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January 26, 2015

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

Re: Docket 50-271; Entergy's Pre-Notice of Disbursement from Decommissioning Trust

Dear Director Dean,

On December 30, 2014, 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 State of Vermont objects to the Bank of New York Mellon releasing "up to \$18,000,000" from the Nuclear Decommissioning Trust Fund at this time. The State formally requests that the NRC immediately exercise its authority, under Vermont Yankee Nuclear Power Station Renewed Facility Operating License Condition 3.J.a(iii) and under the Master Trust Agreement § 4.05, to provide "written notice of objection" to the Bank of New York Mellon concerning the pending request.

Entergy and the Bank's request to release "up to \$18,000,000" provides none of the specifics that are required for the NRC to determine whether this request is in accordance with directly applicable statutes, regulations, and contracts, including the Master Trust Agreement (which the State is attaching to this letter). Rather, Entergy and the Bank state only that "up to \$18,000,000" will be used for unspecified "decommissioning planning costs." The request contains no supporting documentation. Such a letter, if allowed to stand without objection, would make License Condition 3.j.a(iii) meaningless.¹

The NRC should immediately direct that, unless and until Entergy provides additional information to the NRC and to the State of the Vermont confirming that Entergy's request is allowable, the Bank of New York Mellon should not release any money from the Nuclear Decommissioning Trust (NDT) Fund.

¹ In another proceeding, Entergy has taken that position that License Condition 3.j.a(iii) should be eliminated. On September 4, 2014, Entergy filed a License Amendment Request for such elimination. See ADAMS ML#14254A405. That request, however, has not been approved. Nor should it be, for the reasons discussed in this letter and for additional reasons that the State intends to argue when that matter is noticed for public comment. Regardless of the ultimate outcome of that proceeding, License Condition 3.j.a(iii) in the meanwhile remains in full force and effect, as does the NRC Director's explicit authority to object to this initial disbursement under § 4.05 of the Master Trust Agreement.

The NRC is charged with overseeing each nuclear power plant's NDT Fund to ensure that each fund is sufficient to fully decontaminate the site to below the NRC's allowed radiological limits. As the U.S. Court of Appeals for the Seventh Circuit recently held, "[t]he decommissioning of nuclear facilities is closely regulated by the Nuclear Regulatory Commission, and its regulatory authority embraces every potential malfeasance or misfeasance of assets dedicated to the decommissioning process." *Pennington v. Zionsolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014) (Posner, J.).

Entergy and the Bank's request to use "up to \$18,000,000" of NDT Funds for unspecified "planning activities," without any additional documentation of specifically how that money is being used, ignores important limitations on the use of NDT Funds. In particular, applicable statutes and regulations limit disbursements from the NDT Funds to activities that reduce radiological contamination. Further, the Master Trust Agreement governing the use of Entergy's NDT Fund places additional restrictions on disbursements and similarly disallows disbursements at this time for anything other than radiological decommissioning activities.

NRC regulations limit NDT disbursements to activities that reduce radiological contamination

Applicable statutes and NRC regulations do not allow Entergy to use NDT Funds for anything other than radiological decommissioning. Disbursements from the NDT Fund "are restricted to decommissioning expenses." 10 C.F.R. § 50.75(h)(1)(iv). All withdrawals must be "for legitimate decommissioning activities consistent with the definition of decommissioning in [10 C.F.R.] § 50.2." *Id.* § 50.82(a)(8)(i)(A). The NRC's definition of "Decommission" is limited to activities that "reduce residual radioactivity." 10 C.F.R. § 50.2. As the NRC has made clear, "Decommissioning activities do not include the removal and disposal of spent fuel which is considered to be an operational activity or the removal and disposal of nonradioactive structures and materials beyond that necessary to terminate the NRC license." *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018-01, 24018 (1988). Because decommissioning only includes activities that reduce radiological contamination, it "do[es] not include the cost of demolition and removal of noncontaminated structures, storage and shipment of spent fuel, or restoration of the site." *Id.* at 24028.

