

October 28, 2003

Mr. John L. Skolds, Chairman  
and Chief Executive Officer  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, Illinois 60555

SUBJECT: SAFETY EVALUATION OF THE PROPOSED CHANGES TO THE AMERGEN  
DECOMMISSIONING TRUST AGREEMENTS RE: DOCKET NOS. 50-219  
(OYSTER CREEK GENERATING STATION), 50-289 (THREE MILE ISLAND  
NUCLEAR STATION, UNIT 1) AND 50-461 (CLINTON POWER STATION)  
(TAC NOS. MB7348, MB7349, AND MB7350)

Dear Mr. Skolds:

By letter dated January 23, 2003, as supplemented by letters dated March 19, June 17, and July 29, 2003, AmerGen Energy Company, LLC, proposed changes to the trust agreements for the above facilities that would provide for assignment of the trusts to newly formed single-member limited liability companies (LLCs) in the state of Nevada.

The staff has completed its review of the proposed changes to the trust agreements. The enclosed safety evaluation documents the staff's findings resulting from the review of AmerGen's proposal to change the trust agreements for the decommissioning trust funds. The staff's review concludes that the requirements of 10 CFR 50.75 are being met and finds the proposed changes acceptable.

Sincerely,

**/RA/**

Douglas V. Pickett, Senior Project Manager, Section 2  
Project Directorate III  
Division of Licensing Project Management  
Office of Nuclear Reactor Regulation

Docket Nos. 50-219, 50-289, and 50-461

Enclosure: As stated

cc w/encls: See next page

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Project Directorate III  
Division of Licensing Project Management  
Office of Nuclear Reactor Regulation

Docket Nos. 50-219, 50-289 & 50-461

Enclosure: As stated  
cc w/encls: See next page

DISTRIBUTION:

PUBLIC	PDIII-2 r/f	WRuland	AMendiola
RLaufer	JClifford	EHackett	DPickett
PTam	DSkay	THarris	BThomas
CPittigilio	SUttal	OGC	ACRS
GGrant, RIII	BPlatchek, RI	FGillespie	CHaney

ADAMS Accession Number: ML032450189

OFFICE	PM:PDIII-2	LA:PDIII-2	SC:RPRP	OGC	SC:PDIII-2
NAME	DPickett	THarris	BThomas	SUttal	WRuland for, AMendiola
DATE	10/14/03	10/14/03	10/15/03	10/24/03	10/28/03

OFFICIAL RECORD COPY

Oyster Creek Nuclear Generating Station - 2 -

cc:

Oyster Creek Nuclear Generating Station

cc:

Chief Operating Officer  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

Senior Vice President - Nuclear Services  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

Site Vice President - Oyster Creek  
Generating Station  
AmerGen Energy Company, LLC  
P.O. Box 388  
Forked River, NJ 08731

Vice President - Mid-Atlantic  
Operations  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

John E. Matthews, Esquire  
Morgan, Lewis, & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004

Kent Tosch, Chief  
New Jersey Department of  
Environmental Protection  
Bureau of Nuclear Engineering  
CN 415  
Trenton, NJ 08625

Vice President - Operations Support  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

H. J. Miller  
Regional Administrator, Region I

U.S. Nuclear Regulatory Commission  
475 Allendale Road  
King of Prussia, PA 19406-1415

Mayor of Lacey Township  
818 West Lacey Road  
Forked River, NJ 08731

Senior Resident Inspector  
U.S. Nuclear Regulatory Commission  
P.O. Box 445  
Forked River, NJ 08731

Director Licensing  
AmerGen Energy Company, LLC  
Nuclear Group Headquarters  
P.O. Box 160  
Kennett Square, PA 19348

Manager Licensing - Oyster Creek and  
Three Mile Island  
AmerGen Energy Company, LLC  
Nuclear Group Headquarters  
Correspondence Control  
P.O. Box 160  
Kennett Square, PA 19348

