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May 4, 2011

VIA HAND DELIVERY

U.S. District Court  
Attn: Mr. Richard P. Wasko, Clerk  
11 Elmwood Ave., Rm. 506  
P.O. Box 945  
Burlington, Vermont 05402-0945

**Re: *ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., v. PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD***  
**DOCKET NO.: 1:11-CV-99**

Dear Mr. Wasko:

Please find enclosed the following documents for filing in the above referenced matter:

1. New England Coalition, Inc.'s Motion To Intervene;
2. Affidavit of Raymond Shadis in Support of The New England Coalition, Inc.'s Motion to intervene
3. Memorandum Of Law In Support OF New England Coalition, Inc.'s Motion To Intervene;
4. Notice Of Appearance of Brice Simon, Esq. of Breton & Simon, PLC on behalf of the proposed intervenor, New England Coalition, Inc.; and
5. Certificate of Service.

*Filing letter to U.S. District Court*

May 4, 2011

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Please feel free to contact me should you have any questions. Thank you for your kind assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Brice C. Simon', written in a cursive style.

Brice C. Simon, Esq.

Enclosures (as stated)

Cc w/ copies of encl.:

Client

Kathleen M. Sullivan, Esq.

Robert Juman, Esq.

Sanford I Weisburst, Esq.

William B. Adams, Esq.

Quinn Emmanuel Urquhart & Sullivan, LLP

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT )  
YANKEE, LLC and ENTERGY NUCLEAR )  
OPERATIONS, INC., )  
Plaintiffs )

v. )

Docket No: 1:11-CV-99

PETER SHUMLIN, in his official capacity as )  
GOVERNOR OF THE STATE OF )  
VERMONT; WILLIAM SORRELL, in his )  
official capacity as the ATTORNEY )  
GENERAL OF THE STATE OF VERMONT; )  
and JAMES VOLZ, JOHN BURKE, and )  
DAVID COEN, in their official capacities )  
as members of THE VERMONT PUBLIC )  
SERVICE BOARD, )  
Defendants )

**NEW ENGLAND COALITION, INC.'S MOTION TO INTERVENE**

Now comes the New England Coalition, Inc. (“NEC”), by and through counsel, Jared M. Margolis, Esq. and Brice Simon, Esq., and hereby moves the Honorable Court to allow NEC to intervene as a defendant in the above-captioned matter, pursuant to Federal Rule of Civil Procedure 24. In support of this Motion, proposed Intervenor NEC respectfully submits that this Motion is timely, that NEC has an interest relating to the transaction that is the subject of the action, NEC is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, and no existing parties adequately represent NEC’s interests. In further support of its Motion, NEC submits the accompanying Memorandum of Law, and Affidavit of Raymond Shadis.

WHEREFORE, the Court is respectfully requested to grant NEC's Motion to Intervene.

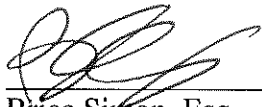
Respectfully submitted this 4<sup>th</sup> day of May, 2011.

NEW ENGLAND COALITION,  
INC.:

By: \_\_\_\_\_

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DAVID COEN, in their official capacities )  
as members of THE VERMONT PUBLIC )  
SERVICE BOARD, )  
Defendants )

**AFFIDAVIT OF RAYMOND SHADIS IN SUPPORT OF  
THE NEW ENGLAND COALITION, INC.'S MOTION TO INTERVENE**

Now comes the Affiant, Raymond Shadis, Member of the Board of Trustees of the New England Coalition, Inc. and advisor thereto, and hereby states the following under oath:

1. I am a trustee, advisor and expert witness for the New England Coalition, Inc. (hereinafter "NEC"), a Vermont non-profit educational corporation located in Brattleboro, Vermont with members throughout the State of Vermont and New England.
2. I have provided expert testimony on behalf of NEC before the Vermont Public Service Board ("PSB") and the Vermont Legislature regarding the condition, maintenance and operation of the Vermont Yankee Nuclear Power Station.
3. I have served as NEC's *pro se* representative in proceedings before the U.S. Nuclear Regulatory Commission and the Vermont Public Service Board.