The NRC's regulations on the creation and use of NDT Funds explicitly state that these funds are intended to cover only radiological decontamination necessary for site closure: "Amounts [required to be set aside in the NDT Funds] are based on activities related to the definition of 'Decommission' in § 50.2 of this part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license." 10 C.F.R. § 50.75 n.1. The NRC's regulations on financial qualifications for nuclear decommissioning similarly note that NDT Funds address "only those decommissioning costs incurred by licensees to remove a facility or site safely from service and reduce residual radioactivity," which does not include, "for example, the costs of dismantling or demolishing non-radiological systems and structures." *Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance*, NUREG-1577, Rev. 1, at 16, § 2(A)(3) (1999). In short, the NRC has made abundantly clear that, absent a waiver, only costs that "reduce residual radioactivity" can be withdrawn from the NDT Fund. *Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors*, NUREG-1713, Final Report, at 4, § (B)(3) (2004).

The Master Trust Agreement limits NDT disbursements at this time to activities that reduce radiological contamination

Just as applicable statutes and regulations place important limitations on what disbursements are allowable from the NDT Fund, the Master Trust Agreement—which Entergy signed when it purchased Vermont Yankee—also places limitations on NDT Fund disbursements.² The Master Trust Agreement imposes legal restrictions on when and for what purposes Entergy can withdraw money from the NDT Fund. Such restrictions are not surprising given that Vermont ratepayers contributed the majority of the principal funds that currently exist in the NDT Fund—Entergy has never contributed any money to that Fund. Rather, Entergy inherited the NDT Fund—subject to numerous conditions in the Master Trust Agreement—as part of its purchase of the plant in 2002, and Entergy has never made a payment to the NDT Fund. The Vermont Legislature has directed the Vermont Department of Public Service to advocate for prudent use of the ratepayer contributions that created the NDT Fund. *See* Vt. Stat. Ann. tit. 30, § 2(d). The State has a significant interest in ensuring that this money is spent consistent with NRC regulations and the terms of the Master Trust Agreement. The NRC should apply extra scrutiny to disbursements from the Vermont Yankee NDT to ensure that Vermont ratepayer money is spent prudently and appropriately.

Further, Vermont ratepayers have an existing 55% interest in any leftover funds. That direct interest is noted in several provisions of the Master Trust Agreement, including Exhibits D and E. The 55% interest is also required under various Vermont Public Service Board Orders and Certificates of Public Good that remain in effect today. When Entergy sought to purchase the Vermont Yankee plant in 2002, the Vermont Public Service Board approved that sale only upon a number of conditions, including the return of any excess NDT funds to ratepayers: “Upon completion of the decommissioning of Vermont Yankee, any property remaining in [Entergy’s] Decommissioning Trust funds shall be distributed by the Trustee for the benefits of the customers of Vermont Yankee’s sponsors.” *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC, and related transactions*, Docket No. 6545 (June 13, 2002) at p.158, available at <http://www.state.vt.us/psb/6545.htm>, affirmed, *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 829 A.2d 1284 (Vt. 2003); *see also* Entergy’s 2002 Certificate of Public Good, Docket No. 6545 (June 13, 2002), Condition 2, available at <http://www.state.vt.us/psb/6545.htm> (same); Entergy’s 2014 Amendment to 2002 Certificate of Public Good, Docket No. 7862 (Mar. 28, 2014), at p.2, available at <http://psb.vermont.gov/sites/psb/files/orders/2014/2014-03/7862%20%20CPG%20Amendment.pdf>.

As the Vermont Public Service Board noted in a related ruling, “the disposition of any potential future excess decommissioning funds has expressly been an issue throughout this proceeding” and was “fully litigated” as part of the proceeding that approved Entergy’s purchase of Vermont Yankee. *Order re: Motions to Alter or Amend, Enter Final Judgment, and Stay Pending Appeal*, Docket No. 6545 (July 30, 2002), at 6 n.17, available at <http://www.state.vt.us/psb/6545.htm>. In fact, the Vermont Public Service Board rejected a proposal that would have denied Vermont ratepayers their full 55% interest in leftover NDT Funds, finding that such a proposal was inconsistent with ratepayer expectations under provisions of the previous decommissioning trust that had been in place since 1988. *Final Order*, Docket No. 6545, at 36-38. The

² The NRC’s approval of the sale of Vermont Yankee explicitly required that the “decommissioning trust agreement must be in a form acceptable to the NRC,” including 30-day notice to the NRC before any disbursements. *Order Approving Transfer of License and Conforming Amendment*, Docket No. 50-271 (May 17, 2002) (ADAMS ML#020390198).

