

August 9, 2012

EA-2011-271

Mr. Wayne Norton
Chief Nuclear Officer
Maine Yankee Atomic Power
Company
321 Old Ferry Road
Wiscasset, ME 04578-4922

SUBJECT: RESPONSE TO MAINE YANKEE ATOMIC POWER COMPANY, MAINE
YANKEE ATOMIC POWER STATION - DISPUTED NOTICE OF VIOLATION
05000309 (TAC L24538)

Dear Mr. Norton,

This letter provides the results of the U.S. Nuclear Regulatory Commission's (NRC or Commission) review of your letter, dated February 23, 2012 (ADAMS Accession No. ML12066A040), regarding the Notice of Violation (NOV) (NOV EA-2011-271, dated January 27, 2012 (ADAMS Accession No. ML120300334)). In your letter, you disagreed that the cited violation of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.38, "Ineligibility of Certain Applicants," had occurred. The NRC has reviewed your letter and applicable supporting documentation, and it has determined that NOV EA-2011- 271 occurred as stated for the reasons stated below.

Maine Yankee Atomic Power Company (Maine Yankee) is the licensee for the Maine Yankee Atomic Power Station and currently holds a 10 CFR Part 50 possession only license. Under 10 CFR 72, Subpart K, "General License for Storage of Spent Fuel at Power Reactor Sites," Maine Yankee is authorized to store spent fuel. Maine Yankee states that the Maine Yankee Atomic Power Station Independent Spent Fuel Storage Installation (ISFSI) is not a production or utilization facility and, therefore, does not fall within the provisions of the Atomic Energy Act that govern 10 CFR Part 50 licensees. In particular, you state that the statutory prohibition on foreign ownership, control or domination (FOCD) derives from the sections governing 10 CFR Part 50 licensees, therefore, the FOCD provisions do not apply to the Maine Yankee license. Maine Yankee notes in its letter that 10 CFR Part 72 has no explicit prohibition on foreign ownership control or domination (FOCD). Maine Yankee states that its 10 CFR Part 50 licensee does not allow operation of a production or utilization facility.

The staff has determined that the Maine Yankee proposal to apply the license transfer analysis of 10 CFR 50.80 to the FOCD restrictions of 10 CFR 50.38 is not appropriate. Maine Yankee's letter did not acknowledge that as a 10 CFR Part 50 licensee it must comply with all the requirements of 10 CFR Part 50 as currently written. That Maine Yankee is no longer authorized to operate an electric power production facility does not relieve it of the applicable 10 CFR Part 50 license requirements, including the FOCD requirements of 10 CFR 50.38. Maine Yankee also states that the FOCD prohibitions of 10 CFR 50.38 cannot arise without a finding of transfer of control of the 10 CFR Part 50 license under 10 CFR 50.80. Maine Yankee

makes two statements in support of its position. First, it says that no foreign entity holds a majority or controlling interest in Maine Yankee. Second, it says the NRC reviewed and allowed a foreign interest, National Grid, to acquire an interest in Maine Yankee, but concluded that the acquisition was not a transfer of control of the license.

Transfer of control of the license is not a necessary condition to make a determination that a foreign interest may have obtained FOCD of a licensee. With respect to the amount of ownership required to find FOCD, the NRC's Final Standard Review Plan on "Foreign Ownership, Control, or Domination," dated June 1999, (FOCD SRP) does not provide a specific threshold above which it would be conclusive that a licensee is controlled by foreign interests (64 FR 52357-52359). The NRC's FOCD evaluation considers the totality of the facts on a case-by-case basis. Section 3.2 of the FOCD SRP states, "An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the "power," direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant" (64 FR 52355- 52358). Moreover, FOCD can arise due to foreign entities or persons with voting rights, financial arrangements, or management positions such as directors, officers, or executive personnel in the licensee's organization. Based on its review of the totality of facts presented, the NRC determined that Maine Yankee violated 10 CFR 50.38 when it failed to implement a negation action plan that would negate the ability of foreign interests to exercise ownership, control or domination over Maine Yankee.

In contrast, the previous determinations of transfer of control of the Maine Yankee Atomic Power Station ISFSI license under 10 CFR 50.80 did not examine the totality of facts with respect to FOCD, since the totality of facts did not become apparent until the NRC's review of the indirect license transfer application submitted on December 6, 2010. The NRC's review identified an apparent violation of the requirements in 10 CFR 50.38 due to a series of incremental ownership changes that resulted in Maine Yankee being owned, controlled, or dominated by three foreign corporations – Iberdrola, based in Spain (38 percent); National Grid, based in the United Kingdom (24 percent); and Emera (12 percent).

