

RAS 1905

UNITED STATES OF AMERICA  
Before The  
NUCLEAR REGULATORY COMMISSION

*In the Matter of*  
Vermont Yankee Nuclear Power Corporation  
and  
AmerGen Vermont, LLC  
Vermont Yankee Nuclear Power Station

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

July 14, 2000

**CITIZENS AWARENESS NETWORK**  
**MOTIONS FOR STAY, CLARIFICATION, REQUEST FOR INVESTIGATION**

Citizens Awareness Network, Inc. [CAN], by and through counsel, Jonathan M. Block, on the basis of the facts as alleged below, requests, pursuant to 10 C.F.R. §2.1327, a stay in the action of the Commission approving the transfer of Vermont Yankee Nuclear Power Station's operating license to AmerGen Vermont, LLC.

CAN also moves the Commission to issue an Order clarifying the NRC Staff's actions on July 7, 2000 and July 10, 2000, whereby a decision was made: (1) without the issuance of a Safety Evaluation Report [SER] in this matter; (2) without proper notice of the decision to approve the license transfer at issue; (3) without any subsequent proper notice of the action at issue, and, that that the Commission direct that an independent investigation be made of the decision-making process at issue.

CAN contends that the failure to follow procedures in this matter violates the Atomic Energy Act, §189a (hearing entitlement), the Administrative Procedure Act 5 U.S.C. § 501 et seq. (no change permitted in procedures without notice and

Template = SECY-041

SECY-02

rulemaking), and NRC regulations in 10 C.F.R. Part 2 (notice of decisions required with provision for appeal in most cases).

CAN requests the Commission to immediately grant the following relief:

1. Issue an Order temporarily restraining or staying the effectiveness of any approval which may have been made to the license transfer at issue in this matter;<sup>1</sup>
2. Issue an Order clarifying the procedures that were used in this matter, including, but not limited to the failure to provide a notice or order prior to granting or denying the hearing requested in this matter, and directing the NRC staff to issue a safety evaluation prior to approval of the license transfer at issue, provision of details of the decision in this matter, the basis for same, and an opportunity to appeal the decision and request a stay of that decision in a reasonable period of time following actual issuance of the decision.

In support of this motion, CAN sets forth as follows:

#### STATEMENT OF FACTS

1. On February 3, 2000, the Commission published a notice in the Federal Register offer a hearing upon request in this case. *Notice of Consideration of Approval of Transfer of Facility Operating License and Conforming Amendment, and Opportunity for a Hearing*, 65 Fed. Reg. 5375 (February 3, 2000).
2. In pertinent part, the notice states:

---

<sup>1</sup> CAN has not received notice of the Commission's action in this case. CAN relies on a press release from the Office of Public Affairs, No. 00-109 (July 10, 2000). Notice by press release is not the approved means of notice in any of the Commission's rules, the Atomic Energy Act, or the Administrative Procedures Act.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the Federal Register and served on the parties to the hearing.

65 Fed. Reg. 5375, 5376 (February 3, 2000).

3. On information and belief, no such notice has issued in this proceeding.
4. On or before the filing deadline in the notice for this case, Citizens Awareness Network, Inc. [CAN], requested a hearing in this matter.
5. On or before the filing deadline in the notice for this case, the State of Vermont, Department of Public Service [VTDPDS], Office of the Public Advocate, requested a hearing in this matter.
6. Following the filings of CAN and VTDPDS [‘Petitioners’], licensee and applicant in this case made responsive filings. Petitioners filed replies within the proscribed period.
7. On Friday, July 7, 2000, someone from the Commission Region I staff telephoned Deborah B. Katz, then appearing in this matter pro se for CAN, and the office of James Volz, Esq., Director of Public Advocacy for the State of Vermont, and informed them that the Commission staff had decided to enter the proceeding and would be taking the position that the license transfer at issue should be approved.
8. Both Mr. Volz’s office and Ms. Katz were told that notice of the Staff’s position would be coming to them forthwith by facsimile transmission.
9. To date, no written notice has been provided to CAN (or the VTPDS) which states plainly the Commission’s basis for its decision and offers application for a stay of that decision and an appeal of the decision.
10. On July 10, 2000, the U.S. Nuclear Regulatory Commission’s Office of Public Affairs [OPA] issued a press release stating that the Commission had decided to grant the license application. OPA, No.00-109 (July 10, 2000).

