STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a Certificate of Public Good, pursuant to 30 V.S.A. § 248 and 10 V.S.A. § 6522 to construct a Second Independent Spent Fuel Storage Installation at the Vermont Yankee Nuclear Power Station

Docket No. 8300

PREFILED TESTIMONY OF
CHRISTOPHER RECCHIA
ON BEHALF OF THE
VERMONT DEPARTMENT OF PUBLIC SERVICE

August 19, 2015

Summary: Commissioner Recchia’s testimony presents the Department’s overall position regarding this petition and discusses the sufficiency of Entergy VY’s financial assurance related to spent fuel management.
Prefiled Testimony
of
Christopher Recchia

Q. Please state your name and occupation.
A. My name is Christopher Recchia and I am the Commissioner of the Vermont Public Service Department (“Department” or “DPS”). My business address is 112 State Street, Montpelier, Vermont.

Q. Please describe your educational background and experience.
A. I have a bachelor’s degree in zoology from the University of Vermont, and master’s degrees in Environmental Law from Vermont Law School and Natural Resource Policy and Management from Yale University. I served as Deputy and then Commissioner of the Vermont Department of Environmental Conservation from 1997 through 2003; as Executive Director of the Ozone Transport Commission from 2003 through 2007; as Executive Director of the Biomass Energy Resource Center from 2007 through 2011; and as Deputy Secretary for the Vermont Agency of Natural Resources (“ANR”) from January 2011 through January 2013. I was appointed to my current position by Governor Peter Shumlin in January 2013.

Q. Have you testified before the Vermont Public Service Board before?
A. Yes, in Dockets 7862, 8190/8191, and 8328.

Q. What is the purpose of your testimony?
A. My testimony presents the Department’s overall position regarding this petition and addresses the issue of adequate financial assurance related to management of spent nuclear fuel.
Q. Do you think that this Project is in the general good of the state?
A. In general, yes. I believe that it is in the economic interest of Vermonters to have the spent nuclear fuel removed from the spent fuel pool and transferred to dry cask storage as soon as possible. The State has an interest in seeing the site greenfielded and returned to productive economic use after appropriate decommissioning overseen by the Nuclear Regulatory Commission (NRC). Although management of spent nuclear fuel is not considered to be part of the decommissioning process, decommissioning of the spent fuel pool cannot be completed without moving the spent nuclear fuel into dry cask storage. As part of the federal process, the Department would like to see the removal of spent nuclear fuel from Vermont and into long-term storage, as promised by the U.S. Department of Energy (DOE). In the interim, the Department believes that the common-sense approach of transferring spent nuclear fuel to dry cask storage is cost effective and provides Entergy the option, consistent with NRC regulations, to decommission and greenfield the site sooner, to the economic benefit of Vermonters.

Q. Is there sufficient information for the PSB to find that, pursuant to 10 V.S.A. § 6522(b)(1), “adequate financial assurance exists for the management of spent fuel at Vermont Yankee for a time period reasonably expected to be necessary, including through decommissioning, and for as long as it is located in the state?”
A. Although the Department does not believe that the financial assurance cited by Entergy Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively “Entergy VY”) in its revised testimony meets this criterion, the Department does believe that there is sufficient information to find that this criterion has been met, as explained below.

Q. Please review Entergy VY’s explanation for why there is adequate financial assurance.
A. According to Mr. Twomey’s prefiled testimony and information Entergy VY has filed with the NRC and submitted in this Docket as exhibit EN-TMT-6, the total cost of
managing spent nuclear fuel until it is removed from the Vermont Yankee site is expected to be $368 million. Mr. Twomey’s prefiled testimony sets outs two different categories of actions that encompass spent nuclear fuel management for the site. First, Entergy is proposing to use $145 million in credit facilities, backed by Entergy Corporation, to pay for construction of the Independent Spent Fuel Storage Installation (ISFSI) pad and transfer of spent nuclear fuel from the pool to dry cask storage. Second, Entergy VY is proposing to use money from the decommissioning trust fund to pay for ongoing maintenance of the dry casks. Additionally, Entergy VY has stated that it intends to seek monies from the Department of Energy for breach of contract and use this money to reimburse Entergy VY and the decommissioning trust fund for spent nuclear fuel management.

