

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of Entergy Nuclear Vermont Yankee, LLC, and)	
Entergy Nuclear Operations, Inc., for amendment of their)	
certificates of public good and other approvals required)	Feb. 2, 2012
under 10 V.S.A. §§ 6501-6504 and 30 V.S.A. §§ 231(a),)	Docket No. 7440
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)	

**NEW ENGLAND COALITION INC.'S OPPOSITION TO MOTION SEEKING
ISSUANCE OF A FINAL DECISION AND ORDER GRANTING CPG**

NOW COMES the New England Coalition, Inc. (NEC), by and through its attorney Jared Margolis, and hereby opposes Entergy's Motion Seeking Issuance of a Final Decision and Order Granting CPG. In support thereof, NEC provides the following Memorandum.

MEMORANDUM

1. Introduction

On January 19, 2012, the United States District Court for the District of Vermont issued its Decision and Order on the Merits of Plaintiffs' Complaint in Docket No. 1:11-cv-99 (jgm) (Entergy v. Vermont). In that decision, the Court struck down the provisions of certain Vermont statutes, which had acted as a barrier to this Board's authority to render a decision in Docket No. 7440. Whereas legislative approval for this Board to issue a decision has been deemed unnecessary, the Board is now able to move forward and complete its review, and issue a decision regarding whether issuance or denial of a Certificate of Public Good (CPG) for the continued operation of the Vermont Yankee facility is appropriate.

Entergy has moved this Board for a decision based on the record that has already been created in Docket 7440. Entergy makes this motion even though it argued before the Vermont

Federal District Court that the appropriate course of action would be to begin anew before the Board, free of the taint of legislative influence and preempted content (see below). Entergy's Motion for a decision based on the existing record is therefore both frivolous and disingenuous. For the following reasons, the Board should deny Entergy's Motion, and conduct a status conference (as requested by DPS) to establish the appropriate procedures for its review of Entergy's request for a CPG.

In that regard, for the reasons stated more fully below, NEC believes that it would be appropriate for the Board to order Entergy to re-apply for a CPG, given that the prior application and subsequent record established in Docket 7440 is too stale for adequately meaningful review and is obsolesced by new and relevant information. Further, the record is thoroughly tainted with information and references to what the Federal Court has now explained to be potentially preempted concerns. NEC therefore submits that a renewed application and additional hearings are necessary before the Board can appropriately rule on Entergy's application for a CPG.

2. The record in Docket 7440 is stale and does not include pertinent and material information.

NEC submits that there remain substantial issues that require additional evidence before the Board could make adequate findings of fact and conclusions of law regarding Entergy's application for a CPG. First, the record in Docket 7440 was established over 2 years ago. The significant lapse of time has several ramifications. There was dramatically conflicting testimony and evidence at the technical hearings in Docket No. 7440. Much of that testimony is now stale. In order to render a decision, the Board would have to make credibility determinations, and ultimately render a decision that would give greater credence to some testimony, while discounting other testimony. Without having the witnesses' testimony fresh in mind, the Board would be unduly disadvantaged in trying to make essential credibility determinations. On the

present record, without contemporaneous testimony, it would be difficult, if not impossible, for the Board to make a well-reasoned decision regarding whose testimony is most reliable.

Moreover, several events have transpired in the past two years that render the existing record incomplete and inadequate to provide the basis for supportable findings of fact. As an example, soon after the close of the record in Docket 7440, it became known that Entergy provided incorrect and misleading information to the State regarding the presence of underground pipes, which not only exist at the plant (contrary to Entergy's false testimony), but leaked tritium and potentially other contaminants into the surface and groundwater in the vicinity of the plant – a public trust resource. This matter was not incorporated into the record in Docket 7440. Rather, the Board decided to open a new docket (Docket No. 7600), which dealt with the contaminated process-water leaks and the potential impacts. The implications of the leaks have not been ruled on in Docket 7600, nor have they been addressed within Docket 7440. The potential for increased decommissioning costs, the impact on the potential reuse of the site in the future and the potential environmental impacts from these leaks – all non-preempted criteria that the Board must consider under Section 248 – are important issues that the Board must rule upon when deciding whether continued operation of the VY plant would be in the public good. *See* 30 V.S.A. §248(b)(1), (4) and (5); *Petition of Green Mountain Power*, Docket No. 5823, Order of 5/16/96 at 42 (the Board must base its determinations on sufficient and credible evidence regarding compliance with the § 248 criteria).

The record in Docket No. 7440 still contains Entergy's false and misleading testimony regarding the presence of underground pipes at the VY plant. Such testimony needs to be corrected, and the parties should be afforded the opportunity to present evidence and cross examine witnesses relative to the false and misleading information previously provided to the

Board. The Board needs to determine how the false testimony impacts the current record in Docket 7440, as well as how the Board should view Entergy as a corporate partner for the State of Vermont. Entergy has repeatedly shown, through its statements and conduct, that it is untrustworthy, and the incredulity of the Applicant impacts whether continued operation of VY by Entergy is in the public good of the State of Vermont. Since these matters have not been incorporated into the record in Docket 7440, that record is incomplete and must be, at the very least, reopened for further testimony and submission of evidence.