4. NEC is the only organization founded expressly to investigate the ramifications of location, construction, and operation of Vermont Yankee Nuclear Power Station. As questions of nuclear safety, emergency planning, environmental impacts, and nuclear waste disposal emerged, NEC responded with programs of public education and advocacy regarding both nuclear hazards and safe, sustainable, and secure energy alternatives.
5. NEC has headquarters and property within the Vermont Yankee Emergency Planning Zone and the regional development zone of interest
6. Since the construction of Vermont Yankee NEC has consistently and actively participated in the regulation of Vermont Yankee, raising nuclear safety, economic and environmental issues in a manner not adequately addressed by the Vermont Department of Public Service or other divisions of the State of Vermont:
  - a. NEC intervened in the Atomic Energy Commission's ("AEC") initial licensing proceedings for Vermont Yankee, raising issues of emergency core cooling performance, containment adequacy, and waste nuclear fuel storage, which are unresolved 40-years later and all of which are issues in the March 2011 Japanese reactor accidents.
  - b. At the state level, New England Coalition participated in the public debate regarding approval of siting and construction of Vermont Yankee before the Vermont Legislature; approval passing by just one vote. New England Coalition participated in developing state regulation and oversight agreements with the original plant operator, Vermont Yankee Nuclear Power Corporation, on such subjects as fence-line radiation exposure limits, thermal discharge to the

Connecticut River, exploration of on-site engineered low-level waste storage, and the Low-Level Waste Compact for storage in Texas.

- c. In the late 1990's NEC, through its members and trustees, participated in formulation of a state energy plan that originally contemplated no role for Vermont Yankee in the state's energy mix past 2012. NEC actively participated in the Vermont Department of Public Service's subsequent obligatory public hearings regarding the plan, and NEC consistently maintained the original position that Vermont Yankee should not be part of the state power mix past 2012.
- d. In 1997, New England Coalition filed an enforcement petition (10 CFR §2.206) with NRC pointing out that Vermont Yankee's emergency steam suppression chamber would fail its function if it relied on cooling water at summer ambient water temperatures, resulting in administrative remedies.
- e. In 1999-2000, when Vermont Yankee's previous owner sought the permission of the Vermont Public Service Board to sell the plant to Plaintiff Entergy, NEC intervened in PSB Docket 6545. NEC championed retention of local (state) control, and NEC's expert witness focused the Board's attention on the fact that removing Vermont utilities' majority ownership share of VY through sale to an out-of-state entity would jeopardize, if not eliminate, many aspects of state regulation of VY.
- f. In the 10 years since the VY sale case (VPSB Docket 6545), NEC has intervened in Public Service Board Dockets 6812 (extended power uprate and sub-docket-rotor repair building), 6812-A (cooling towers), 6976 (parking lot expansion),

7082 (dry cask spent fuel), 7195 (steam dryer testing), 7544 (surveillance and reporting requirements – spent fuel), 7440 (CPG/license extension), and 7600 (tritiated process-water leaks).

- g. In addition, NEC was the only Vermont public interest intervenor before NRC on Extended Power Uprate License Amendment (2004-2007) and License Renewal (2006-2011). NEC intervened before the VT Environmental Court regarding Entergy VY's application for increased thermal discharge to the Connecticut River. During this period, NEC has filed six 10 CFR §2.206 NRC enforcement petitions drawing the agency's attention to safety and operability concerns at Vermont Yankee, ranging from pipe failures to lost nuclear fuel segments.
- h. In 2002, NEC launched a campaign to secure an NRC Independent Safety Assessment (an ISA) of Vermont Yankee; an ISA being an in-depth diagnostic evaluation of selected plants systems, designed to root out design, engineering, operation, and material defects. Approximately 10,000 signatures along with endorsements and petition letters from state and federal officials and local communities were submitted to the NRC. New England Coalition assisted in crafting language for a Vermont Senate resolution also calling on NRC to perform an ISA.
- i. Subsequently, NEC through its expert witnesses testified before committees of the Vermont Legislature on technical and regulatory aspects of a proposed reliability audit, long term nuclear waste storage, extended power uprate, NRC licensing processes, economics of nuclear plant closure, decommissioning standards and procedures, and license renewal. New England Coalition was an active

participant in legislative committee hearings and deliberations leading to Act-160, and NEC members were present to witness Entergy's withdrawal of opposition to the bill.

7. During the PSB hearings regarding the sale of Vermont Yankee to Plaintiff, NEC advocated against the sale due to the threatened loss of local control. Attempting to address the issue, the Vermont Department of Public Service entered into a Memorandum of Understanding with Plaintiff Entergy, extending the PSB's regulatory review. Most features of the MOU were incorporated into the Board's [CPG] Order (VPSB 6545 – 06/13/2002). Although the Board disagreed with NEC's warnings and conclusions regarding State "loss of control" over Vermont Yankee operations, in its Order the PSB incorporated MOU conditions as evidence and assurance that Vermont would retain jurisdiction and oversight, or even increase oversight. The Board's Order stated:

The second, very significant enhancement is ENVY's agreement in the MOU that its Certificate will terminate in 2012 and that this Board will have the full authority to review any request by ENVY to extend its license for an additional period of time.

Intervenors argue that this commitment is valueless because federal preemption will render it unenforceable. Upon review of state and federal law, we conclude that Vermont's authority to determine whether a license extension promotes the general good is not preempted.