Oyster Creek Generating Station Plant  
Manager  
AmerGen Energy Company, LLC  
P.O. Box 388  
Forked River, NJ 08731

Regulatory Assurance Manager  
Oyster Creek  
AmerGen Energy Company, LLC  
P.O. Box 388  
Forked River, NJ 08731

Vice President, General Counsel and  
Secretary

AmerGen Energy Company, LLC  
2301 Market Street, S23-1  
Philadelphia, PA 19101

J. Rogge, Region I  
U.S. Nuclear Regulatory Commission  
475 Allendale Road  
King of Prussia, PA 19406-1415

Correspondence Control Desk  
AmerGen Energy Company, LLC  
200 Exelon Way, KSA 1-N-1  
Kennett Square, PA 19348

Three Mile Island Nuclear Station, Unit 1

cc:

Site Vice President - Three Mile Island Nuclear  
Station, Unit 1  
AmerGen Energy Company, LLC  
P. O. Box 480  
Middletown, PA 17057

Vice President - Mid-Atlantic Operations Support  
AmerGen Energy Company, LLC  
200 Exelon Way, KSA 3-N  
Kennett Square, PA 19348

Senior Vice President -  
Mid Atlantic Regional Operating Group  
AmerGen Energy Company, LLC  
200 Exelon Way, KSA 3-N  
Kennett Square, PA 19348

Vice President -  
Licensing and Regulatory Affairs  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

Chairman  
Board of County Commissioners  
of Dauphin County  
Dauphin County Courthouse  
Harrisburg, PA 17120

Chairman  
Board of Supervisors  
of Londonderry Township  
R.D. #1, Geyers Church Road  
Middletown, PA 17057

Senior Resident Inspector (TMI-1)  
U.S. Nuclear Regulatory Commission  
P.O. Box 219  
Middletown, PA 17057

Director - Licensing - Mid-Atlantic Regional  
Operating Group  
AmerGen Energy Company, LLC  
Nuclear Group Headquarters  
Correspondence Control  
P.O. Box 160  
Kennett Square, PA 19348

Rich Janati, Chief  
Division of Nuclear Safety  
Bureau of Radiation Protection  
Department of Environmental Protection  
Rachel Carson State Office Building  
P.O. Box 8469  
Harrisburg, PA 17105-8469

Three Mile Island Nuclear Station, Unit 1  
Plant Manager  
AmerGen Energy Company, LLC  
P. O. Box 480  
Middletown, PA 17057

Regulatory Assurance Manager - Three Mile  
Island Nuclear Station, Unit 1  
AmerGen Energy Company, LLC  
P.O. Box 480  
Middletown, PA 17057

Michael A. Schoppman  
Framatome ANP  
Suite 705  
1911 North Ft. Myer Drive  
Rosslyn, VA 22209

Three Mile Island Nuclear Station, Unit 1      - 2 -

cc:

Dr. Judith Johnsrud  
National Energy Committee  
Sierra Club  
433 Orlando Avenue  
State College, PA 16803

Eric Epstein  
TMI Alert  
4100 Hillsdale Road  
Harrisburg, PA 17112

Manager Licensing - Oyster Creek and  
Three Mile Island  
AmerGen Energy Company, LLC  
Nuclear Group Headquarters  
Correspondence Control  
P.O. Box 160  
Kennett Square, PA 19348

Clinton Power Station, Unit 1

cc:

Manager Licensing - Clinton and LaSalle  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

Regulatory Assurance Manager - Clinton  
AmerGen Energy Company, LLC  
Clinton Power Station  
RR3, Box 228  
Clinton, IL 61727-9351

Director Licensing  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

Document Control Desk-Licensing  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

Site Vice President - Clinton Power Station  
AmerGen Energy Company, LLC  
Clinton Power Station  
RR 3, Box 228  
Clinton, IL 61727-9351

Clinton Power Station Plant Manager  
AmerGen Energy Company, LLC  
Clinton Power Station  
RR 3, Box 228  
Clinton, IL 61727-9351

