



PO Box 545
Brattleboro VT 05302
802-257-0336 necnp@necnp.org
www.NewEnglandCoalition.org

October 5, 2015

Clay Turnbull
(802) 380-4462
cturnbull@necnp.org

Mrs. Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620-2701

BY HAND DELIVERY

Docket No. 8300: Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for a certificate of public good, pursuant to 30 V.S.A. § 248 and 10 V.S.A. § 6522, authorizing the construction of a second independent spent fuel storage installation storage pad and related improvements, including installation of a new diesel generator with an electrical rating of approximately 200 kW, at the Vermont Yankee Nuclear Power Station in the Town of Vernon, Vermont

Dear Mrs. Hudson:

Enclosed please find for filing an original and six copies of NEW ENGLAND COALITION'S REPLY TO ENTERGY VERMONT YANKEE'S OBJECTION TO ADMISSION OF PREFILED TESTIMONY OF RAYMOND SHADIS.

Thank You for your assistance. Please contact me with any questions.

By:

Clay Turnbull, *pro se*
New England Coalition, Inc.
PO Box 545
Brattleboro, VT 05302

PSB Docket No. 8300 Service List

Parties:

Aaron Kisicki, Esq.
Public Service Department
112 State Street
Montpelier, VT 05620-2601

Matthew B. Byrne, Esq.
Matthew S. Stern, Esq.
Gravel and Shea PC
76 St. Paul Street, 7th Floor, P.O. Box 369
Burlington, VT 05402-0369

(For Entergy Nuclear Vermont Yankee,
LLC and Entergy Nuclear Operations, Inc.)

John H. Marshall, Esq. Nancy
S. Malmquist, Esq. Downs
Rachlin Martin PLLC
90 Prospect Street, P.O. Box 99
St. Johnsbury, VT 05819-0099

(For Entergy Nuclear Vermont Yankee,
LLC and Entergy Nuclear Operations, Inc.)

Leslie A. Cadwell, Esq.
Legal Counselor & Advocate, PLC
751 Frisbie Hill Road
Castleton, VT 05735

(For Entergy Nuclear Vermont Yankee,
LLC and Entergy Nuclear Operations, Inc.)

Jordan Gonda, Esq.
Associate General Counsel
Dept. of Environmental Conservation
Waste Management & Prevention Division
1 National Life Drive, Davis 1
Montpelier, VT 05602-3704

(VT Agency of Natural Resources)

Jennifer S. Duggan, General Counsel
Vermont Agency of Natural Resources
Secretary's Office
1 National Life Drive, Davis 2
Montpelier, VT 05602-3901

Chris Company
Windham Regional Commission
139 Main Street, Suite 505
Brattleboro, VT 05301

Clay Turnbull, *pro se*
New England Coalition
P.O. Box 545
139 Main Street, Suite 606E
Brattleboro, VT 05302-0545

Christiane Howe, Chair, *pro se*
Town of Vernon Selectboard
567 Governor Hunt Road
Vernon, VT 05354

I, Clay Turnbull, hereby certify that on the 5th day of October, 2015, a copy of the attached filing regarding Docket No. 8300 was sent via U.S. Mail, postage prepaid, to the parties listed above.

A handwritten signature in black ink, appearing to read "Clay Turnbull". The signature is written in a cursive, somewhat stylized font.

Clay Turnbull
New England Coalition, Inc.
PO Box 545
Brattleboro, VT 05302

STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for a Certificate of Public Good authorizing the construction of a second independent spent fuel storage installation storage pad and related improvements, including installation of a new diesel generator with an electrical rating of approximately 200 kW, at the Vermont Yankee Nuclear Power Station in the Town of Vernon, Vermont

October 2, 2015
Docket No. 8300

**NEW ENGLAND COALITION'S REPLY TO ENTERGY VERMONT YANKEE'S
OBJECTION TO ADMISSION OF PREFILED TESTIMONY OF RAYMOND SHADIS**

New England Coalition ("NEC"), by and through its Pro Se Representative, Clay Turnbull, replies herein to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "ENVY") objections to the admissibility of the Prefiled Testimony of Raymond Shadis, said objections submitted on September 18, 2015.