By entering into a binding contractual commitment with the Department, upon which we expressly rely in reaching our decision today, ENVY has eliminated much of the jurisdictional uncertainty. VPSB 6545 – 06/13/2002 -PP: 79, 80

Further, as to CPG renewal, the Board stated:

ENVY and ENO have committed that they will not attempt to operate Vermont Yankee beyond its current term without obtaining an extension or renewal of its Certificate from the Board. ENVY and ENO have agreed that the following conditions can be imposed:

ENVY agrees that the order in this case may state that operation of [Vermont Yankee] beyond its current operating license termination date (March, 2012) is not permitted and will be allowed only if application to the Board for renewal of the [Certificate] is made and granted. ENVY and ENO expressly and irrevocably agree to waive any claim they or their affiliates may have that the jurisdiction of the Board to issue the [Certificate] is preempted by federal law.

Thus, the State's right to consider license renewal at issue in this litigation exists in part because NEC raised the issue of loss of local control, and the DPS negotiated the referenced MOU.

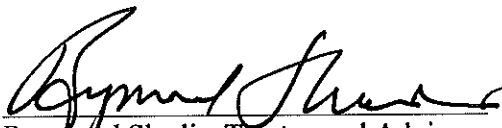
8. New England Coalition was instrumental in informing the Senate deliberations (committee and floor) and vote regarding the proposed license extension for Vermont Yankee – the decision Plaintiff's lawsuit squarely attacks. NEC contributed to the Senate floor deliberations in the form of a case study, Economic Consequences of the Closing of Maine Yankee Atomic Power Station, which NEC had commissioned in 2002 and which NEC's expert, Raymond Shadis, authored and presented to the Senate Finance Committee a few days before the vote. When the Senate majority was accused, by Entergy supporters, of not having considered the economic ramifications of closing VY, the NEC economic impact report was relied upon, printed for distribution to the entire body, and liberally quoted. It was the only economic document, perhaps the only external document, introduced on the floor of the Vermont Senate on the day of the vote.
9. NEC subsequently argued before the PSB that Entergy witnesses had given false testimony before the Board under cross-examination by both DPS and NEC regarding the existence of underground piping at Vermont Yankee with the potential to carry radionuclides. The Board took notice, and declared Entergy witnesses guilty of providing false testimony and levied monetary sanctions. The presence of such underground piping

can add to the cost, complexity, and duration of decommissioning and the return of the site to “greenfield” status. NEC will again be addressing this issue before the Vermont Public Service Board, if and when VPSB Docket 7440 resumes, which resumption will require resolution of the instant case

10. NEC’s record as a Vermont Yankee adversary and public interest advocate presenting nuclear safety and environmental concerns and sustainable energy and conservation advocacy, at every legislative and legal level is unequalled. NEC provides a necessary, public interest perspective regarding the history and technical aspects of the Vermont Yankee operation, which is not adequately addressed by the State of Vermont.
11. Entergy’s pursuit of its claims before this court are a direct threat to NEC’s interests and those of its members as advocates and petitioners before state government in two ways that further distinguish NEC’s interests from those of the State of Vermont:
  - a. In pursuit of its federal claims, Entergy has now issued a hold notice on all relevant state documents and communications, dated from 2001 forward. The pending discovery would cover all of the legislative and regulatory actions in which NEC has participated and as described in the foregoing statements. Thus, Entergy’s proposed investigation ominously overshadows and has a chilling effect on the rights of NEC and its members, to petition, to advocate and to communicate freely with its state government, elected representatives, appointed officials and agencies.
  - b. If this court renders a decision in the Plaintiff’s favor, much of NEC’s extraordinary investment of resources, time, and effort before the Legislature and the Vermont Public Service Board will have been wasted. Thus, NEC’s

extraordinary investment in, and recourse to, the State processes governing the operation of Vermont Yankee is directly attacked by the subject litigation. Only NEC can adequately defend its vested rights in the regulatory process Plaintiff is attempting to undermine through the subject litigation.


DATED at NEWCASTLE, Maine this 3RD day of MAY, 2011.

By:   
Raymond Shadis, Trustee and Advisor  
New England Coalition, Inc.

STATE OF MAINE )  
COUNTY OF Lincoln )

On the 3<sup>rd</sup> day of May, 2011, personally appeared Raymond Shadis, and he swore to the truth of the foregoing.