Resident Inspector  
U.S. Nuclear Regulatory Commission  
RR #3, Box 229A  
Clinton, IL 61727

Chief Operating Officer  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

Regional Administrator, Region III  
U.S. Nuclear Regulatory Commission  
801 Warrenville Road  
Lisle, IL 60532-4351

Senior Counsel, Nuclear  
AmerGen Energy Company, LLC  
4300 Winfield Road  
Warrenville, IL 60555

R. T. Hill  
Licensing Services Manager  
General Electric Company  
175 Curtner Avenue, M/C 481  
San Jose, CA 95125

Chairman of DeWitt County  
c/o County Clerk's Office  
DeWitt County Courthouse  
Clinton, IL 61727

J. W. Blattner  
Project Manager  
Sargent & Lundy Engineers  
55 East Monroe Street  
Chicago, IL 60603

Illinois Emergency Management  
Agency  
Division of Disaster Assistance &  
Preparedness  
110 East Adams Street  
Springfield, IL 62701-1109

OFFICE OF NUCLEAR REACTOR REGULATION  
SAFETY EVALUATION OF THE PROPOSED ASSIGNMENT  
OF THE AMERGEN ENERGY COMPANY, LLC, DECOMMISSIONING TRUST FUNDS  
TO A NEVADA SINGLE-MEMBER LIMITED LIABILITY COMPANY  
DOCKET NOS. 50-219, 50-289, 50-461

1.0 INTRODUCTION

By application dated January 23, 2003, as supplemented by letters dated March 19, June 17, and July 29, 2003, AmerGen Energy Company (AmerGen or, the licensee) submitted proposed changes to the AmerGen decommissioning trust agreements that would provide for assignment of the trusts to newly formed Nevada single-member limited liability companies (LLCs). AmerGen will execute trust agreements for each of its three plants between itself and Mellon Bank, N.A. (Mellon). The licensee also stated that the existing Trustee for these trusts, Mellon, will remain as Trustee.

2.0 BACKGROUND

In its submittal, AmerGen proposed to assign the decommissioning trust funds for Clinton Power Station, Oyster Creek Generating Station, and Three Mile Island Nuclear Station, Unit 1 to newly formed, wholly owned single member LLCs, which will be located and organized in Nevada. The current trustee for the trust funds, Mellon, will remain the trustee and, according to the licensee, the fiduciary duties relative to the trusts will be unaffected by the proposed changes to the trusts.

Each of the three plants has two decommissioning trusts: the qualified trust, which is qualified for special tax treatment under Section 468A of the Internal Revenue Code and associated regulations, and the non-qualified trust. According to AmerGen's submittal, the qualified funds for all plants will be assigned to one single member LLC, AmerGen Generation Consolidation, LLC (Consolidation), a Nevada Company. The non-qualified funds will be assigned to three single-member LLCs (NQF LLC), which will each hold one non-qualified fund for a single plant. Upon completion of the assignments, AmerGen will contribute its interests in the NQF LLC to Consolidation. Through its direct and indirect ownership interests, AmerGen will be the sole owner of the subsidiary LLCs. AmerGen provided a flow chart illustrating the changes.

AmerGen stated that the reason for the proposed changes was to avoid adverse state tax impacts from Pennsylvania. AmerGen further stated that the assignment of the funds to Consolidation and to the NQF LLCs will have no impact on current trust assets, future contributions, or the ability to withdraw funds to use for decommissioning of the AmerGen plants.

According to the licensee, the operation of the subsidiary LLCs will be governed by operating agreements. Due to the potential impact of the proposed changes to the trust on plants, on February 13, 2003, the Nuclear Regulatory Commission (NRC) staff requested a copy of the draft operating agreements for the LLCs associated with the proposed changes. The draft operating agreements were provided to the NRC in a letter dated March 19, 2003.

