between AmerGen and AmerGen Vermont. This Letter Agreement supplements, clarifies and replaces the Letter Agreement dated January 6, 2000.

In consideration of the benefits to be derived by AmerGen from the Assignment and Assumption Agreement and from AmerGen Vermont's ownership and operation of VYNPS, the mutual benefits to be derived by AmerGen and AmerGen Vermont from the commitments contemplated hereunder, and in furtherance of the Limited Liability Company Agreement of AmerGen Vermont (the "LLC Agreement") dated as of January 1, 2000, and any provision in the LLC Agreement which could limit application of this letter agreement notwithstanding, AmerGen hereby agrees that, subject to the terms and conditions of this Agreement, it will provide funds to AmerGen Vermont to assure that AmerGen Vermont will have sufficient funds available to meet its expenses in connection with the operation, maintenance and decommissioning of VYNPS.

AmerGen represents and warrants that it will provide funding to AmerGen Vermont, at any time that the Management Committee of AmerGen Vermont determines that, in order to protect the public health and safety and/or to comply with NRC requirements, such funds are necessary to meet the ongoing expenses at VYNPS or such funds are necessary to safely maintain VYNPS.

This agreement shall take effect upon the transfer of VYNPS to AmerGen Vermont, as approved by the NRC, and will remain in effect and remain irrevocable until such time as decommissioning is completed.

1-WA/1334458.5

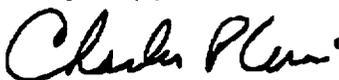
AmerGen shall have the right to demand that AmerGen Vermont permanently cease operations at VYNPS rather than using funds available under this Agreement for continued operations, provided that, in such event, AmerGen Vermont will nevertheless have the right to continue to obtain the funds necessary to assure the safe and orderly shutdown of VYNPS and continue the safe maintenance of VYNPS until AmerGen Vermont can certify to the NRC that the fuel has been permanently removed from the reactor vessel. The foregoing is intended to assure AmerGen Vermont's rights under this agreement to obtain funds to support continued operations until such time as AmerGen Vermont can make the required certification regarding the permanent removal of fuel, even in the event that AmerGen has demanded that AmerGen Vermont permanently cease operations. However, it is in no way intended to limit AmerGen Vermont's right to continue to obtain funds under this Agreement until such time as decommissioning is completed.

AmerGen hereby represents and warrants to AmerGen Vermont that its obligations under this Agreement are valid, binding and enforceable obligations of AmerGen in accordance with their terms (subject to bankruptcy, insolvency, reorganization and similar laws affecting creditors' rights generally and general equitable principles) and do not require the consent, approval or authorization of any Governmental Agency or third party other than those which have been obtained and are in full force and effect (or will be obtained on or prior to the Closing Date).

AmerGen hereby irrevocably, unconditionally and expressly waives, and agrees that it shall not at any time assert any claim or take the benefit or advantage of, any appraisal, valuation, stay, extension, marshaling of assets or redemption laws, any bankruptcy, insolvency or similar proceedings, or exemption, whether now or any time hereafter in force, which may delay, prevent or otherwise affect the performance by AmerGen of its obligations hereunder.

This Agreement shall be governed and construed in accordance with the laws of the State of Vermont without giving effect to conflict of law principles.

Very truly yours,



AmerGen Energy Company, LLC

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicants' Answer to Vermont Department of Public Service's Petition to Intervene and Request for 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 6th day of March, 2000.

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
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**Morgan, Lewis
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COUNSELORS AT LAW

March 6, 2000

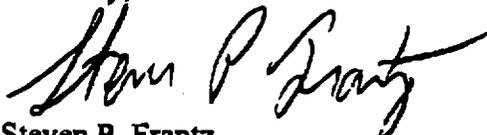
Secretary of the Commission
Attention: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20055

Re: In the Matter of Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC,
Vermont Yankee Nuclear Power Station, Docket No. 50-271 (License Transfer)

Dear Ms. Vietti-Cook:

Enclosed is the "Applicants' Answer to Vermont Department of Public Service's Petition for
Leave to Intervene and Request for Hearing."

Sincerely,



Steven P. Frantz
Counsel for AmerGen Vermont, LLC

Enclosure