Before me,

  
Notary Public  
My Comm. Exp.: April 18, 2017

Stamp or Seal:

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT )  
YANKEE, LLC and ENTERGY NUCLEAR )  
OPERATIONS, INC., )  
*Plaintiffs,* )

v. )

Docket No: 1:11-CV-99

PETER SHUMLIN, in his official capacity as )  
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and JAMES VOLZ, JOHN BURKE, and )  
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as members of THE VERMONT PUBLIC )  
SERVICE BOARD, )  
*Defendants,* )

**MEMORANDUM OF LAW IN SUPPORT OF**  
**NEW ENGLAND COALITION, INC.'S MOTION TO INTERVENE**

NOW COMES the New England Coalition, Inc. (hereinafter "NEC") and, pursuant to F.R.C.P. 7(a)(2), submits the following Memorandum of Law in support of its Rule 24 Motion to Intervene. In addition, NEC incorporates herein by reference the accompanying Affidavit of Raymond Shadis in support of its Motion to Intervene.

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## **CONCISE STATEMENT OF THE ISSUE PRESENTED**

Should the New England Coalition, Inc. (“NEC”) be allowed to intervene in this proceeding, pursuant to Federal Rule of Civil Procedure 24, where NEC’s motion is being filed within three weeks of Plaintiff’s filing the Complaint, before the filing of any responsive pleadings, in a matter that will impact NEC’s members throughout New England and regarding which NEC has been significantly involved for many years, and where NEC’s intervention would not prejudice any parties or delay these proceedings?

## INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, NEC respectfully moves to intervene in the above-captioned proceeding. On April 18, 2011, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter “Entergy” or “Plaintiffs”) filed a Complaint for Declaratory and Injunctive Relief (the “Complaint”) alleging that the State of Vermont, acting through the Governor, Attorney General and Public Service Board, have impermissibly sought to assert jurisdiction over the continued operation of the Vermont Yankee nuclear power plant past the date of its current operating license, which expires in 2012. NEC has a long history of involvement before the Vermont Public Service Board, Vermont Legislature and the Federal Nuclear Regulatory Commission regarding the Vermont Yankee facility. *See* Affidavit of Raymond Shadis (filed herewith and incorporated herein by reference). NEC has members throughout Vermont and New England whose interests in this matter are different than the State of Vermont. *Id.*

Given NEC’s significant interests in the pending litigation, as well as NEC’s unique perspective and history in matters involving Vermont Yankee, and NEC’s active participation and expert testimony provided to both the Vermont Public Service Board and Vermont Legislature regarding relicensing issues, NEC’s intervention would aid and enhance the Court’s understanding of the underlying legal and factual issues and thereby assist with the efficient resolution of this action. Further, NEC’s intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Therefore, allowing intervention would be appropriate.

## MEMORANDUM

### I. Factual Background

After participating in many dockets before the Vermont Public Service Board, as well as hearings before the Vermont Legislature, and after years of State oversight of the Vermont Yankee nuclear power plant, on April 18, 2011, Entergy filed suit in this Court asserting that Federal Law preempts State oversight of the plant. Entergy has argued that the commitments Plaintiffs made to the State of Vermont not to pursue a federal preemption claim regarding relicensing no longer apply, and that the only basis for the State's decision is concerns over health and safety issues that are preempted by the Nuclear Regulatory Commission ("NRC"). As of the filing of NEC's Motion, the State of Vermont has not yet answered the complaint.

NEC is a Vermont not-for-profit corporation (formerly the New England Coalition on Nuclear Pollution) with headquarters and property within the Vermont Yankee Emergency Planning Zone. Affidavit of Raymond Shadis, ¶ 4. Since 1971, NEC's purpose has been to oppose nuclear hazards, and has advocated for increased safety and more effective regulation of the Vermont Yankee plant. *Id.* at ¶¶ 5 – 9.

NEC has members who live and work in the vicinity of the Vermont Yankee nuclear power plant, and whose interests may be adversely impacted by the continued operation of the plant. *Id.* Further, NEC's members include citizens of not only Vermont, but also New Hampshire and Massachusetts as well, whose interests may be impacted by the regional implications of the continued operation of the Vermont Yankee station on power production within the ISO-NE grid. Affidavit of Raymond Shadis, ¶¶ 1 – 9.

NEC seeks to intervene in this matter in order to represent its member's interests regarding the jurisdiction and authority of the State of Vermont to deny the continued operation

of the Vermont Yankee plant. NEC has participated before the Vermont Public Service Board and testified before the Vermont Legislature regarding the economic and reliability concerns of continued operation – areas that the U.S. Supreme Court has specifically stated are within the purview of the States.

NEC now seeks intervention in this matter, so that it can fully represent its members' interests in this proceeding, which have not historically been adequately protected by the State of Vermont. *Id.*

## II. Legal Standard

Federal Rule of Civil Procedure 24(a)(2) provides for intervention as of right to “anyone” who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2) contemplates a “rather expansive notion of the interest sufficient to invoke intervention of right,” *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), and does not require a potential intervenor to have a specific legal or equitable interest to be entitled to intervene. *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999).