In addition, Maine Yankee states that the indirect foreign ownership of minority shareholders in Maine Yankee does not equate to FOCD. The NRC agrees that the FOCD evaluation is not a simple review of ownership percentages. As previously stated, the Commission's FOCD SRP explains that the FOCD determination considers the totality of facts on a case-by-case basis. This was the subject of the meeting held on September 20, 2011, in Rockville, Maryland, with representatives of Maine Yankee Atomic Power Company, Connecticut Yankee, Yankee Atomic Electric Company, and Northeast Utilities, (together referred to as the "Yankee Companies"). The organization and governance of the Yankee Companies were discussed at the meeting. According to the Yankee Companies representatives, after completing decommissioning of the reactor facilities, Maine Yankee changed its bylaws to support weighted voting, where the number of directors was appointed based on the percentage of stock ownership, and that per the Maine statutes on corporate structuring, Maine Yankee included a provision for unanimous vote of shareholders to support the weighted voting structure, and unanimous consent provisions for Maine Yankee would apply to proposed changes to certain sections of the bylaws. Several directors represented foreign interests, and had the power, whether or not exercised, to participate in Board decisions regarding nuclear safety and security.

Maine Yankee states that the NOV does not identify any safety or security issue in which a foreign entity exerted actual control over Maine Yankee with respect to safety or security. However, asserting that actual FOCD was not exercised during that period is not relevant.

The FOCD SRP states, "An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the "power," direct or indirect, *whether or not exercised*, to direct or decide matters affecting the management or operations of the applicant." [Emphasis added]. FOCD SRP Section 4.2 directs the staff to consider whether the foreign interest has the ability to appoint managers. Finally, the regulatory standard is based upon a review of the totality of facts and circumstances which may require negation measures. Upon review of the information provided, the NRC has concluded that, in fact, foreign interests have that power. Since Maine Yankee is a 10 CFR Part 50 licensee, it is required to comply with all of the requirements of 10 CFR Part 50. Based on information provided, the staff finds that Maine Yankee was subject to FOCD and thus required a negation action plan during the period cited for in the NOV.

Separately, the NRC continues to review Maine Yankee's request, dated May 16, 2011, (ADAMS Accession No. ML11139A088) for an exemption to 10 CFR 50.38. The NRC will notify you the results of the staff's evaluation when it is completed

If you have any questions, please contact me at (301) 492-3338 or John Goshen of my staff, at (301) 492-3325.

Sincerely,

/RA/

Douglas W. Weaver, Deputy Director
Division of Spent Fuel Storage and Transportation
Office of Nuclear Material Safety
and Safeguards

Docket Nos.: 50-309, 72-30
License No: DPR-36

TAC No.: L24538

cc: Maine Yankee Atomic Power Station Service List

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Office of Nuclear Material Safety
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cc: Maine Yankee Atomic Power Station Service List **ADAMS P8 Accession No.: ML12226A232**

OFC	NMSS/SFST	NMSS/SFST	NMSS	NMSS/SFST	NMSS/SFST
NAME	WWheatley	JGoshen	KMattern	MWaters	DWeaver
DATE	6/ 02 /2012	6/ 19 /2012	6/ 21 /12	8/1 /2012	8/9/2012
OFC	NRR	NRR	OGC	OE	
NAME	JSimpson	CRegan	CSafford	JWray	
DATE	6/ 19 /2012	6/ 19 /2012	6/ 27 /2012	6/21/2012	

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Maine Yankee Atomic Power Station Service List

cc:

David A. Repka
Partner
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817

Senator Charles Pray
State Nuclear Safety Advisor
State Planning Office
State House Station #38
Augusta, ME 04333

First Selectman of Wiscasset
Municipal Building
U.S. Route 1
Wiscasset, ME 04578

Friends of the Coast
P.O. Box 98
Edgecomb, ME 04556

Mr. Jonathan M. Block
Attorney at Law
P.O. Box 566
Putney, VT 05346 0566

Joseph Fay, Esquire
Maine Yankee Atomic Power Company
321 Old Ferry Road
Wiscasset, ME 04578-4922

Mr. Gerald Poulin
Chairman and President
Maine Yankee Atomic Power Company
321 Old Ferry Road
Wiscasset, ME 04578-4922

Director
Division of Health Engineering
Department of Human Services
#10 State House Station
Augusta, ME 04333

Mr. Patrick J. Dostie
State of Maine Nuclear Safety Inspector
Department of Health and Human Services
Maine Public Health
Division of Environmental Health
286 Water St., Key Plaza - 8th Floor
State House Station 11
Augusta, ME 04333

Mr. Jay Hyland
State of Maine
286 Water St., Key Plaza - 8th Floor
State House Station 11
Augusta, ME 04333

Regional Administrator, Region I
U.S. Nuclear Regulatory Commission
2100 Renaissance Boulevard, Suite 100
King of Prussia, PA 19406-2713

Decommissioning Branch Chief, Region I
U.S. Nuclear Regulatory Commission
2100 Renaissance Boulevard, Suite 100
King of Prussia, PA 19406-2713

David R. Lewis, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1122

Mr. James Connell
ISFSI Manager
Maine Yankee Atomic Power Company
321 Old Ferry Road
Wiscasset, ME 04578-4922