ENVY claims that Mr. Shadis' prefiled testimony should be excluded because it:

" (1) addresses issues that are irrelevant to this proceeding; (2) exceeds the limited scope of NEC's intervention allowed by the Board; and (3) addresses areas that are preempted by federal law."

ENVY is wrong on all three counts. ENVY is also in error regarding its claim that much of the Shadis testimony is federally preempted.

The testimony of Raymond Shadis is relevant, within the scope of issues delineated by the Board, and it is material to an informed decision. Mr. Shadis' uncritical recounting of the schedules, agendas, and topical concerns of federal agencies, commissions, and so forth does

not affect in any way the federal regulatory scheme nor does it invite the Board to attempt to base its decisions on preempted matter or regulate in anyway those areas reserved to the U.S. Nuclear Regulatory Commission. Mr. Shadis' testimony is therefore not preempted.

As discussed below, the objection of ENVY should be overruled or dismissed and the testimony of Raymond Shadis should be admitted. NEC and its witness look forward to vigorous examination by the Board and cross-examination by the parties.

DISCUSSION

NEC agrees with ENVY that evidentiary matters before the Board are governed by 3 V.S.A.

§ 810, Board Rule 2.216(A) and that Section 810 provides, in pertinent part:

In contested cases: Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

NEC agrees that in determining whether evidence should be admitted over an objection in a contested case, the Board must thus examine whether the evidence is relevant, material, or not unduly repetitious. The Board must also determine whether the evidence is admissible under the Vermont Rules of Evidence. Finally, if the evidence is not admissible under the Vermont Rules of Evidence, the Board must determine whether the evidence is "necessary to ascertain facts not reasonably susceptible of proof" under these rules and whether "it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." 3 V.S.A. § 810(1).

Setting aside the question of whether or not Mr. Shadis' testimony is repetitious (no one claims it to be repetitious), NEC turns first to the question of relevance, which in the Vermont Rules of

Evidence (invoked, but not quoted, by ENVY in its Objection) reaches to both materiality and admissibility.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the Supreme Court. Evidence which is not relevant is not admissible

V.R.E. Article IV. RELEVANCY AND ITS LIMITS
As amended through August 5, 2015

NEC notes that the V.R.E. definition of relevance hinges on whether the evidence has "any tendency" to make any material fact "more probable or less probable" than it would be absent the evidence. Mr. Shadis' testimony regarding an alternative approach to incorporating public opinion regarding ISFSI siting and his warning that the tenure of the ISFSI may exceed the expectations promoted by Entergy VY amply meets the relevancy criteria set forth in Rule 401. And if the proffered evidence (in this case, testimony) is relevant then it is admissible under Rule 402

NEC further notes that Blanes Law Dictionary [and this may be the thrust of ENVY's Objection] gives a somewhat less generous definition of relevant evidence:

RELEVANT EVIDENCE: the evidence and the testimony that directly relates to the issues disputed or discussed.
thelawdictionary.org/relevant-evidence/

Even so, that portion of Mr. Shadis' testimony which ENVY deems irrelevant can only be found

to be irrelevant if we follow ENVY's cribbed, highly selective, and distorted interpretation. Mr. Shadis did not discuss events at Maine Yankee only, as ENVY says, he contrasted and compared the Maine Yankee approach to public involvement in decommissioning and spent fuel storage installation siting and construction with the approach taken by ENVY. The nexus between seeking to understand and incorporate the values and perceptions of the affected public and seeking to mitigate any potential negative impacts of the proposed project on such within-the-scope considerations as aesthetics, planning, and site reuse is really self-evident or should be even to ENVY unless they are being deliberately obtuse.

One way to take the measure of an object or action is to measure it with a ruler or stopwatch; another less precise although equally legitimate, way is to contrast or compare it to known or experienced objects or actions.