In the alternative, NEC requests that it be permitted to intervene pursuant to Fed. R. Civ. P. 24(b)(1)(B). Under this rule, the Court may allow permissive intervention by anyone who “has a claim or defense that shares with the main action a common question of law or fact.” In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights. Fed. R. Civ. P. 24(b)(3). Unlike Rule 24(a), a “significant protectable interest” is not required by Rule 24(b) for intervention. All that

is necessary for permissive intervention is that the intervenor's "claim or defense and the main action have a question of law or fact in common." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002).

Moreover, Courts have noted that regardless of the path by which intervention is sought, "Rule 24 should be broadly construed in favor of potential intervenors," *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (internal quotations omitted), as "[a] lawsuit often is not merely a private fight and will have implications on those not named as parties." *Michigan State AFL-CIO*, 103 F.3d at 245 (internal quotations and alterations omitted). This liberal standard for demonstrating an adequate interest under Rule 24 is consistent with the "basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972).

### III. Argument

#### A. Intervention must be granted pursuant to Rule 24(a)(2).

Intervention must be granted as a matter of right under Rule 24(a)(2) for "anyone" who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

Therefore, under Rule 24(a)(2), an intervenor must show that:

(1) the application is timely; (2) "the applicant claims an interest relating to the property or transaction which is the subject matter of the action . . ."; (3) the protection of the interest may as a practical matter be impaired by the disposition of the action; and (4) the interest is not adequately protected by an existing party.

See *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). These requirements are readily met in this matter by NEC.

*i. NEC's Motion is Timely*

NEC's motion to intervene in this matter is timely, and will not prejudice the interests of the other parties. NEC's motion is being filed within three weeks of when the complaint was filed in this proceeding, before the filing of any responsive pleadings, and discovery has yet to commence in this case.

While Entergy has filed a motion for a preliminary injunction, briefing has not commenced on that motion, and a hearing on the motion has not been scheduled. In addition, NEC does not intend to offer any additional factual evidence regarding the preliminary injunction motion and, therefore, intervention would not delay the determination of that motion.

Where an intervention motion is filed shortly after the complaint while the case is "obviously in its initial stage," the motion is "timely as a matter of law." *Michigan State AFL-CIO*, 103 F.3d at 1245. Here, the proceedings are in their earliest stages, and whereas this motion has been filed while the case is "obviously in its initial stage" and would cause no prejudice to any of the original parties, intervention should be granted as timely as a matter of law.

*ii. NEC has a significant interest relating to the subject of this action.*

NEC has a long history of involvement with the Vermont Yankee nuclear power plant, and has undertaken efforts for many years to bring to the attention of the State of Vermont and the Nuclear Regulatory Commission the various reliability and economic concerns of its members. See Affidavit of Ray Shadis.

A number of courts have found a sufficient interest for intervention where a case threatens the interests of an organization dedicated to environmental or conservation issues. *See, e.g., Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001) (“[O]rganizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens these goals.”); *Mausolf v. Babbitt*, 85 F.3d 1295, 1302 (8th Cir. 1996) (recognizing association’s interest in preventing unrestricted snowmobiling and in vindicating conservationist vision for national park); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (recognizing organization’s concern with preservation of birds and their habitats); *Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998) (litigation concerns legislation the organization supported, and threatens interests of organization’s members in environmental quality and rural character of area).

As set forth above and in the affidavit of Raymond Shadis, NEC has a long standing involvement in the regulation of nuclear power plants that plainly satisfies these intervention standards. NEC is a non-profit, environmental organization founded by several groups of citizens and scientists concerned about the nation’s growing civilian nuclear power program. NEC’s mission is to “investigate the safety, suitability, and environmental effects of nuclear power plants; and to participate in government hearings and inform the public and government agencies of the hazards and risks of nuclear power.” NEC’s combination of grassroots activism and legal work has helped decommission the Maine Yankee nuclear power station, and resulted in more protective oversight of nuclear plants throughout the northeast.

In addition, an organization such as NEC also has a right to intervene to ensure that the law is properly enforced, particularly where the proposed intervenor has a demonstrated and long-standing interest in that law. *Michigan State AFL-CIO*, 103 F.3d at 1245-47. As discussed

herein, NEC has years of experience in litigation and advocacy regarding the Vermont Certificate of Public Good process pursuant to 30 V.S.A. § 248, as well as before the NRC on health and safety issues. NEC has participated in these proceedings and protected its members' interests (as well as the interests of all Vermonters) by ensuring that the Vermont Public Service Board and the NRC are fully informed when making their decisions.