The NRC staff issued a Request for Additional Information (RAI), designated ADAMS Accession Number ML031840006, and subsequently held a series of teleconferences with AmerGen to address and resolve the concerns that NRC identified in the RAI. The proposed changes to AmerGen's trust agreements and operating agreements submitted on July 29, 2003, documented the resolution of the staff's RAI.

Attachment F, "Revised Draft Operating Agreement AmerGen Consolidation, LLC" to the July 29, 2003, submission is the revised draft operating agreement for Consolidation, a single member Nevada LLC. The agreement is between Consolidation and "the Member." The Member, as indicated by the signature page of the agreement is AmerGen. The managers of Consolidation will be appointed by the Member. See Letter from Michael P. Gallagher, to NRC, Answer to General Question 1.1. The operating agreement provides, among other things, that 1) the company is "organized solely for the purpose of holding an interest in, managing and distributing the Qualified and Nonqualified Funds in accordance with the terms and provisions of the Amended and Restated Nonqualified and Qualified Nuclear Decommissioning Master Trust Agreements and all applicable Federal, State and local statutes and regulations governing nuclear decommissioning trust funds;" 2) the company may not make any material changes in the trust agreements without prior written consent of the Director, Office of Nuclear Reactor Regulation (NRR); 3) the appropriate parties will be given immediate access to the funds in accordance with and upon satisfaction of the trust conditions; 4) no additional persons may be admitted as members without the written consent of the member and prior written consent of the Director, NRR; 5) the member cannot withdraw from the company, and; 6) the company cannot dissolve its affairs without prior written consent of the Director, NRR.

Attachment E, "Revised Draft Operating Agreement Amergen NQF, LLC" to the July 29, 2003, submission is the revised draft operating agreement for AmerGen NQF, LLC. The agreement is between the NQF, LLC and "the sole Member," which is AmerGen. The agreement contains provisions similar or identical to those listed in the preceding paragraph, but the NQF, LLC's purpose is confined to "holding an interest in, managing and distributing the Nonqualified Funds in accordance with the terms and provisions of the Amended and Restated Nonqualified Nuclear Decommissioning Trust Agreement and all applicable Federal, State and local statutes and regulations governing nuclear decommissioning trust funds."

This safety evaluation report documents the results of the staff's review of the proposed changes to the trust agreements and the decommissioning fund ownership.

### 3.0 REGULATORY FRAMEWORK

Title 10 Part 50.75 of the *Code of Federal Regulations* requires power reactor licensees to demonstrate to the NRC how the licensee will provide reasonable assurance that funds will be available for decommissioning. Section 50.75(e) provides that power reactor licensees must

use either (i) prepayment, (ii) an external sinking fund, or (iii) a surety method, insurance, or other guarantee method to provide the required financial assurance.<sup>1</sup> Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," provide additional guidance on decommissioning funding

#### 4.0 TECHNICAL EVALUATION

##### 4.1 Documents Reviewed

The staff reviewed the following documents:

- Amended and Restated Qualified<sup>2</sup> Nuclear Decommissioning Master Trust Agreement with Mellon. The licensee has established a tax qualified trust for each licensed unit. The trust agreement is identical for each of the units.
- Amended and Restated Nonqualified Decommissioning Master Trust Agreement with Mellon. The licensee established a non-tax qualified trust for each licensed unit. The trust agreement is identical for each of the units.
- Amended Master Terms for Trust Agreements for Mellon, which establishes definitions and certain provisions common to both the tax qualified and the non-tax qualified trusts. A single master trust agreement covers all tax qualified and non-tax qualified trust agreements between AmerGen and Mellon.
- As discussed in the Background Section of this safety evaluation, a proposed Operating Agreement<sup>3</sup> for a Nevada-based single member Limited Liability Company (LLC) (to be known as Consolidation) to which the tax qualified trusts would be assigned.<sup>4</sup> A single LLC would be created to which all tax qualified trusts would be assigned.
- As discussed in the Background Section of this safety evaluation, a proposed Operating

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<sup>1</sup> The NRC, in a final rule promulgated on December 24, 2002, and effective December 24, 2003 (67 Federal Register 78332), has amended the financial assurance requirements in 10 CFR 50.75 for nuclear power plant licensees that are no longer rate-regulated, or no longer have access to a non-bypassable charge for decommissioning. AmerGen recognized that it may be necessary to make additional revisions to its trust agreements in a timely manner to meet the requirements of NRC's final rule on decommissioning trust provisions, when it becomes effective on December 24, 2003.