Additionally, the energy market has changed substantially since the evidence was presented in Docket 7440, making the forward energy market predictions in the record outdated. These predictions are essential in determining the economic benefits of continued operation, since they impact the proceeds that certain State utilities will receive pursuant to the Revenue Sharing Agreement (RSA) contained in the Memorandum of Understanding from Docket 6545 (the Sale MOU). The Board will recall that Entergy is relying on the potential proceeds from the RSA as a basis for meeting the economic benefit requirements of 30 V.S.A. § 248(b)(4). At the time of the technical hearings, then-current energy prices were below the strike price, and forward energy prices had been falling significantly.¹ The value of the RSA to Vermont utilities and ratepayers has the potential to be negligible, or amount to no benefit at all, depending on market rates. If market rates remain below the Strike Price, then there would be no benefit under the RSA. An updated analysis of forward energy markets is therefore necessary in order for the Board to assess the economic benefit, or lack thereof, of the RSA and thereby determine whether continued operation would provide the economic benefits that Entergy has relied on in its arguments pursuant to 30 V.S.A. § 248(b)(4). *See In re: Champlain Pipeline Co.*, Docket No.

¹ *See* Tr. 6/02/09 at 99 (Deehan); Chernick Feb. 11, 2009 Pf. at 24; Lamont Feb. 11, 2009 Pf. at 15.

5300, Order of 8/21/89 at 47 (stating that the petitioner bears burden of proof to show that they satisfy all elements of § 248); *Petition of Green Mountain Power*, Docket No. 5823, Order of 5/16/96 at 42 (the Board must base its determinations on sufficient and credible evidence regarding compliance with the § 248 criteria).

Additional information regarding Entergy's corporate structure and economic viability have also come to light since the record was closed in Docket No. 7440, which should be incorporated into the record. For example, Entergy failed to reorganize its nuclear division as a leveraged spin-off (Enexus) and as a consequence withdrew its application for a CPG in Docket No. 7404. Entergy also failed to find a buyer for Vermont Yankee, signaling a lack of market confidence in Vermont Yankee's viability. Furthermore, in a 2011 Earnings Call, Entergy CEO, J. Wayne Leonard, stated:

For the pessimists, and I know there may be a lot of you out there on this issue, one thing you should know is, and it may not have been well, but over the last few years, VY's earnings contribution to Entergy at best has simply covered its fully allocated overhead. Some of that is fixed and some of that is variable.

Entergy ([ETR](#)) Q4 2010 Earnings Call February 08, 2011 11:00 am ET. This apparent lack of profitability and market confidence is important in determining the true extent of the economic benefits that Entergy claims will result from relicensing – information that is necessary in order for the Board to fully assess the economic benefits of continued operation. 30 V.S.A. § 248(b(4)).

Furthermore, since the time the record was closed in Docket 7440, the nuclear power industry was confronted with the very real potential for catastrophe when the Fukushima Plant in Japan was struck by an earthquake and tsunami. Since that time, the NRC has discussed the implementation of certain measures to retrofit nuclear plants to prevent similar disasters here in the U.S. While it is clear that the Board may not consider the radiological health and safety

implications of the disaster, or the requirements that may be imposed to prevent VY from a similar fate, the Board certainly can and should consider the economic, aesthetic and environmental implications of the Fukushima disaster, and those actions Entergy may take in response to the ongoing fallout from that experience. Once again, the fact that this issue has not been incorporated into the record indicates that the existing record is incomplete, and must be, at the very least, be updated.

3. Supplementing the existing record would not be sufficient, and a new docket is required to ensure that the Board renders a valid decision.

Simply supplementing the existing record would not be enough to allow this Board to render a valid decision based on the testimony and record that was created over two years ago. That record would presumably need to be scrubbed of all references to safety-related issues in order for the Board to render a decision that was not tainted by Entergy's concerns regarding preemption. This is essential to avoid further unnecessary litigation, since Entergy could otherwise claim that any adverse decision rendered by the Board was tainted by health and safety concerns. Despite Entergy's promise not to raise preemption issues, it has done so already relative to a variety of statements in the public record. There is no reason to believe that Entergy would not raise preemption as a bar to any adverse decision by the Board considering the arguable health and safety issues contained in the hearing record. Such a preemption claim could paralyze the relicensing process in endless litigation.

In fact, Entergy's attorney, Mrs. Sullivan, explained to Judge Murtha during the Federal hearings exactly why Entergy believed that the record in Docket 7440 was tainted, and why Entergy would need to start over with a new Docket, contrary to the Motion it has now made requesting a decision on the existing Docket record. Attorney Sullivan stated:

But our concern, Your Honor, is of course, especially since members of the Public Service Board were part of who helped the Legislature craft the other words for safety, we're not confident that we can go back to a Public Service Board that's in some sense tainted by these statutes. We think we would have to go back to the Public Service Board with a fresh docket and a fresh start, not the docket that has been created under the shadow of these unconstitutional statutes. And if we have to go back to the Public Service Board with these statutes eliminated, we would want a chance to make a fresh docket and confine the proceedings to non-nuclear safety issues.... We do have a Federal constitutional issue with the proceedings [before the Board] as they've happened to date. We think that the activity of the Board to date in its interactions with the Legislature means that we should have a fresh start in front of the PSB, a fresh start which we could be sure there won't be any consideration of public health under Act 160. So, if Act 74 and Act 160 are removed from the picture, we think we should have a chance at a fresh docket.