Q. Please explain any deficiencies with Entergy VY’s proposed financial assurance.

A. Entergy VY is relying on the use of the decommissioning trust fund to provide financial assurance for spent fuel management, which requires, among other things, an exemption from NRC regulations. The NRC Staff has granted Entergy VY’s request for such an exemption. The State of Vermont, through the Attorney General’s Office and the Department of Public Service, and joined by Green Mountain Power Corporation and the Vermont Yankee Nuclear Power Corporation, has challenged the exemption for such use of the decommissioning trust fund through a petition filed in the D.C. Circuit Court of Appeals (see exhibit CR-1 – Petition for Review). In addition, the State has formally asked the NRC to object to an Entergy VY request to the Trustee providing monies for spent nuclear fuel management (see exhibit CR-2 – Letter to NRC re Fund). As there is ongoing litigation around the use of the decommissioning trust fund for spent nuclear fuel management, and because the use of the fund for this purpose is expressly contrary to NRC regulations and other federal and state laws, it is inappropriate for Entergy VY to use this funding source as the basis for demonstrating adequate financial assurance.
Q. Please explain why there is adequate financial assurance for management of spent nuclear waste.

A. There are legal aspects to this question that I will leave for the DPS attorneys; however, in my opinion, the Board appears to have a significant amount of discretion in determining constitutes “adequate” and what is an “assurance.” Entergy VY has provided $145 million in credit facilities for the work related to constructing the ISFSI pad and transferring the spent nuclear fuel from the spent fuel pool to dry cask storage, which is what this CPG is for. In addition, the Department of Energy has reimbursed Entergy VY for work related to spent fuel management. I anticipate that the Department’s lawyers will brief why DOE reimbursement should be considered in determining that there is adequate financial assurance to meet this criterion. Also, NRC regulations (10 C.F.R. § 50.54(bb)) require financial assurance for spent fuel management. Consequently, assuming the State prevails in its arguments for not allowing Entergy to use the decommissioning trust fund for spent nuclear fuel management, the NRC will require Entergy to provide a separate form of financial assurance. The Department’s brief will provide further context on the litigation surrounding the use of the decommissioning fund and any preemption issues that might arise from Section 6522(b) generally.

Finally, in my view, the Board must evaluate what is “adequate” in light of reasonable alternatives. In this case, the alternative is for Entergy VY to keep the spent nuclear fuel in the pool. This is not a cost-free proposition. In fact, my understanding is that it would be more costly to continue to store the fuel in the spent fuel pool. It therefore makes little sense to demand a greater degree of financial assurance for dry-cask spent fuel management (a desirable outcome) than for wet spent fuel management (a less desirable outcome). Entergy VY has provided $145 million in credit facilities for the work related to constructing the ISFSI pad and transferring the spent nuclear fuel from the spent fuel pool to dry cask storage. In my view, this provides adequate financial assurance for the transfer from wet to dry storage. After that, the ongoing spent fuel
management costs are likely to be less expensive than the status quo. In light of this reality, the $145 credit facilities are adequate.

Q. Does this conclude your testimony?
A. Yes.
The Commission issued its approval to the owner/operator of Vermont Yankee, Entergy Nuclear Operations, Inc. ("Entergy"), via letter dated June 17, 2015, and notice was published in the Federal Register on June 23, 2015 (80 Fed. Reg. 35992; a copy of which is attached hereto). This filing is within the 60-day statute of limitations and is timely pursuant to 28 U.S.C. § 2344. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 2342(4) and 2344, and is a proper venue pursuant to 28 U.S.C. § 2343.

Petitioners have standing pursuant to 28 U.S.C. § 2344 and 5 U.S.C. § 702 to bring this Petition. The State of Vermont, its citizens, and its ratepayers are aggrieved by the Commission's decision, which affects: (1) the license for a nuclear power plant located in the State, and (2) the Nuclear Decommissioning Trust Fund ("Decommissioning Fund") for Vermont Yankee, which was primarily funded by monies collected from Vermont ratepayers, and in which Vermont ratepayers have an interest in excess funds remaining after decommissioning. The Vermont Yankee Nuclear Power Corporation and its current sole owner, Green Mountain Power Corporation, are utilities that also have a direct interest in proper use of the Decommissioning Fund. Vermont Yankee Nuclear Power Corporation, now owned by Green Mountain Power Corporation, collected the principal funds that (with interest) constitute the entirety of the Decommissioning Fund. Further, Green Mountain Power Corporation, and through it their Vermont ratepayers, have
a 55% interest in all monies that remain in that fund following completion of
decommissioning. Thus, every time the Commission allows an improper
withdrawal from the Decommissioning Fund, it harms Vermont Yankee Nuclear
Power Corporation, Green Mountain Power Corporation, and their Vermont
ratepayers. Finally, Petitioners jointly submitted a letter (dated June 5, 2015) to
the Commission requesting the opportunity for public participation on Entergy’s
exemption request and requesting to participate in the matter before the
Commission issued its decision. No such opportunity was granted.