Vermont Public Service Board concluded that “these funds were collected from ratepayers for a specific purpose and, if not needed for that purpose, should be returned” to ratepayers. *Id.* at 152.

Given their 55% interest in any leftover funds, Vermont ratepayers have a direct interest in ensuring that every disbursement from the NDT Fund complies with applicable statutes, regulations, and the Master Trust Agreement. Vermont ratepayers are directly harmed by any money that the Bank of New York Mellon improperly disburses.

The Master Trust Agreement places numerous restrictions on any use of the NDT Fund. Most importantly, for purposes of the pending request, the Master Trust Agreement:

- (1) requires that all radiological decontamination and decommissioning be complete before any money from the NDT Fund can be used for spent fuel management or site restoration³; and
- (2) once radiological decontamination and decommissioning is complete, allows withdrawals only for spent fuel management costs that were not recovered from the Department of Energy.⁴

The “exclusive purpose” of the Master Trust Agreement is “to accumulate and hold funds for the contemplated Decommissioning of the Station and *to use such funds, in the first instance, for* expenses related to the *Decommissioning of the Station as defined by the NRC in its Regulations* and issuances, and as provided in the licenses issued by the NRC for the Station and any amendments thereto.” Master Trust Agreement § 2.01 (emphasis added). As discussed above, NRC regulations clearly define decommissioning as activities that reduce radiological contamination, and explicitly exclude expenses such as spent fuel management and site restoration. The Master Trust Agreement’s “exclusive purpose” is to follow these NRC regulations by ensuring that NDT expenses are used in the first instance to reduce radiological contamination. Thus, the Master Trust Agreement requires that all radiological decontamination and decommissioning be complete before any money from the NDT Fund can be used for spent fuel management or site restoration.

Other sections of the Master Trust Agreement similarly require the Bank to refrain from disbursing funds for anything other than radiological decontamination and decommissioning until those activities are complete. In particular, the Master Trust Agreement, in several sections, specifically sets up a sequencing

³ The Master Trust Agreement recognizes that “Decommissioning” may at times include activities that, though not directly reducing radiological contamination by themselves, are nevertheless necessary to allow radiological decommissioning and decontamination, such as the removal of spent fuel from the reactor to the spent fuel pool, which may qualify as a “non-DOE [U.S. Department of Energy] spent fuel” expense. Master Trust Agreement § 1.01(j).

⁴ As both the NRC and Entergy are aware, Entergy must obtain an exemption from the NRC before Entergy can withdraw any money for spent fuel management costs. On January 6, 2015, Entergy made such an exemption request to allow it to use the NDT Fund for an estimated \$225 million in spent fuel management expenses (ADAMS ML#15013A171). This exemption request—like Entergy’s pending request to eliminate License Condition 3.j.a(iii)—has not been approved. Nor should it be, for the reasons discussed in this letter and for additional reasons that the State intends to argue when that matter is noticed for public comment. Noticeably absent from Entergy’s January 6, 2015 exemption request is any reference to the legally binding Master Trust Agreement or to the fact that Entergy’s request seeks to use the NDT Fund to pay for certain expenses that the U.S. Department of Energy (DOE) is legally required to undertake.

of disbursements that requires all radiological decontamination and decommissioning activities to be “completed” before any other disbursements are allowed. Master Trust Agreement § 4.01.

