

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee, LLC,
And Entergy Nuclear Operation, Inc., for
Amendment of their Certificates of Public Good
And other approvals required under 10 V.S.A. §§
6501-6504 and 30 V.S.A. §§ 231(a), 248 & 254,
For authority to continue after March 21, 2012,
Operation of the Vermont Yankee Nuclear Power
Station, including the storage of spent-nuclear fuel

DIRECT TESTIMONY OF
MICHAEL A. MULLETT, M.A., J.D., LL.M.

ON BEHALF OF
VERMONT DEPARTMENT OF PUBLIC SERVICE

November 14, 2008

Summary: Mr. Mullett identifies and analyzes the principal implications of continued operation of Vermont Yankee for twenty years beyond its current operating license on the management of the plant's spent nuclear fuel and low-level radioactive waste. He also describes and analyzes the regulatory commitments which ENVY and Entergy have made to the State of Vermont which will extend beyond the term of Vermont Yankee's current operating license.

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EXHIBITS:

DPS-MAM-1: Resume of Michael A. Mullett, M.A., J.D., LL.M.

DPS-MAM-2: Act 160 Report Chapter on Nuclear Waste Management

DPS-MAM-3: Act 160 Report Chapter on Economic Commitments

1 **I. INTRODUCTION**

2 **Q. Please state your name and business mailing address.**

3 A. My name is Michael A. Mullett. My business address is Mullett & Associates,
4 Counselors at Law, P. O. Box 2084, Columbus, IN 47202.

5
6 **Q. What is the nature of Mullett & Associates' business?**

7 A. The legal and consulting services provided by Mullett & Associates include principally
8 law and policy advice relating generally to the subjects of energy, utilities, and the
9 environment, especially the regulation and deregulation of public utilities and their affiliates.

10
11 **Q. What are your position and responsibilities with Mullett & Associates?**

12 A. I am the sole owner and senior counsel of Mullett & Associates. In that capacity, I
13 provide legal representation to certain clients in several legacy cases which I retained when I
14 transferred the balance of my active cases to a former associate, effective January 1, 2005.
15 However, my primary responsibility at the present time is to provide legal and policy advice
16 to my own clients and clients of other law and consulting firms which retain my services for
17 a specific case or project.

18
19 **II. QUALIFICATIONS**

20 **Q. Please summarize your educational background.**

1 A. I graduated with honors from the University of Michigan in 1966 with a Bachelor of Arts
2 degree in Political Science. I received a Master of Arts degree in Public Policy and
3 Administration with honors from the University of Michigan in 1973. I was awarded a Juris
4 Doctor degree, *magna cum laude*, by the Indiana University School of Law at Indianapolis in
5 1982 and a Master of Law degree in Environmental and Natural Resources Law from the
6 Lewis & Clark Law School in 1999.

7

8 **Q. Please summarize your recent professional experience.**

9 A. Following admission to the Bar in 1982, I have been engaged in the private practice of
10 law in the State of Indiana. I am admitted to practice before the Supreme Court of Indiana,
11 the Federal District Courts for the Northern and Southern Districts of Indiana, the Federal
12 Circuit Court for the District of Columbia, and the Supreme Court of the United States. My
13 primary area of practice has been utility regulation and deregulation, especially before the
14 Indiana Utility Regulatory Commission, the Indiana courts, and the Indiana General
15 Assembly. I have also appeared in various proceedings before other Indiana agencies, as
16 well as several proceedings before both the Federal Energy Regulatory Commission
17 (“FERC”) and the Nuclear Regulatory Commission (“NRC”).

18 Since January 2005, I have been focused principally on teaching and consulting. My
19 primary teaching responsibilities are as Adjunct Professor of Law at both the Indiana
20 University School of Law in Indianapolis, Indiana and the Lewis & Clark Law School in
21 Portland, Oregon, where I teach seminars, respectively, in Public Utility Regulation and

1 Deregulation and Nuclear Waste Law and Policy. My primary consulting assignments to
2 date have involved public utility regulation and deregulation projects for various clients,
3 including but not limited to GDS, the consulting firm which retained my services in this case.
4 A copy of my current resume is attached as Exhibit DPS-MAM-1.