The Commission acted arbitrarily, abused its discretion, and violated the
Atomic Energy Act, the Administrative Procedure Act, and the National
Environmental Policy Act in approving the exemptions and failing to provide an
opportunity for Petitioners to participate in the process. Petitioners respectfully
request that this Court review the Commission’s decision, vacate that decision,
and remand the matter to the Commission.

Dated: August 13, 2015

Respectfully submitted,

THE STATE OF VERMONT

By its attorneys,

WILLIAM H. SORRELL
ATTORNEY GENERAL
By: Kyle H. Landis-Marinello,
D.C. Circuit Bar Roll No. 55684
Assistant Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
kyle.landis-marinello@vermont.gov
Tel: (802) 828-3186

GEORGEY COMMONS
PUBLIC ADVOCATE
By: Edward McNamara
Regional Policy Director
State of Vermont
Department of Public Service
112 State Street, Third Floor
Montpelier, VT 05620-2601
ed.mcnamara@state.vt.us
Tel: (802) 828-4007

Of counsel:
Robert C. Kirsch,
D.C. Circuit Bar Roll No. 50119
Felicia H. Fillsworth,
application for admission pending
Bonnie L. Heiple,
application for admission pending
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
robert.kirsch@wilmerhale.com
felicia.fillsworth@wilmerhale.com
bonnie.heiple@wilmerhale.com
Tel: (617) 526-6000
GREEN MOUNTAIN POWER CORPORATION

Charlotte B. Ancel
Vice President, General Counsel
Power Resources, and Corporate Secretary
163 Acorn Lane
Colchester, VT 05446
Charlotte.Ancel@greenmountainpower.com
Tel: (802) 655-8764

VERMONT YANKEE NUCLEAR POWER CORPORATION
By its attorney

Peter H. Zamore
Sheehy Furlong & Behm P. C.
30 Main Street, Gateway Sq, 6th Fl
P.O. Box 66
Burlington, VT 05402
pzamore@sheehyvt.com
Tel: (802) 864-9891
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT  

THE STATE OF VERMONT,  
VERMONT YANKEE NUCLEAR  
POWER CORPORATION; and  
GREEN MOUNTAIN POWER  
CORPORATION  

Petitioners  

v.  

UNITED STATES NUCLEAR  
REGULATORY COMMISSION, and  
UNITED STATES OF AMERICA,  

Respondents  

CERTIFICATE OF SERVICE  

I hereby certify that I have on this 13th day of August 2015 served a copy of the foregoing Petition for Review by first-class mail, postage prepaid, on the following individuals at the following addresses:  

Office of the Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  

James Kim, Project Manager  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission,  
Washington, DC 20555-0001
A. Louise Lund  
Division of Operating Reactor Licensing,  
Office of Nuclear Reactor Regulation  
Washington, DC 20555-0001

Anne Boland  
Division of Operating Reactor Licensing,  
Office of Nuclear Reactor Regulation  
Washington, DC 20555-0001

Office of Commission  
Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Office of the Secretary  
ATTN: Rulemakings & Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Andrew Averbach  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Trip Rothschild  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Marian Zobler  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Catherine Scott  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001
Edward Williamson  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Site Vice President  
Entergy Nuclear Operations, Inc.  
Vermont Yankee Nuclear Power Station  
P.O. Box 250  
Governor Hunt Road  
Vernon, VT 05354

Bonnie L. Heiple
August 13, 2015

William Dean, Director
Office of Nuclear Reactor Regulation
Nuclear Regulatory Commission
Washington D.C. 20555-0001

Re: Docket 50-271; Request for Immediate Objection to Entergy’s July 16, 2015 Pre-Notice of Disbursement from Decommissioning Trust for Non-Decommissioning Expenses

Dear Director Dean,

On July 16, 2015, Entergy Nuclear Vermont Yankee, LLC (Entergy) and the Managing Director of the Bank of New York Mellon (the Bank) submitted a “Pre-Notice of Disbursement from Decommissioning Trust.” The notice requests “up to $12,000,000” from the Nuclear Decommissioning Trust Fund for expenses that include “operational irradiated fuel management expenses.” The State, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation formally request that the NRC immediately provide “written notice of objection” to the Bank of New York Mellon concerning the pending request, pursuant to the NRC’s authority under Vermont Yankee Nuclear Power Station Renewed Facility Operating License Condition 3.J.a.(iii) and under the Master Trust Agreement § 4.05.