Case No. 11-cv-99, Sep. 14, 2011 (morning session) Tr. at 674-675. Entergy took specific issue with the Act 189 study ("NSA Report"). Mrs. Sullivan specifically stated that the NSA Report must be scrubbed from the record in Docket 7440, and argued that in Entergy's view a new docket would be the right course of action. She argued:

But there is one more formal reason why we think the current docket is tainted, that is the Act 189 Study... Act 189 was all about safety, was preempted, and therefore, created a study, the NSA study approved by the Public Oversight Panel that was all about safety, and the Act 189 study is part of the record that is before the current PSB. So... what we argue to Your Honor is you would have to enjoin the PSB from withholding a Certificate of Public Good on grounds of nuclear safety and whether you do that within the current docket, telling them they have to in a sense scrub that docket of any tainted part, including the 189 report, or whether it's simpler for you to simply say start over on a clean slate, we think that's within Your Honor's discretion. ... And if you think they can, in a sense, close their eyes and ears to the tainted portions of existing record and clean it up, that would be acceptable as long as you think it's doable. We think the safer course would be to start over.

Id. at 678-679. Entergy's claim, in its current motion before the Board, that "the Board has a fully sufficient record, without taking any additional evidence, to issue a decision either amending the existing certificate of public good or issuing a new one to authorize operation of Vermont Yankee for twenty years after March 21, 2012," is therefore belied by the arguments

made by Entergy before the Federal Court.² It remains unclear how Entergy believes the record to be complete and “all issues properly before the Board,” when the record is replete with testimony and arguments based on the findings of the NSA report.³ The contradictory statements by Entergy’s counsel provide ample reason for concern that Entergy will oppose, on preemption grounds, any adverse decision by the Board on the present record, and the Board should not be forced into granting the CPG to avoid such a result.

The decision of whether to continue the current Docket 7440, scrubbing it of preempted concerns and updating the testimony, or starting new with a fresh docket was not decided by the Federal Court. Eschewing such a determination was appropriate, as the Board and not the Federal Court has jurisdiction to decide what record is appropriate for the Board to rely upon in deciding the CPG application. Thus, it is now up to the Board to decide how to proceed. If the Board chooses to clean up the existing record, which even Entergy stated is necessary should a new Docket not be implemented, that must be an open process wherein all parties participate to ensure that the resulting record is complete. As Entergy itself argued, it may very well be easier, and potentially more appropriate, to start over with a fresh docket before this Board.

² These contradictory arguments further run afoul of the judicial estoppel doctrine, which “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *New Hampshire v. Maine*, 532 U.S. 742 (2001). As the United States Supreme Court explained in *New Hampshire*, the purpose of this doctrine “is ‘to protect the integrity of the judicial process,’ [] by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment.’” *Id.* at 743 (citations omitted).

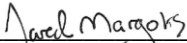
³ Entergy went so far before the Federal District Court of Vermont as to accuse this Board of allowing itself to be politically influenced in creating the extant record in this case. While NEC does not believe this to be the case, Vermont precedent cautions against allowing even the appearance of undue influence or conflict. *Ball v. Melsure Corporation*, 161 Vt. 35, 39 (1993). NEC does not agree that Entergy’s accusation meets the requisite standard regarding undue influence; however, since Entergy’s position appears to be that the record was created under the cloud of undue and inappropriate influence, they must, of consequence, accept creation of a new record under the clarified atmosphere of a federal ruling, which Entergy clearly believed to be necessary when arguing before the Federal Court.

This decision should not be rushed into, but should only come after a careful consideration of the existing record and what needs to occur in order to move forward and allow the Board to make a fully supportable decision based on a valid record. It is clear, however, that rendering a decision on the existing record would not be judicious, would be inappropriate considering the recent history of the Federal Preemption case, and would subject the Board to collateral attack in the event it issued an adverse decision. NEC contends that at this time, the prudent course of action would be for the Board to deny Entergy's Motion, and set a status conference as requested by DPS. All of the parties should have an opportunity to be heard at the status conference, and NEC submits that absent convincing argument to the contrary, the Board should open a new docket, order that Entergy re-submit its application, and begin the review of Entergy's request for a CPG with a clean slate.⁴

4. Conclusion

For the foregoing reasons, the Board should deny Entergy's Motion, and schedule a conference of the parties to discuss how to proceed with the review of Entergy's application for a CPG.

Dated at Jericho, Vermont this 2nd day of February, 2012.



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⁴ With respect to a timely process, it should be noted that Vermont Yankee will be permitted to continue operation while the CPG is litigated; therefore, the Applicant is not unduly burdened by the prospect of a new, fair, and thorough review.