Section 4.01 of the Master Trust Agreement, like the applicable NRC regulations discussed above, limits disbursements from the NDT Fund to “paying costs, liabilities and expenses of Decommissioning or, if so specified, administrative expenses.” The Master Trust Agreement defines “Decommissioning” as “the removal of the Station from service and disposal of its components in accordance with Applicable Law.” Master Trust Agreement § 1.01(j). Only “[o]nce Decommissioning is *completed*” can the Bank release NDT Funds to Entergy for uncovered “Spent Fuel Costs and Site Restoration Costs.” *Id.* § 4.01 (emphasis added).

This sequencing is clarified by Exhibit D of the Master Trust Agreement. Exhibit D—labeled “Decommissioning Requirements”—explicitly defines the “Completion of Decommissioning” as “plant *dismantlement and decontamination to NRC standards* plus the completion of additional activities agreed to or imposed in the course of [the sale docket] before the Vermont Public Service Commission or pursuant to any subsequent law or proceeding, but *excluding spent fuel management and any site restoration.*” Master Trust Agreement Ex. D (emphasis added). In other words, spent fuel management and site restoration expenses could be recovered from the NDT Fund only if they occurred *after* the completion of radiological decommissioning.

And even then, the NDT Fund can only be used to cover expenses that the U.S. Department of Energy (DOE) does not have to pay. The Master Trust Agreement was signed in 2002. At that point, four years after DOE breached its contractual obligation to remove spent nuclear fuel from nuclear sites such as Vermont Yankee, it was clear that Entergy would have the ability to sue DOE for spent fuel management expenses. In fact, the Purchase and Sale Agreement for Vermont Yankee explicitly transferred all rights to such lawsuits, and Entergy has since recovered tens of millions of dollars from DOE for spent fuel management expenses that would not have occurred had DOE removed the fuel in 1998.

The continuation of these lawsuits was anticipated by the Master Trust Agreement, which set up a process to ensure that Entergy did not double recover for spent fuel management expenses by using NDT Funds for expenses that it would later recover from DOE through litigation. In particular, the definition of “Decommissioning” in the Master Trust Agreement states that it includes “*non-DOE* spent fuel storage.” Master Trust Agreement § 1.01(j) (emphasis added). Similarly, Exhibit D of the Master Trust Agreement sets up the following provision to address the “return of excess funds” from the NDT—a provision that clearly requires Entergy to obtain all possible relief from DOE before it attempts to use NDT Funds for spent fuel management expenses:

Return of Excess Funds in accordance with the second following paragraph, shall occur following the earliest of (i) the date Completion of Decommissioning has occurred and the Company has satisfied all of its responsibilities for spent fuel management and site restoration or (ii) the date on which Completion of Decommissioning occurs and any of the following occur: (x) *settlement* between the Company and the US Department of Energy ("DOE") with respect to spent fuel management responsibilities for the Station, (y) *final resolution of litigation* by the Company against DOE with respect to spent fuel management responsibilities for the Station, or (z) *satisfactory performance by DOE* of its spent fuel responsibility with respect to the Station.

Master Trust Agreement Ex. D (emphasis added). Exhibit D then notes that “excess funds” excludes costs “not otherwise payable by the federal government in accordance with (x), (y) or (z) above.”

Section 5.02 of the Master Trust Agreement similarly notes that it is “upon termination of this Master Trust or such Funds, [that] the Trustee shall distribute all funds necessary for Spent Fuel Costs and Site Restoration Costs to the Company.” That is because, as NRC regulations require, the NDT Fund must cover all necessary radiological decontamination and decommissioning expenses before any disbursements can be made to cover other expenses such as spent fuel management and site restoration. That sequencing is the only way to ensure, as the NRC must do, that Entergy maintains sufficient funds to radiologically decontaminate the site.

The sequencing mentioned above is also required by the Master Trust Agreement—for the same safety reasons that the NRC requires it, but also because Vermont ratepayers have a direct interest in all excess funds. In particular, as mentioned above, Vermont ratepayers will obtain 55% of all excess funds from the NDT Fund. Thus, the Master Trust Agreement contains numerous provisions to ensure proper care of these funds by Entergy and the Bank of New York Mellon—including, for instance, the requirement that Entergy not spend any NDT Funds on expenses that DOE is legally required to undertake.