5

6 **Q. Have you previously presented testimony as an expert witness on law and policy**
7 **matters relating to utility regulation and deregulation?**

8 A. Yes. I have previously presented testimony as an expert witness on various law and
9 policy matters relating to utility regulation and deregulation before committees of the Indiana
10 and Ohio legislatures, as well as in rulemakings and generic investigations before the Indiana
11 Utility Regulatory Commission. I have also testified before the Wisconsin Public Service
12 Commission. This is my first opportunity to testify before the Vermont Public Service
13 Board.

14

15 **Q. Have you recently presented testimony to a regulatory body with respect to legal**
16 **and policy matters associated with the ownership or management of a commercial**
17 **nuclear plant?**

18 A. Yes, in 2007, I was retained by Synapse Energy Economics to conduct a review and
19 present testimony on behalf of the Wisconsin Citizens Utility Board and Clean Wisconsin
20 with respect to the proposed transfer of ownership and operational control of the Point Beach
21 Nuclear Plant from Wisconsin Electric Power Company and the Nuclear Management

1 Company to FPL Energy - Point Beach, LLC. Specifically, I evaluated and presented
2 testimony in Docket No. 6630-EI-113 with respect to the commitments proffered by FPLE
3 regarding decommissioning and spent fuel management to compare those commitments to
4 those accepted by the Wisconsin Commission in conjunction with the transfer of ownership
5 of the Kewaunee Nuclear Power Plant, which had previously been approved in Docket No.
6 05-EI-136.

7

8 **Q. Have you recently been involved in preparing or presenting testimony to a**
9 **regulatory body with respect to any other aspect of the ownership or operation of a**
10 **commercial nuclear plant?**

11 A. Yes, in 2006 and 2007, I assisted in the preparation of the testimony of the witnesses
12 from Synapse Energy Economics who testified on behalf of the Attorney General of
13 Michigan before the Michigan Public Service Commission in Docket No. U-14992. This
14 testimony presented the results of Synapse's review of the Purchase Power Agreement and
15 other matters associated with the transfer of ownership and operational control of the
16 Palisades Nuclear Plant from Consumers Energy Company and the Nuclear Management
17 Company to a subsidiary of Entergy.

18

19

III. ASSIGNMENT

20 **Q. What is the purpose of your testimony?**

1 A. GDS Associates, Inc. was retained to assist the DPS in development of an analysis of
2 many issues relating to the license renewal at Vermont Yankee. GDS refers to the results of
3 this analysis as the Act 160 report. DPS also requested GDS to develop testimony to be filed
4 in Docket 7440 to summarize a number of the Act 160 report chapters. GDS retained me to
5 draft two chapters of the Act 160 report, one addressing the principal legal and policy issues
6 associated with Vermont Yankee's license renewal relating to nuclear waste management
7 and the other discussing the primary regulatory commitments previously made to the PSB
8 and DPS by ENVY and Entergy which will extend beyond the term of the plant's current
9 operating license. My testimony summarizes the results of my review as reflected in the Act
10 160 report chapters for which I am responsible, copies of which are appended as Exhibits
11 DPS-MAM-2 and DPS-MAM-3.

12

13 **Q. Have you relied on the work of others in preparing the Act 160 report chapters for**
14 **which you are responsible?**

15 A. Yes, I have. The work of others on which I have relied specifically is footnoted in
16 Exhibits DPS-MAM-2 and DPS-MAM-3. I have also relied generally on discussions and
17 communications with DPS and other State of Vermont personnel regarding the operational
18 and regulatory history of Vermont Yankee. However, unless otherwise indicated in my
19 exhibits, the conclusions and recommendations included in the report chapters for which I am
20 responsible are my own.

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IV. CONCLUSIONS AND RECOMMENDATIONS

Q. Please summarize the conclusions and recommendations included in the Act 160 report chapter on nuclear waste management.

A. The conclusions and recommendations included in the Act 160 report chapter on nuclear waste management address two general topics: spent nuclear fuel (SNF) and low-level radioactive waste (LLRW).