<sup>2</sup> A tax qualified decommissioning trust meets the requirements of Section 468A of the Internal Revenue Code and associated IRS regulations.

<sup>3</sup> Nevada Revised Statutes (NRS) 86.101 defines "Operating agreement" as "any valid written agreement of the members as to the affairs of a limited liability company and the conduct of its business."

<sup>4</sup> The single member is the Exelon Generation Company, LLC. NRS 86-081 defines "member" as "the owner of a member's interest in a limited-liability company" and NRS 86.291 specifies that management of a LLC "is vested in its members in proportion to their contribution to its capital." NRS 86.286 1. provides that an operating agreement may be adopted by the sole member.

Agreement for Nevada-based single member LLCs to which the non-tax qualified trusts would be assigned. Each trust would be assigned to a different LLC, so a total of three such LLCs would be created, and AmerGen's plans to use the LLCs for the non-tax qualified trusts as an interim step, and plans to assign the Member's interests in the non-tax qualified trusts to Consolidation subsequent to the creation of the interim trusts.

## 5.0 TECHNICAL EVALUATION

The application was reviewed to confirm that the proposed trust agreements and operating agreements will provide reasonable assurance that the funds will be available for the decommissioning process in accordance with 10 CFR 50.75. The proposed trust agreement and operating agreement were also reviewed against the existing License Conditions, Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," and supplemental criteria that the staff developed to provide reasonable assurance.

The Master Terms for the Qualified and Nonqualified Trust agreements is between AmerGen, Consolidation, and Mellon, and restricts the use of the assets of each fund to the expenses and liabilities of decommissioning that fund's unit, paying administrative costs and incidental expenses of each fund, and investing the funds, except that 1) investments in the securities or obligations of AmerGen, or affiliates thereof, or their successors or assigns are prohibited, and 2) except for investments tied to market indexes or other non-nuclear sector mutual funds, investments in any entity owning one or more nuclear power plants are prohibited. In addition, first priority for expenditure of monies from the trust funds will be for radiological decommissioning (10 CFR 50.2) in compliance with NRC's regulatory standards; disbursements of funds from the trusts will not be made without 30 days prior written notice to the NRC; disbursement cannot be made without presentation of a certification of decommissioning costs, and material modifications cannot be made to the decommissioning trusts without prior written consent of the NRC.

The Amended and Restated Nonqualified Nuclear Decommission Master Trust Agreement and Amended and Restated Qualified Nuclear Decommission Master Trust Agreement between AmerGen, Consolidation, and Mellon for the qualified fund, and between AmerGen and the NQF Companies and Mellon for the nonqualified funds limits the use of the funds in each of the trust funds to providing funds for decommissioning that fund's unit and makes the funds subject to the Master Terms described, in part, above.

The Master Terms for the Trust Agreement define the conditions of operation and apply to the Amended and Restated Qualified Nuclear Decommissioning Master Trust Agreement between AmerGen, Consolidation, and Mellon, and the Amended and Restated Nonqualified Nuclear Decommissioning Master Trust Agreement between AmerGen, the limited liability companies identified in Schedule A of the Nonqualified Nuclear Decommissioning Trust Agreement, and Mellon.

The revised Operation Agreements between AmerGen and Consolidation define the terms of operation for both the qualified and nonqualified decommissioning trust funds.