NEC therefore has long understood the dual jurisdiction afforded by the Supreme Court in *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (hereinafter "*PG&E*"), and has acted well within the scope of the Court's preemption jurisprudence by actively participating before the NRC regarding matters related to health and safety, while providing testimony and arguments before State regulators regarding non-preempted issues, such as economic and reliability concerns. NEC has an interest in ensuring that the law regarding preemption, as enunciated by the Supreme Court, continues to allow States to play a role in the oversight of nuclear power plants. NEC's long-standing interest in ensuring that States continue to provide sufficient regulatory oversight indicates that NEC has a direct and substantial interest in this litigation.

Finally, the Circuit Courts have held that parties seeking to intervene as of right need not satisfy Article III standing requirements. In *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998), the court stated: "...we hold that Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." Nor must intervenor-plaintiffs have an independent cause of action. *See Id.* at 832.

The present suit, which involves an effort to remove any and all State oversight over nuclear power plants, plainly implicates NEC's interests in protecting its members and the citizens of New England from the harms of nuclear power generation – including non-preempted economic and land-use related harms. As such, NEC easily satisfies the protectable interest prong of the Rule 24(a)(2) intervention standard. *See Donaldson v. United States*, 400 U.S. 517 (1971) (requiring a “significantly protectable interest” for intervention).

*iii. If Entergy succeeds in this action, NEC's interests will be impeded.*

NEC has spent countless time and resources participating in proceedings before State legislators and regulators to represent the interests of its members. These efforts have focused on closing what NEC believed to be a poorly managed, deteriorating nuclear power plant that cannot be reliably operated past 2012 (and is not being reliably operated now). NEC believes that its years of participation in these matters has lead to an understanding by Vermont legislators that the Vermont Yankee plant is unreliable, and that Entergy is not able to manage Vermont Yankee in a reliable manner, and that the economic and land-use related risks of continued operation are too high to warrant relicensing. NEC has therefore worked hard to ensure that the Vermont Yankee plant is not relicensed, and ultimately Vermont appears to have accepted NEC's position, and decided that the continued operation of this plant in our State is not in the public good.

All of those effort, as well as NEC's ongoing and future planned efforts in other states, to ensure that the voice of our members is heard by regulators, who can then take action to protect NEC members' interests will be forever altered and impaired, if not voided entirely, if the Court rules in favor of Entergy. NEC does not believe that Federal oversight by the NRC has been adequate, and reliance on the NRC will not ensure that the interests of states over economic and

land-use concerns will be adequately addressed absent State authority over these traditional areas of State concern. NEC has therefore worked within both the State and Federal domains to ensure that all aspects of nuclear power production are understood and adequately regulated, and the States have an important role to play in the dual regulatory scheme applicable to nuclear power plant. *See PG&E* at 205.<sup>1</sup> The Court’s decision will therefore directly influence NEC’s mission and its ability to seek the oversight that is central to its goals.

In addition, absent participation in this case, NEC’s ability to “bring [its] particular knowledge and expertise to bear on the statutory issue” may be impaired. *See* 76 A.L.R. Fed. 762 § 5[a]. Indeed, NEC brings to this case decades of knowledge and experience in working to ensure proper regulation and oversight of nuclear power plants. It is therefore in a special position to contribute significantly to the disposition of the claims, and its interests will be significantly affected by the Court’s decision in this matter.

*iv. NEC’s interests are not adequately represented by other parties.*

Finally, an applicant for intervention must show that its interests may not be adequately represented by the existing parties to the litigation. The burden of demonstrating inadequate representation is “minimal,” as the proposed intervenor need not show that the representation of its interests “will in fact be inadequate,” but only that such representation “*may* be inadequate.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).

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<sup>1</sup> *See also PG&E* n.19 (emphasis added):

“This account indicates that from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear powered electricity generation: the Federal Government maintains complete control of the safety and “nuclear” aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.”

In order to meet the “timeliness” requirement, this motion is being submitted prior to the Vermont Attorney General filing a response to the complaint, and as such it is not possible for NEC to know exactly what arguments or positions the State may take. Regardless, although a presumption of adequate representation arises when the putative representative is a governmental body, that presumption is overcome when the applicant shows “that its interest is in fact different from that of the [governmental entity] and that the interest will not be represented by [it].”

*Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996).

Furthermore, a number of courts have found that because the government is required to represent the interests of the public in general, a governmental party is often not able to adequately represent the specific interests of an environmental or other type of advocacy group. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003); *Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001) (granting environmental organization’s intervention of right because the government’s obligation to represent the public interest generally may not be coextensive with the intervenor’s particular interest, and the government is subject to unanticipated policy shifts); *Coalition of Arizona/New Mexico Counties v. U.S. Dept. of Interior*, 100 F.3d 837, 845 (10th Cir. 1996); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 776, 780-81 (4th Cir. 1991) (granting Sierra Club intervention as of right because the organization represents a subset of citizens represented by the State agency and would offer a different perspective than the government on issues in the litigation).