A. Spent Nuclear Fuel

The principal conclusions and recommendations included in the Act 160 report relating to SNF include the following:

1. Spent nuclear fuel is perhaps the most dangerous radioactive waste of all in terms of its threat to human health and the environment, absent appropriate measures for its safe storage and disposal.
2. Even though it accounts for less than one percent of the volume of all radioactive waste in the United States, SNF contains 95 percent of the radioactivity from all civilian and military sources combined. Generally, the radioactive isotopes in spent fuel are considered dangerous to human health and the environment for at least ten and, in some cases, as many as twenty half-lives. Thus, shorter-lived fission products, such as strontium-90 and cesium-137 with 30-year half-lives, require isolation from the environment for 600 years before being considered safe. By contrast, long-lived transuranics, such as plutonium-239, remain hazardous for at least 240,000 and perhaps as long as 500,000 years.

1 3. The Congressional Research Service has reported that, by 2010, there will be
2 approximately 62,000 MTU of commercially-generated spent fuel in temporary storage
3 nationwide. Additional spent fuel is currently being generated at the rate of approximately
4 2,150 MTU per year. DOE has estimated that the cumulative amount of commercial spent
5 fuel and other highly radioactive waste generated by commercial plants nationwide may
6 eventually reach 130,000 metric tons.

7 4. Currently, most commercial spent fuel is being stored in steel-lined, water-filled pools
8 below ground-level at the site of the generating reactor. However, a smaller but increasing
9 amount of spent fuel is being stored in heavy, thick-walled metal or concrete casks above-
10 ground on pads at reactor sites.

11 5. The Nuclear Waste Policy Act of 1982 established a program for developing a
12 geologic repository for the permanent disposal of up to 70,000 metric tons of spent nuclear
13 fuel and high-level waste. The Nuclear Waste Fund, which holds receipts from a fee on
14 commercial nuclear power to dispose of its waste and federal contributions for emplacement
15 of high-level defense waste, was established to pay for the program.

16 6. After much controversy over DOE's implementation of NWPA, the Act was
17 substantially modified by the Nuclear Waste Policy Amendments Act of 1987. Under the
18 amendments, the only candidate site DOE may consider for a permanent high-level waste
19 repository is at Yucca Mountain, Nevada. If that site cannot be licensed, DOE must return
20 to Congress for further instructions.

1 7. The Yucca Mountain repository was originally scheduled to be completed so that
2 DOE could begin accepting spent nuclear fuel from commercial reactors beginning in 1998.
3 However, numerous political, technical, financial and legal problems have significantly
4 delayed progress on the Yucca Mountain repository. As a result, DOE did not submit a
5 license application to the NRC for the planned Yucca Mountain repository until June, 2008.
6 Currently, it is expected that Yucca Mountain will not be licensed, constructed and ready to
7 receive nuclear waste shipments until 2020 — twenty-two years later than originally required
8 by the NWPA.

9 8. Because of the protracted delays regarding Yucca Mountain, over sixty utilities have
10 filed suits in the Court of Federal Claims seeking, in the aggregate, billions of dollars in
11 damages. Industry sources have predicted that owners of all of the nation's nuclear plants
12 will eventually collect damages totaling as much as \$53 billion. By comparison, DOE has
13 estimated that the federal government will be liable for \$7 billion in damages if Yucca
14 Mountain begins operating by 2017, with the liability growing by \$500 million for each year
15 of additional delay. These damage payments will be made from the federal government's
16 Judgment Fund, not the Nuclear Waste Fund.

17 9. Similar to the situation at many other nuclear plants, the Yucca Mountain delays have
18 meant that the amounts of spent fuel projected to accumulate at Vermont Yankee during its
19 current license period would exceed the capacity of the plant's spent fuel pool. As a result,
20 ENVY sought and obtained conditional approval from the NRC and PSB to construct and
21 operate a dry cask storage facility at the plant, commonly called an Independent Spent Fuel

1 Storage Installation (“ISFSI”). Under terms of the NRC license and PSB order regarding the
2 ISFSI, only SNF generated in Vermont may be stored at Vermont Yankee. It is expected that
3 ENVY will require a second ISFSI as early as 2015 to store Vermont Yankee’s spent nuclear
4 fuel.

5 10. Like the other nuclear utilities, VYNPC filed suit against DOE in the Federal Court
6 of Claims for breach of its spent fuel disposal contract. Following its purchase of VYNPS,
7 ENVY did also. The two suits were then consolidated by the Court of Claims, which then
8 ruled that DOE was liable to VYNPS and ENVY for their damages caused by the
9 Department’s breach of the spent fuel disposal contract, with the respective amounts of those
10 damages to be determined at a trial which has yet to be scheduled.

