

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

In a letter dated January 23, 2003, and supplements dated March 19, 2003 and June 17, 2003, AmerGen Energy Company, LLC, (AmerGen) provided to the NRC proposed changes to the AmerGen trust agreements that would provide for assignment of the trusts to newly formed Nevada single-member limited liability companies (LLCs). The licensee stated that the purpose of the assignment is to avoid certain adverse tax consequences of the current structure and to secure certain tax advantages in Nevada as well as to consolidate and simplify accounting and management functions. The licensee has also stated that the existing Trustee for these trusts, Mellon Bank, N.A., will remain Trustee.

2.0 BACKGROUND

This safety evaluation report (SER) documents the staff's findings resulting from the review of the application by AmerGen, to amend the trust agreements for the decommissioning trust funds that affects the Clinton Power Station, Oyster Creek Generating Station, and Three Mile Island Nuclear Station, Unit 1. AmerGen has executed trust agreements for each of the 3 facilities between itself, and Mellon Bank, N.A. The licenses for AmerGen's reactor facilities requires that the decommissioning trust agreements may not be amended in any material respect without written approval by the NRC.

Due to the potential impact of the proposed change to the trust on 3 plants on February 13, 2003, the NRC staff requested a copy of the draft operating agreements for the LLCs associated with the proposed amendments. The draft operating agreements were provided to the NRC in a letter dated March 19, 2003. Following NRC's review of the proposed amendments to the trust agreements and the LLC operating agreements, combined with the complexity of the review, the potential impact of the Trust Funds on the 3 units, and because the submittals to transfer the Trust Fund to LLCs are a first-of-a kind submittal, the staff notified AmerGen that the staff intended to conduct a detailed review of the proposed amendment to the Decommissioning Trust Fund Agreement and would need sufficient time to review the proposal.

The NRC staff issued a set of Request for Additional Information (RAI) designated ADAMS Accession Number ML03184006, and subsequently held a series of teleconferences with AmerGen to address and resolve the concerns that NRC identified in the RAI. The revised proposed changes to AmerGen's trust agreements and operating agreements submitted on June 17, 2003, documented the resolution of the staff's RAIs. This SER documents the results of the staff's review of the proposed amended trust agreements and the operating agreements.

3.0 REGULATORY FRAMEWORK

10 CFR 50.75 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. 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.

4.0 TECHNICAL EVALUATION

4.1 Documents Reviewed

The staff reviewed the following documents:

- Amended and Restated Qualified¹ Nuclear Decommissioning Master Trust Agreement with Mellon Bank, N.A.. The licensees have established a tax qualified trust for each licensed unit. The trust agreement is identical for each of the 3 units. The staff reviewed a representative trust agreement.
- Amended and Restated Nonqualified Decommissioning Master Trust Agreement with Mellon Bank, N.A.. The licensees established a non-tax qualified trust for each licensed unit. The trust agreement is identical for each of the 3 units. The staff reviewed a representative trust agreement.
- Amended Master Terms for Trust Agreement for Mellon Bank, N.A., 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 Bank, N.A.. The staff reviewed the master trust agreement.

¹ A tax qualified decommissioning trust meets the requirements of Section 468A of the Internal Revenue Code and associated IRS regulations.

- Operating Agreement² for AmerGen Consolidation, LLC, for a Nevada single member LLC to which the tax qualified trusts would be assigned.³ A single LLC would be created for which all 3 tax qualified trusts would be assigned. The staff reviewed this operating agreement.
- Operating Agreement for AmerGen Consolidation, LLC,, a Nevada single member LLC to which the non-tax qualified trusts would be assigned. Each trust would be assigned to a different LLC, creating a total of 3 LLCs. The staff reviewed a representative operating agreement. The staff also reviewed AmerGen's plans to use the LLCs for the non-tax qualified trusts as an interim step, and shortly after their creation to assign the Member's interests in the non-tax qualified trusts to AmerGen Consolidation, LLC.

4.2 Review Criteria

The documents were reviewed to ensure that the proposed trust agreements and operating agreements provided reasonable assurance that the funds will be available for the decommissioning process in accordance with 10 CFR 50.75. To provide reasonable assurance, the proposed trust agreements and operating agreements were reviewed against the criteria identified below which was based on the recent revisions to 10 CFR 50.75. The criteria are:

- Material modifications to the trust agreements cannot be made without 30 days prior written notice to the NRC.
- Disbursement of funds from the trust funds cannot be made without 30 days prior notice to the NRC.
- Disbursement procedures specified in the trust agreements can be carried out by the proposed LLCs.
- No disbursements of trusts may be made if the trustee receives written notice of objection from NRC within the 30-day period.

² 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." A recent study of LLCs calls the operating agreement "the heart of the relationship among the LLC, its members, and managers." Murdock, Charles W., "Limited Liability Companies in the Decade of the 1990's: Legislative and Case Law Developments and Their Implications for the Future," 56 Business Lawyer, 499, 511 (February 2001).

³The single member is the AmerGen Energy 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. Although numerous states require LLCs to have at least two members, Nevada law allows single member LLCs. See, Ribstein, Larry E., "The Emergence of the Limited Liability Company," 51 Business Lawyer, 1, 7 (November 1995)

- Proposed LLCs will not create inappropriate licensee involvement in investment decisions.
- All investments by the trust funds must meet the “Prudent Investor” standard.
- First priority for expenditure of monies from the trust funds will be for radiological decommissioning in compliance with NRC’s regulatory standards.
- Costs attributable to the establishment of the proposed LLCs will not be paid from monies in the decommissioning trust funds.
- Proposed restructuring will not reduce the assurance that the licensee, Exelon Generation Company, LLC, is directly responsible, if necessary, for providing funds for decommissioning the affected units.

5.0 CONCLUSION

Based on the review and follow up discussions concerning the RAIs, AmerGen made the necessary revisions to the proposed decommissioning trust. In addition, AmerGen provided explanations for specified provisions of the trust agreements and operating agreements. The revised trust agreements and operating agreements combined with AmerGen’s clarifications satisfactorily resolved the NRC’s concerns identified in the staff’s RAIs.

Based on the staff’s review of the revised trust agreements and operating agreements submitted on July 29, 2003, the staff’s review confirmed that the revised submittal addressed all of the criteria identified in Section 4.2, “Review Criteria” and incorporated all of the agreed resolutions to the staff’s RAIs into the revised trust agreements and operating agreement; therefore, the staff concluded the requirements of 10 CFR 50.75 have been met, and is approving the proposed amendment to the decommissioning trust agreements.