The staff notes that each of the plants covered by these trust agreements are subject to the following existing license conditions:

1. License Condition prohibiting material modifications to the trust agreements unless the NRC has provided prior written consent.
2. License Condition prohibiting disbursement of funds from the trust funds without 30 days prior written notice to the NRC.
3. License Condition prohibiting disbursements of the funds if the trustee receives written notice of an objection from NRC within the 30-day period.
4. License Condition prohibiting investments in prohibited securities.
5. License Condition requiring that all investments by the trust funds must meet the "Prudent Investor" standard.

The amended trusts contain these conditions and are therefore, consistent with the license conditions.

The licensee confirmed that the costs attributable to the establishment of the proposed LLCs will not be paid from monies in the decommissioning trust funds. The licensee also confirmed that the disbursement procedures specified in the trust agreements can be carried out by the proposed LLCs.

The revised changes to AmerGen's Trust Agreements and Operating Agreement submitted on July 29, 2003, documented the resolution of the staff's RAI. The staff finds the trust agreements to be in a form acceptable to the NRC. The staff also finds that the Trust Agreement: 1) prohibits material modifications to the trust agreements unless the NRC has provided prior written consent; 2) prohibits disbursement of funds from the trust funds without 30 day prior written notice to NRC; 3) prohibits disbursements of trusts if the trustee receives written notice of an objection from NRC within the 30-day period; 4) prohibits proposed LLCs creating inappropriate licensee involvement in investment decisions; 5) requires all investments by the trust funds to meet the "Prudent Investor" standard, and 6) prohibits investments in the securities or other obligations of AmerGen or affiliates thereof, or their successors or assigns. The staff concludes that the proposed Trust Agreement has satisfied all of the existing License Conditions.

The proposed Trust Agreement has also demonstrated the licensee's commitment to providing first priority for expenditure of monies from the trust funds to be allocated for radiological decommissioning in compliance with 10 CFR 50.75, and has committed to not allocate the costs attributable to the establishment of the proposed LLCs from monies in the decommissioning trust funds.

The revised submittal for decommissioning dated July 29, 2003, has specified procedures in the trust agreements that allow disbursement to be carried out by the proposed LLCs.

The Commission's Regulations provide that the licensee is responsible for the cost of decommissioning its nuclear facilities. Therefore, the obligation to provide financial assurance

for decommissioning remains with AmerGen for all of its nuclear plants. The staff finds that the proposed assignment of the trust funds and the restructuring of the financial assurance mechanism will not reduce the assurance that the licensee, AmerGen, remains directly responsible, if necessary, for providing funds for decommissioning, and maintaining ownership and control of the decommissioning funds for the affected units.

The staff finds, based upon the foregoing discussion and upon the facts that the decommissioning trusts contain the same requirements as those in the license conditions for each of the licenses, the trustee will remain the same and their fiduciary duties relating to the trust will not change, that the trust agreements are acceptable to the staff. The staff further finds that AmerGen is the sole member of Consolidation and of each of the NQF, LLCs, which are thus, wholly owned and controlled by AmerGen. Therefore, the staff concludes that AmerGen has complied with the provisions of 10 C.F.R. 50.75. The staff further concludes that, given the considerations previously discussed, AmerGen's decommissioning funding mechanism meets the requirements of 10 CFR 50.75(e)(1)(iv).

## 6.0 CONCLUSION

Based on the information contained in the licensee's revised submittal dated July 29, 2003, the staff concludes that AmerGen has complied with the requirements of 10 CFR 50.75, the existing License Conditions, and supplemental criteria developed by the staff to provide reasonable assurance of decommissioning trust funds, and although the formation of the new LLCs is a first-of-a kind change, the proposed change will not have an adverse impact on AmerGen's ability to provide reasonable assurance that funds will be available for decommissioning AmerGen's units. Therefore, the staff finds the proposed revisions to the decommissioning trust agreements acceptable.

Principal Contributor: Clayton Pittiglio, RPRP/NRR

Date: October 28, 2003