

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 FOR LEAVE TO FILE AMICUS
CURIAE MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PREMIMINARY INJUNCTION**

NOW COMES the New England Coalition, Inc. ("NEC"), by and through its attorneys, Jared Margolis, Esq. and Brice Simon, Esq., and, pursuant to Fed. R. App. P. 29(a) and the Court's Memorandum and Order on NEC's Motion to Intervene, hereby moves for leave of the Court to accept the accompanying *amicus curiae* Memorandum in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction. In support whereof, NEC relies upon the *amicus curiae* Memorandum and Declaration of Raymond Shadis filed herewith, the Motions and Affidavit previously filed by NEC in this matter, and the following Memorandum of Law:

MEMORANDUM OF LAW

INTRODUCTION

The NEC has a long history of involvement in issues relating to the regulation of the Vermont Yankee facility, and seeks to provide arguments in response to the Plaintiffs' Motion for Preliminary Injunction that were not addressed by the Defendants in their opposition. NEC's memorandum provides information that will allow this Court to have a more full and complete understanding of the issues in this matter, and therefore the amicus memorandum is desirable and should be considered by the Court.

LEGAL STANDARD

Whether to permit a nonparty to submit a brief, as *amicus curiae*, is, with inapplicable exceptions, a matter of judicial grace. *NOW, Inc. v. Scheidler*, 223 F3d 615, 47 FR Serv 3d 447 (2000, CA7 Ill). District courts have inherent authority to appoint or deny amici, which is derived from Fed. R. App. P. 29. *Youming Jin v. Ministry of State Sec.*, 557 F Supp 2d 131 (2008, DC Dist Col). Movant's memorandum in support of *amicus curiae* status must state the movant's interest, the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. Fed. R. App. P. 29.

ARGUMENT

1. NEC's Interests in this Matter are Distinct from the Defendants' and Allowing NEC to Participate as *Amicus Curiae* Would Provide the Court with an Important Unrepresented Perspective

NEC's interests in this matter have been discussed in detail in its Motion to Intervene and associated Memorandum and Affidavit of Raymond Shadis, which are incorporated herein by reference. NEC is a Vermont not-for-profit corporation (formerly the New England Coalition on Nuclear Pollution) with headquarters and property in Brattleboro, Vermont, 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 also been engaged in education and advocacy for sustainable energy alternatives to nuclear generated electricity, and has participated in the State of Vermont initiatives to plan for an energy future that does not include Vermont Yankee.

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 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 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 various proceedings and acted to protect 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 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).

In addition, NEC was a party in Public Service Board ("PSB") Docket 6545, which proceeding resulted in the Memorandum of Understanding ("MOU") the Plaintiffs seek to

repudiate in this action. As discussed more fully in NEC's Motion for Reconsideration of the Court's Order denying NEC permission to intervene, also incorporated herein by reference, NEC relied upon the Plaintiffs' promises in the MOU when foregoing an appeal of the Certificate of Public Good ("CPG") in PSB Docket 6545. Moreover, NEC's direct involvement in the regulatory process leading to the MOU gives NEC a legal interest in defending the participatory, democratic process resulting in the MOU. Allowing NEC to participate as *amicus curiae* in this matter would ensure the Court that the perspective of an active participant in the proceedings leading to this litigation is represented. That perspective necessarily includes a defense of the participatory regulatory process that led to the MOU being attacked by Plaintiffs, which process NEC is in a unique position to defend.

2. NEC's Amicus Memorandum in Opposition Covers Relevant Matters Not Addressed in the Defendants' Opposition and Provides Important Information that Will Help the Court Make a Fully-Informed Decision

Pursuant to the Court's May 17, 2011 Memorandum and Order on New England Coalition, Inc.'s Motion to Intervene, NEC has limited the arguments made in its attached amicus memorandum to relevant matters that NEC believes have not been sufficiently addressed by the other parties. NEC's memorandum would thus be helpful to the Court in making its decision.

In its attached Memorandum, NEC has provided additional information concerning Supreme Court precedent relevant to the Court's analysis of preemption. NEC has also provided information on the economic impacts of the closure of Maine Yankee, indicating that the Plaintiffs' and Defendants' assumptions regarding these impacts are not accurate. NEC has additionally provided supplementary arguments regarding the non-preempted economic, environmental and reliability concerns that provide a valid basis for the State's decision not to

allow the plant to continue to operate. These arguments are in addition to those put forth by the Defendants, and are not mere extensions of the same arguments. Moreover, NEC has provided documentation from the transcripts before the Public Service Board to support many of its assertions, and NEC's intimate familiarity with the record in those dockets, as well as Entergy's arguments before the Board, will be helpful in informing this Court's decision.

NEC's proposed amicus brief further provides information that refutes Entergy's claims that Plaintiffs will suffer irreparable harm related to ordering new fuel for the Vermont Yankee reactor by July, 2011. NEC is in a unique position to provide such documentation, based on its broad involvement in nuclear regulatory issues. By providing perspective and factual information relevant to Plaintiff's claim of irreparable harm, as well as argument related to such information, NEC will aid the Court in its analysis of the issue relevant to the Preliminary Injunction request. NEC's information and argument in this regard is not duplicative, and will result in a more complete review of the issues before the Court.

The foregoing arguments advanced by NEC in its proposed amicus brief are supplementary to the Defendants' Opposition, and are relevant to refuting the Plaintiffs' arguments regarding the likelihood they will succeed on the merits of this case, and the potential harm they would endure if a preliminary injunction is not granted. NEC's amicus brief therefore asserts matters that are relevant to the disposition of the case, and provide the Court with an important, unrepresented perspective that will help the Court make a fully-informed decision.

CONCLUSION

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 participation as *amicus curiae* 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.

WHEREFORE, NEC respectfully requests the Honorable Court for permission to participate as *amicus curiae* in this matter, and to file the accompanying *amicus curiae* Memorandum in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction.

DATED at Stowe, Vermont this 31st day of May, 2011.

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