All of Entergy’s previous pre-notices of disbursements have been only for what Entergy asserts to be “legitimate decommissioning expenses.” This is the first time Entergy has asserted a right to reimburse itself for non-decommissioning expenses—something which NRC regulations explicitly forbid. 10 C.F.R. § 50.75(h)(1)(iv) (disbursements “are restricted to decommissioning expenses”); see also, e.g., id. § 50.82(a)(8)(i)(A) (disbursements must be “for legitimate decommissioning activities consistent with the definition of decommissioning in [10 C.F.R.] § 50.2,” which in turn defines decommissioning as limited to activities that “reduce residual radioactivity”); General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24018-01, 24018 (1988) (“Decommissioning activities do not include the removal and disposal of spent fuel which is considered to be an operational activity . . . .”) (emphasis added).

Entergy’s assertion of an ability to reimburse itself for millions of dollars in “operational irradiated fuel management expenses” appears to be based on the NRC’s June 23, 2015 granting of an exemption from the above regulations. See 80 Fed. Reg. 35992-35995 (June 23, 2015). However, the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power have now challenged that decision in the U.S. Court of Appeals for the D.C. Circuit. See attachment. This pending
legal challenge states that the NRC’s June 23, 2015 decision should be overturned as a violation of the Atomic Energy Act, the Administrative Procedures Act, and the National Environmental Policy Act.

Further, as the State has previously noted, regardless of whether Entergy has been exempted from applicable NRC regulations, Entergy and the Bank of New York Mellon have independent legal obligations to not release funds for “operational irradiated fuel management expenses.” In particular, the 2002 Master Trust Agreement and the related Vermont Public Service Board Order do not allow use of the Nuclear Decommissioning Trust Fund for spent fuel expenses until the site has been decommissioned, and have specific provisions regarding the return of 55% of excess amounts in that fund to Vermont ratepayers through the Vermont Yankee Nuclear Power Corporation and Green Mountain Power. Entergy has not yet sought approval from the NRC or the Vermont Public Service Board to amend those requirements.

Applicable Federal Energy Regulatory Commission (FERC) regulations similarly state that “absent express authorization” from FERC—authorization Entergy has not received—“no part” of the Nuclear Decommissioning Trust Fund may be “used for, or diverted to, any purpose other than to fund the costs of decommissioning.” 18 C.F.R. § 35.32(a)(6) (emphasis added). Entergy’s planned use of alleged “excess” funds also violates the requirement that any “excess jurisdictional amount” be “return[ed] . . . to ratepayers”—here, through Vermont Yankee Nuclear Power Corporation and Green Mountain Power. Id. § 35.32(a)(7). Entergy’s contractual obligations as well as federal laws, including laws Entergy has not been exempted from, prohibit the release of trust funds for “operational irradiated fuel management expenses” at this time. And the undersigned have now filed a direct challenge in the U.S. Court of Appeals for the D.C. Circuit to the exemption request that forms the entire basis for Entergy’s claim that it can use the fund in this way. Unless and until these legal issues are resolved, it would be arbitrary and an abuse of discretion for the NRC to stand by and decline to exercise its right to provide “written notice of objection” to the Bank of New York Mellon concerning the pending request.

Thank you for your attention to this matter, and we look forward to your immediate action.

Sincerely,

William E. Griffin
Chief Assistant Attorney General
Vermont Attorney General’s Office

Christopher Recchia
Commissioner
Vermont Department of Public Service

Charlotte B. Ancel
Vice President, General Counsel
Power Resources, and Corporate Secretary
Green Mountain Power Corporation
163 Acorn Ln, Colchester, VT 05446

cc: Annette L. Vietti-Cook, Secretary of the Nuclear Regulatory Commission
U.S. Nuclear Regulatory Commission Document Control Desk
Daniel H. Dorman, Regional Administrator, Region 1, NRC
James S. Kim, Project Manager, Division of Operating Reactor Licensing, NRC
T. Michael Twomey, Vice President of External Affairs, Entergy Nuclear Vermont Yankee, LLC
Chris Wamser, Site Vice President, Entergy Nuclear Vermont Yankee, LLC
Glen Metzger, The Bank of New York Mellon