11 11. ENVY has developed and submitted to the NRC and PSB a plan for Vermont Yankee
12 spent fuel management assuming the plant will be shut down in 2012. However, under
13 existing rules, ENVY will not be required to develop and submit until 2027 a plan for SNF
14 management assuming a 2032 shutdown.

15 12. The NRC Staff has recently rejected ENVY’s initial plan for spent fuel management
16 subsequent to an assumed 2012 shutdown because of issues associated with the plan’s
17 funding.

18 13. As a result, the ENVY plans associated with spent fuel management and removal
19 assuming shutdown in 2032 are uncertain at the present time. However, recent proceedings
20 provide some guide as to the principal issues likely to arise regarding such a scenario.

21 Accordingly, in order for the Board and parties to fully analyze the adequacy of ENVY’s

1 petition, the company must develop and file analyses in its next round of prefiled testimony
2 addressing the following:

3 a. The need to significantly reduce the number and density of spent fuel assemblies
4 stored in the VYNPS reactor storage pool and transfer a significant number of those
5 assemblies to dry cask storage in order to reduce the risks of pool fires due to accidents or
6 malicious acts.

7 b. Analysis of the environmental impacts of spent fuel storage at the VYNPS site for a
8 period of time that will be significantly longer than contemplated in the NRC's Generic EIS
9 extending for a period of 50 to 60 years, or longer, after plant shutdown.

10 c. The amount of additional commitments necessary to address the funding of spent fuel
11 management after plant shutdown.

12 14. One of the principal differences between shut down and continued operation
13 scenarios for VYNPS spent fuel management will not be the existence but instead the
14 capacity, configuration, manner of operation, and life expectancy of the second dry cask
15 storage facility.

16 15. There are profound uncertainties associated with the Yucca Mountain repository and
17 the evolving federal policy response to the continuing conundrum of what to do with spent
18 nuclear fuel and other high level nuclear waste. This interplay has many ramifications for
19 spent fuel management at Vermont Yankee.

20 16. For instance, the 2012 shutdown scenario envisioned in ENVY's initial report to the
21 NRC and PSB would appear to be too optimistic regarding the opening of the Yucca

1 Mountain repository and the initiation of spent fuel removal from VYNPS. Specifically, it
2 now appears that the earliest plausible date for the opening of Yucca Mountain is 2020 and
3 not 2017. Moreover, there are significant uncertainties regarding the funding, licensing,
4 construction and operation of the Yucca Mountain repository which would make it prudent to
5 use both a “base case” and a “contingency case” for Vermont planning purposes. A 2020
6 date would be appropriate for the opening of Yucca Mountain in the “base case,” but a
7 considerably later date would be appropriate for the “contingency case” in order to analyze
8 the effects of an even more extended Yucca Mountain delay.

9 17. An inherent ramification of a Vermont Yankee license extension will be significant
10 additional amounts of spent fuel being generated by the plant, with potentially significant
11 implications for both the capacity and life expectancy of spent fuel management facilities at
12 the site. In order for the Board and parties to fully analyze the adequacy of ENVY’s
13 petition, the company must submit an analysis of these implications in its next round of
14 prefiled testimony.

15 18. The extended life expectancy of spent fuel management facilities in even a 2012 but
16 especially a 2032 shutdown scenario makes comprehensive analysis of the sources and
17 amounts of funding for spent fuel management very important. This financial information is
18 especially important where, as with Vermont Yankee, funds previously collected from
19 ratepayers for both decommissioning and spent fuel management are commingled in the
20 same trust funds and most spent fuel management costs – at least for waste generated through
21 2012 – would presumably be reimbursed by DOE as damages in the pending spent fuel

1 litigation. Again, in order for the Board and parties to fully analyze the adequacy of ENVY's
2 petition, the company must submit a comprehensive analysis of the sources and amounts of
3 funding for spent fuel management at the Vermont Yankee site covering both a 2012 and
4 2032 shutdown in its next round of prefiled testimony.