The Board would not be remiss nor would information gathered be irrelevant if the Board were to at least somewhat displace ENVY's speculations regarding ISFSI impacts with observations and perspective gleaned from real experience in ISFSI siting and construction elsewhere in New England. This added perspective is not irrelevant but it is germane and relates directly to the issues in dispute.

With Entergy VY as a background, Mr. Shadis compares one licensee's alternative approach to integrating community values and perceptions. The Board must weigh this alternative way of seeking reconciliation with community values, plans, goals, and aesthetics.

"In a § 248 proceeding, the Board 'is engaged in a legislative, policy-making process.' " *In re Twenty-Four Vt. Utils.*, 159 Vt. 339, 357, 618 A.2d 1295, 1306 (1992) (quoting *Auclair v. Vt. Elec. Power Co.*, 133 Vt. 22, 26, 329 A.2d 641, 644 (1974)). The Board must employ "its discretion to weigh alternatives presented to it, utilizing its particular expertise and informed judgment." *Id.*

895 A.2d 226 (Vt. 2006) 179 Vt. 370 *In re Petitions of Vermont Electric Power Company, Inc. And Green Mountain Power Corporation.* Supreme Court of Vermont March 10, 2006

In re Petitions of Vermont Electric Power Company, Inc. And Green Mountain Power Corporation

goes on to explain how issues of aesthetics, as raised in Mr. Shadis' testimony, are properly considered:

Under the two-part "*Quechee test*" utilized by the Board and approved by this Court for reviewing issues of aesthetics under § 248(b), a determination must first be made as to whether a project will have an adverse impact on the aesthetics and the scenic and natural beauty of an area. *In re Halnon*, 174 Vt. 514, 515, 811 A.2d 161, 163 (2002) (mem.). If the answer is in the affirmative, the inquiry advances to the second prong--whether the impact would be "undue." *Id.* This is determined by assessing whether it violates a clear community standard, it offends the sensibilities of the average person, or the applicant has failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings. *Id.* [emphasis added]

In its Objection, ENVY complains that

Mr. Shadis opines that the Department of Energy ("DOE") is unlikely to remove spent fuel from the site before 2073 and, as a result, unspecified "mitigating actions" should be required of Entergy VY. *See* Shadis pf. at 8-13.

NEC responds that it can nowhere in Entergy's CPG application or in supporting prefiled testimony find an admission that an aggregation of several dozen nineteen-foot-tall concrete silos on a raised blank concrete pad may not be in keeping with " the aesthetics and the scenic and natural beauty of an [the] area"

It appears that, following logically, ENVY has laid no plans, nor has it taken

"generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings."

These mitigating steps are first for the applicant to propose; not the intervenors. If the applicant fails to perform then certainly intervenor's proposals should be entertained by the Board,

especially considering that the ultimate goal in this matter is the general public good.

Next, ENVY complains"

Even if Mr. Shadis' prefiled testimony would have any relevance to the VY Station, his critique of the "public participation" process regarding the site's decommissioning and the ISFSI is outside the scope of the interests that the Board permitted NEC to address in this docket. Specifically, the Board granted NEC "permissive intervention limited to the interests it has articulated in the Project's impacts on the local environment, the reuse of the [VY Station] property, regional planning and development, and aesthetics." Docket 8300, Order of 7/7/15 at 5. These interests do include a determination of what a "meaningful public participation" process would be for decommissioning in Vermont. That decision has already been made in 2014 by the Vermont General Assembly in Act 178 by forming the Nuclear Decommissioning Citizens Advisory Panel. *See* H.855, 2013-2014 Sess. (Vt. 2014). Mr. Shadis' testimony recommending that the Board consider "the possibility of a very different licensee approach to decommissioning and the establishment of an ISFSI," Shadis pf. at 3, is not related to any particularized interest of NEC in the *Project's impacts*, much less any of the limited particularized interests enumerated by the Board in its order authorizing NEC's permissive intervention.