11. There is no provision in the Atomic Energy Act, the Administrative Procedure Act, or the NRC's regulations which permits "notice" of a Commission decision by press release.
12. No proper notice of the Commission's decisions, including a rationale for the decision, has been issued to date.
13. The Commission's decision in this matter violates, for failure of proper notice, the due process requirements of the United States Constitution, Amendment V, the Atomic Energy Act, the Administrative Procedure Act, and the NRC's rules and regulations.

### ARGUMENT

Pursuant to the requirement of 10 C.F.R. § 2.1327(d), CAN contends:

I. CAN WILL BE IRREPARABLY INJURED UNLESS A STAY IS GRANTED.

CAN requested a hearing in this matter pursuant to a Federal Register notice issued under the requirement of federal laws creating hearing opportunities before the United States Nuclear Regulatory Commission and providing for orderly administrative process to govern such proceedings, viz. the Atomic Energy Act §189a and the Administrative Procedure Act 5 U.S.C. § 501 et seq. . The NRC Staff (and Commission sanctioned) action thus far are harms in that they are direct violations of federal law, including failure to follow the terms of the Commission's rules and lawful notice.

CAN, as any other citizen of the United States, has the right to demand that an agency of the United States provide minimum due process to CAN, as required by the United States Constitution, Amendment V, and as required by federal law. AEA § 189a; APA, 5 U.S.C. § 501. CAN is entitled to proper notice and an opportunity to

be heard. Proper notice includes a rational basis for the decision and a reasonable time to take issue with it. APA, 5 U.S.C. 501 et seq. To the extent that the NRC has changed its position on the notice that would be provided to a person requesting a hearing in this matter, that change in position is also a violation of CAN's right to due process under the U.S. Constitution, Amendment V, and the APA's requirement that agency action have a rational basis and be explained. *See generally* 5 U.S.C. 501 et. seq.; *CAN v. NRC*, 59 F.3d 284, 291 (1<sup>st</sup> Cir. 1995). Any alteration or reversal in the policy of the Commission—including the provision of notice in a decision, certainly the substance of a decision itself—must include *some* reasoning, *some* indication that the decision is rational, and therefore not arbitrary and capricious. *Puerto Rico Sun Oil Co.*, 8 F.3d at 77-78. *see also Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973) (“Whatever the ground for the [agency's] departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action.”).

Failure to provide such notice and rationale is prejudicial to CAN's interests in and of itself, and, more importantly, a violation of CAN's rights under the United States Constitution and the cited federal laws. In the instant matter, CAN (and the State of Vermont) followed the Commission's rules and notice to request a hearing. The Commission's notice states that a person requesting a hearing will receive notice in the event it is denied. 65 Fed. Reg. 5375, 5376 (February 3, 2000). A telephone call stating that the NRC staff has decided to intervene and take the position that the license

transfer should be granted and that this will be sent to the parties is not in any way shape or form proper notice under applicable federal law or the Commission's own customary practices. Moreover, the Commission's failure to provide proper notice is prejudicial to CAN's ability to respond to the action. CAN still has nothing more by way of knowing of the NRC Staff and reputed Commission action than a press release issued on July 10, 2000, which press release cannot possibly be legal notice under Commission regulations or applicable federal law.

## II. CAN IS LIKELY TO PREVAIL ON THE MERITS

CAN has already had the United States Court of Appeals for the First Circuit find that the NRC's attempt to deny hearings without proper notice and without following proper procedures was illegal. *See generally, Citizens Awareness Network, Inc., v. United States Nuclear Regulatory Commission*, 59 F.3d 284 (1<sup>st</sup> Cir. 1995). There is no reason to believe that in a case on the facts as stated above, and, in terms of merits, those alleged in the hearing requests CAN and the VTDPS filed, that a reviewing Court will not find that once again the Commission's actions violated well-founded standards governing Due Process, administrative procedure, the Commission itself, and the Commission's own rules. The First Circuit has visited just the kind of arbitrary and capricious Commission practice in *CAN v. NRC*—no doubt any appellate attorney worthy of that title will tell the Commission that it does not have a leg to stand on in arguing that CAN has received anything remotely like reasonable notice in this case. Failure to provide notice which tells CAN the basis on which the

Commission took action and sets forth the current status of the license transfer at issue places CAN in the position of not being able to make any kind of full argument on the merits--hence creating the same kind of "Catch-22" situation which CAN confronted in its previous appeal of the Commission's arbitrary, capricious abuse of discretion, which the Court found was not otherwise in accord with the Atomic Energy Act §189a and the Administrative Procedure Act, 5 U.S.C. § 501 et. seq., and other federal law.