5 19. The effect of the proposed Enexus spinoff on ENVY's spent fuel management plan is
6 necessarily speculative at this time until the pending proceedings before the PSB have
7 concluded and the terms and conditions of any approval of the spinoff are known.

8 20. The effects on Vermont Yankee's spent fuel management plan of a future bankruptcy
9 filing by ENVY are somewhat less speculative than the effects of the Enexus spinoff. This
10 is because a bankruptcy filing is generally not a bar to enforcement by federal agencies of
11 ongoing regulatory obligations, especially where the obligations in question involve
12 protection of public health and safety as they do with spent fuel management. Additionally,
13 the extent to which spent fuel management funds are held in dedicated trust funds
14 disbursements from which are subject to NRC approval would also provide protection for
15 Vermont interests. However, any damage awards paid by DOE to ENVY as reimbursement
16 for spent fuel management costs incurred at VY would likely be considered general assets of
17 the bankruptcy estate. As a result, they cannot be assumed to be available to fund any
18 shortfall which may otherwise exist with respect to future spent fuel management funding.

19 **B. Low-Level Radioactive Waste**

1 The Act 160 report chapter on low-level radioactive waste (“LLRW”) adopts and updates
2 the conclusions and recommendations of the State Nuclear Engineer regarding LLRW in his
3 most recent report to the Vermont Legislature, principally:

4 1. Vermont Yankee is, by far, the largest LLRW generator in Vermont, with recent waste
5 volumes generated ranging from approximately 2,000 to 10,000 cubic feet annually, with the
6 variation in amount depending largely on the occurrence and nature of a plant outage in a
7 particular year. By comparison, in its last completed decommissioning study (January 2007),
8 Vermont Yankee estimated it will have 267,578 cubic feet of low-level decommissioning
9 waste.

10 2. Vermont Yankee is the sole generator of Class B and C waste in Vermont, and the
11 volume is small compared to the plant’s annual low-level radioactive waste generation in
12 total.

13 3. Nationally, the disposal of LLRW is governed by the Low-Level Radioactive Waste
14 Policy Amendments Act of 1985. The development of disposal facilities by the multiple
15 state compacts envisioned by the Act has not occurred. States selected to host new compact
16 facilities have all experienced difficulties developing sites, and efforts to locate sites are
17 stopped or stalled in all compacts. Currently, only the Northwest and Atlantic compacts
18 remain secure with usage of the existing Hanford, Washington and Barnwell, South Carolina
19 sites as disposal facilities..

20 4. A prime driving force for the lack of compact progress was the continued availability
21 until recently of the Barnwell site, and the emergence of the private (non-compact)

1 Envirocare of Utah facility in Clive, Utah (now named Energy Solutions). With considerably
2 lower disposal prices, Energy Solutions has become the disposal facility of choice for Class
3 A waste. Barnwell's higher prices have resulted in its use primarily for Class B and C waste
4 and special requirement disposal items which Energy Solutions does not currently accept.

5 5. The State of Vermont, following a protracted evaluation of its options, elected in 1994
6 to enter into a compact with the States of Texas and Maine ("Texas Compact"), which was
7 approved by Congress and the President in 1998. With the closing of the Maine Yankee
8 plant in 2002, the State of Maine withdrew from the Texas Compact.

9 6. South Carolina, host state for the Atlantic Compact's Barnwell site, began to exclude
10 access to non-compact members as of July 1, 2008. The Energy Solutions facility had
11 considered expanding its acceptance to include Class B and C waste, but has abandoned this
12 plan. Therefore, the Texas Compact facility appears to be the only future disposal option for
13 Vermont Class B and C wastes.

14 7. Under the Texas Compact, the State of Texas has committed to the development of a
15 LLRW disposal facility. The primary private candidate site is a 16,000-acre hazardous and
16 mixed waste disposal facility in Andrews County, owned by private developer Waste Control
17 Specialists (WCS).

18 8. Progress has been made recently with the licensing of the Compact site. In particular,
19 the Texas Commission on Environmental Quality (TCEQ) has now issued a Final Draft
20 License and the Draft Environmental Analysis to WCS. However, there are still significant
21 steps remaining to be accomplished before the Texas Compact facility becomes a reality.