Almost too much twaddle to swallow. ENVY knows very well that Mr. Shadis was not critiquing the "public participation" process, but rather the Entergy VY approach to public participation, more specifically, their approach to gathering "effective public input". In particular, Mr. Shadis made the point that a community thoroughly familiar with site activities and projects is that much more likely to perceive them in a positive way. This goes to the Quechee standard elaborated on previously: Whether the impact would be "undue." ... is determined by assessing whether it violates a clear community standard, it offends the sensibilities of the average person, or the applicant has failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings. *Id.* [emphasis added]. NEC avers that there is no better way to

determine what offends the sensibilities of the average person than to listen to the average person. To the extent possible, limited by the format and the information available to the public, the Board does this in holding public hearings alongside of its more structured and legally formal technical hearings. Irrespective of [commendable] state initiatives, the applicant has done nothing of the kind.

A somewhat comparable exploration of aesthetic considerations involved the Vermont Yankee power plant site, the Vermont Electric Company, the U.S. Nuclear Regulatory Commission, and consultation on the aesthetic effects of a revised landscape mitigation plan with Vernon town officials and abutting property owners. NEC states that the following excerpt from the Board's Order of August 17, 2011 illustrates the value of public consultation in resolving siting issues and that it further provides an example of the amicable resolution of competing (but not conflicting) state and federal interests:

On February 11, 2009, the Public Service Board ("Board") issued an Order and a Certificate of Public Good authorizing the construction of the Southern Loop Transmission Upgrade Project (the "Project"). The Project, as approved by the Board, included plans to mitigate the aesthetic impact of the Project, including views of a new Vernon Substation located near the existing transmission infrastructure and within the fence line of the Vermont Yankee power plant. [Emphasis added]

In a filing on July 8, 2011, VELCO advised the Board of the need to make revisions to the landscape mitigation plan for the Vernon Substation and included a revised mitigation plan with its filing. VELCO seeks Board approval of the revised landscape mitigation plan for the Vernon substation.^[1]

The revised mitigation plan for the Vernon Substation is a result of changes to U.S. Nuclear Regulatory Commission ("NRC") vegetative clearing requirements related to a nearby meteorological tower. These NRC requirements will require the removal of existing vegetation (including

mature trees) that currently help screen the Vernon Substation from public view and will also restrict the height and type of vegetation that can be installed as part of VELCO's landscape mitigation plan.^[2] These NRC requirements will have a negative effect on the ability to screen the Vernon Substation from public views.^[3]

In response to these NRC clearing requirements, VELCO's aesthetic consultant worked with the Town of Vernon, the Department of Public Service ("Department") and Entergy to devise the revised landscape mitigation plan that was included in VELCO's July 8 filing with the Board. VELCO agreed to meet with the Vernon Select Board and property abutters approximately one year after the clearing of the existing vegetation and the installation of new mitigation plantings to evaluate public views of the substation and assess whether the plantings meet the town's aesthetic expectations.

ENVY proposes that the Shadis' testimony about the potential schedule for removal of spent fuel from the VY station is irrelevant and/or preempted. But, in fact, it is quite relevant because demolition and disposal of the fuel storage pad cannot be begun until the last of the fuel is removed. As stated in the introduction of this Reply, a discussion of federal schedules and actions, in particular, scheduled performance, is in no way preempted from Board consideration, in particular if the resulting decision does not impinge in any way on the federal scheme for the use (etc.) of radiological materials. Mr. Shadis, quite clearly is not talking about that. His testimony is confined to an objective lens on the tenure of existence, use, and impact of the proposed project. It is elementary that the duration of an insult adds to its gravity. Clearly, how long the ISFSI pad is extant and occupied will affect how long its potential negative impacts on within-scope issues, such as aesthetics and local planning will endure and potentially accumulate. In the case of an ISFSI, where federal agencies are openly discussing 500-year contingencies, intergenerational equity issues (not heretofore dealt with by this Board) keep prodding the relatively smooth, uncomprehending

surface stream of our deliberations. NEC means no disrespect, but the fact is that we are all confronted with a proposition that is unprecedented in our (Vermont's) experience.