NEC is a public interest group with a very specific mission that has often conflicted with the State’s decisions regarding Vermont Yankee. NEC has consistently taken a contrary position to the State in dockets before the Vermont Public Service Board regarding the Vermont Yankee

Station. NEC has disagreed with the state over reliability, land-use and economic concerns regarding Vermont Yankee, and conducted important and lengthy cross examination of the State's experts regarding the Comprehensive Reliability Assessment, as well as testimony and arguments that show a very different position with regards to the ability of Entergy to operate the Vermont Yankee nuclear power plant reliably in the future, and as the plant ages.

Although NEC and the State of Vermont may both argue that the Court should find that the State retains jurisdiction over certain matters related to Vermont Yankee, these entities have inherently different overall interests. NEC is a non-profit organization dedicated to opposing nuclear hazards, and has advocated for increased safety (before the NRC) and more effective regulation of existing nuclear power plants by States. NEC members have localized and focused interests regarding reliability and land-use related concerns. By contrast, the State in this case represents all of the interests of the State, including economic and political interests that must be balanced against the interests that NEC represents.

This division of interests is not just theoretical; it is described in NEC's filings before the Public Service Board. To support these efforts, NEC has initiated several lawsuits on behalf of its members, and intervened in dockets before the Vermont Public Service Board and the Federal Nuclear Regulatory Commission to assert the interests of its members. NEC members have a strong interest in preventing the continued operation of a nuclear power plant that NEC feels to be poorly managed and unreliable. NEC and the State may also have different interests regarding the scope of preemption, and the role the State should play regarding oversight of the Vermont Yankee plant.

In determining whether there is adequate representation courts also consider "whether the interest of a present party is such that it will *undoubtedly* make *all* the intervenors'

arguments....” *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (emphasis added). Even where the proposed intervenor and an existing party have the same general goal in the litigation, inadequate representation can be found if the intervenor may seek to raise arguments that the existing party would not. *Michigan State AFL-CIO*, 103 F.3d at 1247. In this case, the State will not “undoubtedly make all” of NEC’s arguments, and NEC may present additional arguments and evidence pertaining to the scope of preemption and the State’s jurisdiction over nuclear power plants, as well as the reliability and economic concerns that would justify a decision to deny relicensing.

Moreover, NEC has members outside of Vermont, whose interests will be affected by a decision in this matter, but who are not represented by Vermont. This includes NEC members living in the emergency evacuation zone of Vermont Yankee in New Hampshire, as well as NEC members living in New Hampshire and Massachusetts, whose electricity comes from the ISO-NE grid that Entergy claims would be impacted by a decision regarding the continued operation of the Vermont Yankee station. No other party represents the interests of these NEC members.

Finally, the State of Vermont may be more open to settling the suit or less likely to appeal any decision than would NEC. This too overcomes any presumption of adequate representation. *See Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999) (“A greater willingness to compromise can impede a party from adequately representing the interests of a nonparty.”). The existence of such differences is sufficient to establish that representation of an intervenor’s interest by the governmental may be inadequate. *See Id.*

B. In the alternative, NEC has satisfied all of the elements for permissive intervention pursuant to Rule 24(b).

If the Court should find that NEC has not met the requirements for intervention as a matter of right pursuant to Rule 24(a), NEC should still be allowed to intervene permissively pursuant to Rule 24(b). Pursuant to Rule 24(b), the Court may allow permissive intervention by anyone who “has a claim or defense that shares with the main action a common question of law or fact.” In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights. As discussed above, NEC has made a timely motion for intervention, and NEC’s participation in these proceedings will not prejudice any party. The only question, then, is whether NEC would assert a question of law or fact in common with the main action.

NEC intends to assert defenses that are directly responsive to the claims brought by the Plaintiffs in this action. This case regards the scope and limits of State jurisdiction over the licensing of nuclear power plants. The Plaintiffs have asserted that the State of Vermont is entirely preempted from asserting jurisdiction over the Vermont Yankee nuclear power plant, and that the NRC preempts all State authority in this field. This is not accurate. The Supreme Court specifically stated in *PG&E* that Congress:

intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that States retain their traditional responsibilities in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.

*PG&E* at 205. As discussed above and in the affidavit of Raymond Shadis, NEC has participated before the Vermont Public Service Board in almost every docket related to Vermont Yankee, including Docket No. 6545 (the sale of Vermont Yankee to Entergy), Docket No. 7440 (the relicensing Docket) and Docket No. 7600 (the tritium leak – wherein preemption arguments

were made by the parties). The focus of NEC's involvement has always been to provide the factual and legal basis for the Board to consider the economic, land-use and reliability related issues involved in the continued operation of the Vermont Yankee station.