### III. GRANTING A STAY WILL NOT HARM ANYONE

AmerGen, applicant to receive the Vermont Yankee Nuclear Power Station operating license, as the Commission knows, cannot operate the facility absent the Vermont Public Service Board's issuance of a certificate of public good approving AmerGen's purchase of the facility and related transactions. 30 V.S.A. §§ 107, 109, et seq. See Vermont Public Service Board Order on Scope of the Proceeding and Schedule, Docket 6300 (January 21, 2000), which Order, allowing the final reply briefs for July 14, 2000, was subsequently extended to July 24, 2000, with decision anticipated by the end of August 2000. For additional information on the Order in docket 6300, see <http://www.state.vt.us/psb/index.htm>

Approval will not take place--if it take place--until the Public Service Board issues a ruling on the matter. That ruling is not due until August, 2000. The Federal Energy Regulatory Commission has already approved the license transfer, but other matters are pending in the docket, which matters will not be resolved until next year,

at the earliest. *In the Matter of Vermont Yankee Nuclear Power Corp., Vermont Electric Power Company, Inc., AmerGen Vermont, L.L.C., Order Authorizing Disposition Of Jurisdictional Facilities, Accepting For Filing Certain Proposed Agreements, And Establishing Hearing Procedures* (Docket Nos. EC00-46-000, ER00-1027-000, ER00-1028-000, ER00-1029-000), 91 F.E.R.C. P61,325 (June 29, 2000); *see also An Order Establishing a Procedural Schedule*, Docket EC00-46 et al. (July 12, 2000) (hearing on rate issues will not occur until 2001). On information and belief, AmerGen still needs approvals from the Security and Exchange Commission.

Thus, no one will be harmed by the slight delay required for the Commission to stay the approval, clarify its decision, and provide a reasonable amount of time and an opportunity for a stay, if desired, of that decision (once actually available to the persons requesting a hearing in this case), and an opportunity, if desired, to appeal the actual decision.

In fact, the only persons who stand to be harmed here are the persons who requested a hearing and have been treated to a violation of due process, federal law, and just plain rudeness. The Commission needs to speak with its staff and take action to remedy this situation immediately. Granting these motions for stay and clarification permits such appropriate action.

IV. THE PUBLIC INTEREST LIES IN GRANTING A STAY AND CLARIFYING ORDER

The public interest at this point is less in merely expeditious agency action than in agency action which is rational, based upon an articulated rationale, available to the public in some written form for a reasonable time prior to triggering agency rules governing appeal and stay, and, in all, provided in a way that does not violated the United States Constitution, federal law, and agency rules. That kind of behavior is, CAN contends, in the public interest. The kind of behavior the NRC has so far exhibited in this case is not. Correcting the NRC's error is in the public interest, as is lawful agency conduct. Failure to do so is not.

As it stands now, a reasonable person might presume (rationally) from the NRC's conduct that the NRC deliberately moved to approve the license transfer request at issue in order to meet pressure from the licensee, applicant, and the nuclear industry. Such conduct could, again, rationally, be presumed to place pressure on the Vermont Public Service Board at a time when it is making its decision on the merits of the case.

The NRC owes the people of this country and the citizens of Vermont better treatment than it has so far provided. It owes the non-corporate citizens of Vermont and the United States more than it owes its current and would-be corporate (and limited liability) licensees. What is called for is granting the motions CAN has made AND launching an internal investigation as to why the decision in this case was made

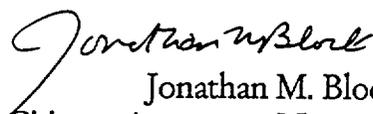
as it was, who did, and who, outside and within the agency, they conferred with prior to making that decision.