1 9. WCS projects the following timetable for the balance of the licensing process for and
2 the initiation of LLRW waste disposal at the Compact facility:

3 09/17/08 – Close of public comment period and filing of request for public hearing

4 09/17/09 – Proposal for decision by TCEQ

5 11/15/09 – Final License issued by TCEQ

6 12/15/10 – LLRW disposal begins.

7 10. It currently appears that the Texas Compact facility is the only available option for
8 future disposal of Vermont Class B and C wastes. Accordingly, the State's participation in
9 the Texas Compact continues to be necessary. Pending completion of the Texas Compact
10 facility, Vermont Yankee has shielded concrete vaults on its site with sufficient capacity to
11 store Class B and C waste for at least five years

12 .
13 **Q. Please summarize the conclusions and recommendations included in the Act 160**
14 **report chapter on regulatory commitments.**

15 A. The principal conclusions and recommendations included in the Act 160 report chapter
16 on regulatory commitments include the following:

17 1. The current purchase power agreement with ENVY expires in 2012 when its current
18 operating license does. Because of the importance of the purchase power agreement to an
19 evaluation of the comparative costs and benefits of extending the operating life of Vermont
20 Yankee, serious consideration should be given to negotiation with ENVY of a successor
21 purchased power agreement which would become effective if and when the NRC approved

1 license extension and the Board issued a certificate of public good for continued operation of
2 VYNPS.

3 2. There are potential ambiguities and uncertainties in the ENVY commitment to share
4 excess revenues from VYNPS power sales in the event of a license extension and continued
5 operation. These ambiguities and uncertainties should be resolved prior to any issuance of a
6 Certificate of Public Good for continued operation of the plant post-2012.

7 3. The dollar amounts of the EIHL-ENVY Intercompany Credit Agreement and Entergy
8 Corporation guarantee should be re-evaluated for likely increases due to expected changes in
9 circumstances and the time value of money foreseeable by 2032; in addition, the substitution
10 of a third-party letter of credit for the parental guarantee should be seriously considered
11 independent of the current contingency of a downgrade of Entergy's security rating.

12 4. ENVY's commitment to provide additional funds or other acceptable financial
13 assurance to accomplish decommissioning, including site restoration and spent fuel
14 management, to the extent committed in Docket 6545, should also be clarified and
15 quantified.

16 5. The principal alternative scenarios and timetables for the decommissioning and
17 removal of spent fuel at VYNPS should be identified, evaluated, and quantified with respect
18 to the ENVY commitment to share excess decommissioning funds.

19 6. The principal alternative scenarios and timetables for the performance of Entergy's
20 commitment to VYNPS site restoration should be identified and evaluated.

1 7. The term "commercially reasonable" as it relates to ENVY's commitment regarding
2 removal of spent fuel should be clarified and articulated in a more definite manner, especially
3 in relation to the principal alternative scenarios and timetables associated with future spent
4 fuel generation and management at VYNPS.

5 8. ENVY's commitment to no storage at VYNPS of nuclear waste generated from out of
6 state should be expressly renewed in conjunction with any extension of the plant's operations.

7 9. In conjunction with any approval of extension of VYNPS' operations, ENVY's
8 commitment regarding the configuration of the plant's spent fuel pool should be defined with
9 more particularity in the context of the principal alternative scenarios and timetables
10 associated with spent fuel generation, management, and removal.

11 10. ENVY's commitment not to seek to have its other additional commitments pre-
12 empted should be expressly renewed in conjunction with any extension of the plant's
13 operations.

14 11. All of ENVY's additional commitments should be expressly extended to any
15 successor or assign in conjunction with any extension of the plant's operations.

16 12. ENVY is a Delaware limited liability company the key legal and operating
17 characteristics of which are defined in detail by non-public documents. These documents
18 should be obtained and reviewed with respect to their implications for the Company's
19 additional commitments for the benefit of Vermont ratepayers prior to any approval of the
20 proposed extension of the plant's operations.

21

1 **Q. Have you provided the bases for your conclusions and recommendations?**

2 A. Yes, the bases for my recommendations and conclusions are included in the Act
3 160 Report chapters on nuclear waste and regulatory commitments which are appended to
4 this testimony as Exhibits DPS-MAM-2 and DPS-MAM-3.

5

6 **Q. Does that conclude your testimony at this time?**

7 A. Yes, it does.