NEC's experts have also provided testimony before the Vermont Legislature regarding the economic and reliability concerns related to continuing operation of the Vermont Yankee station. In fact, while the Legislature was able to review thousands of pages of testimony and arguments from their own investigations as well as from the proceedings before the Public Service Board prior to voting against allowing the PSB to rule on the issuance of a Certificate of Public good, one of the few items that was handed out on the floor of the legislature on the day of the vote was a report on the economic implications and ramifications of the closure of Maine Yankee on the local and regional economy, authored by NEC's expert consultant Raymond Shadis.

NEC is therefore in a position to provide the Court with the factual background necessary for the Court to understand the non-preempted traditional state concerns that are a reasonable basis for the State's denial of continued operation of the Vermont Yankee nuclear power plant. Entergy has ignored the voluminous arguments made by NEC before the Vermont Legislature and Public Service Board, which indicate that there are many concerns outside of the realm of human health and safety that provide a valid basis for the State's decision. NEC will claim and intends to show that Entergy's complaint lacks merit, and that the State does indeed retain jurisdiction over certain aspects of Vermont Yankee, and that there is a legal and factual basis, established by NEC in its efforts before the Vermont Legislature and Public Service Board, for the State to find that continued operation of Vermont Yankee is not in the public good.

NEC has satisfied the requirements of Rule 24(b), and NEC's long history of involvement in legal proceedings regarding Vermont Yankee warrant the Court providing intervention to allow NEC to continue to protect its members' interests. NEC therefore respectfully requests that if the Court denies its motion to intervene as of right, the Court exercise its discretion to permit permissive intervention to defend against the challenges to Vermont's authority to regulate and license the Vermont Yankee nuclear power plant.

#### IV. Conclusion

For the foregoing reasons, NEC must be granted intervention pursuant to Rule 24(a)(2). In the alternative, given NEC's unique perspective with respect to this matter, NEC's intervention would very likely aid and enhance the Court's understanding of the underlying legal and factual issues and thereby assist the efficient resolution of this action. Further, NEC's intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Therefore, allowing permissive intervention would be appropriate.

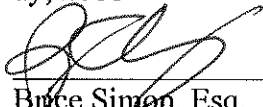
WHEREFORE, NEC respectfully requests the Honorable Court grant its motion to intervene as of right, or in the alternative for permissive intervention.

Dated at Jericho, Vermont this \_\_\_\_\_ day of May, 2011.

NEW ENGLAND COALITION, INC.:

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Dated at Stowe, Vermont this 4<sup>th</sup> day of May, 2011

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT )  
YANKEE, LLC and ENTERGY NUCLEAR )  
OPERATIONS, INC., )  
Plaintiffs )

v. )

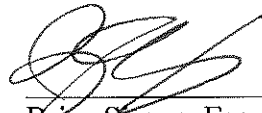
) Docket No: 1:11-CV-99  
)

PETER SHUMLIN, in his official capacity as )  
GOVERNOR OF THE STATE OF )  
VERMONT; WILLIAM SORRELL, in his )  
official capacity as the ATTORNEY )  
GENERAL OF THE STATE OF VERMONT; )  
and JAMES VOLZ, JOHN BURKE, and )  
DAVID COEN, in their official capacities )  
as members of THE VERMONT PUBLIC )  
SERVICE BOARD, )  
Defendants )

**NOTICE OF APPEARANCE**

Now comes Brice Simon, Esq., of Breton & Simon, PLC, and hereby enters his  
appearance on behalf of the proposed intervenor, New England Coalition, Inc.

Dated this 4<sup>th</sup> day of May, 2011.



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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT )  
YANKEE, LLC and ENTERGY NUCLEAR )  
OPERATIONS, INC., )  
Plaintiffs )

v. )

) Docket No: 1:11-CV-99

)  
PETER SHUMLIN, in his official capacity as )  
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VERMONT; WILLIAM SORRELL, in his )  
official capacity as the ATTORNEY )  
GENERAL OF THE STATE OF VERMONT; )  
and JAMES VOLZ, JOHN BURKE, and )  
DAVID COEN, in their official capacities )  
as members of THE VERMONT PUBLIC )  
SERVICE BOARD, )  
Defendants )

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I filed the foregoing document with the Clerk of the Court. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

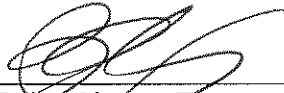
Robert B. Hemley, Esq.  
Matthew B. Byrne, Esq.

Michael N. Donofrio, Esq.  
Scot L. Kline, Esq.

I hereby certify that on this date, I served the foregoing document by first-class mail to the following attorneys of record:

Kathleen M. Sullivan, Esq.  
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DATED: 5/4/11

  
\_\_\_\_\_  
Bruce Simon, Esq.  
Counsel for NEC