WHEREFORE, CAN requests that its motions be granted and that the NRC stay its decision granting approval, issue an order clarifying its decision, and direct that an independent investigation be made into the circumstances surrounding the decision at issue.

DATED AT: Putney, Vermont, this 14<sup>th</sup> day of July, 2000.

Respectfully submitted:

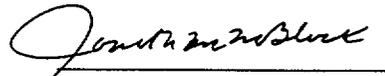
CITIZENS AWARENESS NETWORK

  
Jonathan M. Block  
Attorney for Citizens Awareness Network  
94 Main Street  
P.O. Box 566  
Putney, VT 05346-0566  
802-387-2646

cc: Service List

CERTIFICATE OF SERVICE

I, Jonathan M. Block, Attorney for Citizens Awareness Network, hereby certify that copies of the Citizens Awareness Network's Request for Stay and Motion for Clarification were served upon the persons listed below by e-mail and with a conforming copy deposited in the U.S. mail, first class, postage prepaid, this 14th day of July, 2000.

  
Jonathan M. Block

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Attn: Rulemakings and Adjudications  
Staff  
Washington, D.C. 20555-0001  
[secy@nrc.gov](mailto:secy@nrc.gov)

Office of the Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
[hrb@nrc.gov](mailto:hrb@nrc.gov)

Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
[ogclt@nrc.gov](mailto:ogclt@nrc.gov)

James Volz, Esq.  
Director for Public Advocacy  
Vermont Department of Public Service  
112 State Street - Drawer 20  
Montpelier, VT 05620-2601  
[volz@psd.state.vt.us](mailto:volz@psd.state.vt.us)

David R. Lewis  
Ernest L. Blake, Jr.  
Shaw Pittman  
2300 N Street, N.W.  
Washington, D.C. 20037  
[david\\_lewis@shawpittman.com](mailto:david_lewis@shawpittman.com)  
[ernest\\_blake@shawpittman.com](mailto:ernest_blake@shawpittman.com)

Frederick Katz  
Deborah B. Katz  
Citizens Awareness Network, Inc.  
P.O. Box 3023  
Clairmont, MA 01339-3023  
[can@shaysnet.com](mailto:can@shaysnet.com)

Steven P. Frantz, Esq.  
Counsel for AmerGen Vermont, LLC  
Morgan Lewis & Bockius  
Steven P. Frantz  
Michael A. Bauser  
Alex S. Polonsky  
Morgan, Lewis & Bockius LLP  
1800 M Street, N.W.  
Washington, DC 20036-5869  
[spfrantz@mlb.com](mailto:spfrantz@mlb.com)

UNITED STATES OF AMERICA  
Before The  
NUCLEAR REGULATORY COMMISSION

*In the Matter of*  
Vermont Yankee Nuclear Power Corporation  
and  
AmerGen Vermont, LLC  
Vermont Yankee Nuclear Power Station

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

July 14, 2000

**NOTICE OF APPEARANCE**  
**CITIZENS AWARENESS NETWORK**

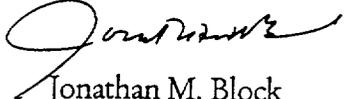
Pursuant to 10 CFR Part 2, on this 14<sup>th</sup> day of July, 2000, Attorney Jonathan M. Block hereby gives notice of his appearance on behalf of Citizens Awareness Network, Inc.[CAN], in the above captioned matter. Mr. Block will provide legal assistance for CAN at this time due to illness of its pro se representative, Deborah B. Katz.

Name: Jonathan M. Block  
Address: 94 Main Street  
P.O. Box 566  
Putney, VT 05346-0566  
  
Telephone Number: (802) 387-2646  
Fax number: (802) 387-2667  
E-mail: [jonb@sover.net](mailto:jonb@sover.net)

Cooperation of the Commission and all parties is requested in providing copies of any and all Orders, Notices, and other types of legal pleadings in this matter to both Mr. Block and Ms. Katz.

DATED AT: Putney, Vermont, this 14<sup>th</sup> day of July, 2000

Respectfully submitted:

  
Jonathan M. Block  
(address as above)

cc: Service List