More Information is needed to evaluate whether Entergy and the Bank’s request complies with NRC regulations and the Master Trust Agreement

As noted above, both NRC regulations and the Master Trust Agreement limit NDT disbursements at this time to activities that reduce radiological contamination. Entergy and the Bank’s request to use “up to \$18,000,000” for unspecified “decommissioning planning costs” provides none of the information required to determine whether these planning costs were for activities that reduce radiological contamination. Supporting documentation is needed to ensure that reimbursed expenditures are allowed under applicable statutes, regulations, and the Master Trust Agreement. *See Pennington v. ZionSolutions LLC*, No. 11 C 4754, 2013 WL 3895263, at *2 (N.D. Ill. July 29, 2013) (allegations that the plant owner was using NDT funds for, among other things, improper uses such as spent fuel management expenses and “self-dealing” for profits “in the range of 15 to 20 percent”).

Turning to Entergy and the Bank’s request, there is no explanation of what constitutes their alleged “planning costs.” Are these “planning costs” limited to radiological decommissioning activities, or has Entergy inappropriately included planning costs related to spent fuel management or site restoration? For instance, in accordance with a Settlement Agreement reached between Entergy and the State of Vermont in December 2013, Entergy recently provided the State with a Site Assessment Study that in part addresses site restoration. Preparation for site restoration is not a radiological decommissioning expense and thus not a proper expenditure from the NDT Fund. Have Entergy and the Bank included those expenses in their request for “up to \$18,000,000”? If so, the NRC cannot allow such expenditures to be withdrawn from the NDT Fund. Also, given that Entergy has hired a subsidiary, TLG Services Inc., to perform decommissioning planning activities, has Entergy disclosed the profit margin it is granting its subsidiary and provided an explanation for that profit margin? The NRC needs to act now to ensure that Entergy and the Bank answer these and other important questions before any disbursement occurs.

As “the designated policeman of decommissioners,” the NRC is tasked with “assess[ing] the management of the complex, technologically sophisticated process of nuclear decommissioning.”

Pennington, 742 F.3d at 719. Without a specific breakdown of each expense Entergy has incurred to date, the NRC cannot exercise its statutory duty to “closely regulate[]” against “every potential malfeasance or misfeasance of assets dedicated to the decommissioning process.” *Id.*

In short, given unique aspects of the Vermont Yankee NDT, including its primary funding source (Vermont ratepayers), Entergy and the Bank should not determine allowable withdrawals on their own. Rather, in accordance with Vermont Yankee License Condition 3.j.a(iii), the NRC should establish a rigorous review process, with direct input from the State of Vermont, for withdrawal requests.

Conclusion

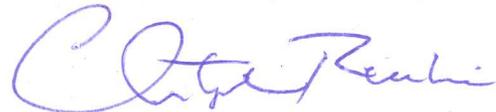
Entergy is responsible for the safe decommissioning of Vermont Yankee, and the NRC must ensure that Entergy has sufficient financial capacity to perform all necessary activities to safely decommission the plant. Entergy should provide a detailed breakdown of the expenses for which it seeks reimbursement from the NDT Fund. Entergy’s request is for past expenses. It presumably has all of the relevant specific bills in hand and need only turn over those documents to the NRC and the State, as it should have done in the first place when it submitted its December 30, 2014 letter. To ensure that this occurs, the State formally requests that the NRC act immediately to object to the requested disbursement, and that the NRC act now to establish a review process, with direct input from the State of Vermont, for future withdrawal requests.⁵

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

Sincerely,



Kyle H. Landis-Marinello
Assistant Attorney General



Christopher Recchia, Commissioner
Vermont Department of Public Service

cc: Annette L. Vietti-Cook, Secretary of the Commission
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USNRC Resident Inspector, Entergy Nuclear Vermont Yankee, LLC

⁵ Regardless of whether the NRC files a formal objection, the Bank of New York Mellon should be aware that if the current request does not comply with “Section 4.01” and “Exhibit D” of the Master Trust Agreement, then the request would require “approval for such disbursement or payment from the State of Vermont Public Service Board.” Master Trust Agreement § 4.06.