As to ENVY's concern that NEC's witness has offered to discuss possible mitigating actions with the Board: It is, of course, ENVY that should be making that offer (See, Quechee test, above).

However, to lay to rest ENVY's concern that testimony not prefiled is inadmissible. NEC and its witness are not talking about witness-initiated testimony, they are talking about witness responses in Board examination and the parties' cross-examination which are indeed lawful matter for Board deliberation and Findings of Fact upon which a decision, including conditioning of a CPG, may rest. ENVY selectively quotes *Maine Yankee Atomic Power Co v. Bonsey*, 107 F. Supp. 2d (D.Me.2000., regarding the Federal Court's decision allowing Friends of the Coast (of which, Mr. Shadis is Executive Director) to file an Amicus brief instead of intervening. In point of fact that decision rested on federal standards for intervention where "distinguishable and particularized" interests are more narrowly construed than under Vermont standards. ENVY attacks (again) NEC's standing as an intervenor in this docket, by stating that the decision in *Maine Yankee* is cause to renew ENVY's claim that NEC should be relegated to Amicus participation. ENVY does not include a following pertinent sentence in the *Maine Yankee Order*, "As noted previously, Friends of the Coast was permitted to intervene in the state administrative proceeding." [Emphasis added]

ENVY's extraordinary selectivity continues in its preemption-related quotation from *Maine Yankee Atomic Power*,

Specifically, *Maine Yankee* provides that states "have no role to play, for example, in determining whether [a facility] should use dry cask storage on [its] site or some other storage vehicle. . . Nor does the state have any authority to prevent an on-site transfer of the spent fuel - clearly an operational and nuclear safety issue. Nor does the state have any say in the selection, or specifications regarding construction of the dry cask storage containers . . . or regarding whether the site and the installation, including the cask storage pads, are adequate to withstand the weight of

the casks, or threats posed by natural phenomena such as earthquakes and tornados, or the threat of sabotage." *Id.* at 55.

Did ENVY not see the following language from the same portion of the *Maine Yankee* Order?

Defendants [the state] may, however, insist that the ISFSI comply with state requirements that do not impermissibly infringe on radiological, operational, construction, or safety issues, such as, for example, aesthetic landscaping requirements, or flood or soil erosion control measures. See Me. Rev. Stat. Ann. tit. 38, § 484 (West 1989 & Supp.1999); see also *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d at 827 ("The City does indeed have the power to say 'no' to aspects of the project" that fail to comply with the City's regulations, "if they do not directly involve radiation hazards (including those 'inextricably intermixed' with non-radiation hazards) and are not selected for scrutiny by the City merely to delay or frustrate the project as a whole."). (A normal and customary performance bond requirement, designed to ensure completion of site grading, landscaping, drainage, etc., would probably be permissible, for example.)

In Docket 6812, the Board admonished ENVY that overly selective and partial quotations signified a "willingness to be less than forthright with this Board".

Entergy's selective quotation suggests a willingness to be less than forthright with this Board." Order entered: 6/13/2003

NEC offers that ENVY's cumulative misrepresentations of the Shadis testimony and highly-selective partial quotations of the rules and caselaw in ENVY's *Objection* far exceed those offenses which drew the Board's chastisement in 6812.

CONCLUSION

Although NEC has defended against every one of ENVY's multiple charges in this instance, NEC respectfully proffers that enough is enough. ENVY complaints are frivolous, without base, and should not be entertained. The testimony of Raymond Shadis on behalf of NEC has been demonstrated by the foregoing discussion and citations to be relevant, material, not federally preempted, and admissible, wherefore NEC now respectfully moves to set aside ENVY'S Objection in its entirety and to admit the testimony of its expert, Raymond Shadis. Such clarifications of perception , nuances of opinion, and indeed, challenges as to factual assertions such as may remain are best and most productively left to Board examination of the Witness and such cross-examination as the parties may legitimately require.

As stated at the onset, and with all due respect, NEC and its witness await the day.

Respectfully Submitted
on Behalf of New England Coalition
This Second Day of October, 2015,



Clay Turnbull
Pro Se representative
New England Coalition

