

STATE OF VERMONT
PUBLIC SERVICE BOARD

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 Docket No. 8300 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

February 1, 2016

Docket 8300

NEW ENGLAND COALITION'S RESPONSE TO ENTERGY VY'S OBJECTION TO ADMISSION OF PREFILED SURREBUTTAL TESTIMONY OF RAYMOND SHADIS SUBMITTED ON BEHALF OF NEW ENGLAND COALITION

New England Coalition, through its pro se representative, Clay Turnbull, herein responds to the Objection of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "ENVY") to the admissibility of the Prefiled Surrebuttal Testimony of Raymond Shadis submitted on behalf of New England Coalition ("NEC") on December 23, 2015.

ENVY complains that Mr. Shadis's surrebuttal testimony at A7, A8 and A9, pages 4 through 10 (1) exceeds the limited scope of NEC's intervention allowed by the Board; (2) addresses issues that are irrelevant to this proceeding; and (3) addresses areas that are preempted by federal law and therefore should be excluded. In an accompanying footnote ENVY states further, "To be clear, Entergy VY [ENVY] objects to the entirety of Mr. Shadis's testimony in question and answer numbers 7, 8 and 9."

ENVY is entirely mistaken on all three counts. As demonstrated in the following responsive memorandum, ENVY's Objection is facetious, without merit, and thus the Board should reject it wholesale.

Memorandum

I. MR. SHADIS'S TESTIMONY IS WITHIN THE SCOPE PERMITTED

ENVY complains that "The Board did not grant NEC authority to address whether Entergy VY has provided adequate financial assurances for the management of spent fuel under 10 V.S.A. § 6522(b)(1)." However, "adequate assurance for the management of spent fuel" is manifestly not the thrust of Mr. Shadis's testimony, rather his concern, as it is plainly stated in several places, is that of full funding of ENVY's mitigation of the ISFSI's potential negative impacts on site reuse, regional planning, local environment, and aesthetics.

"At present, Mr. Shadis states, we have no assurance that financial straits brought on by a depleted NDT will not impede ENVY's mitigation of the ISFSI's potential negative impacts on site reuse, regional planning, local environment, and aesthetics." Thus, availability and allocation of funds for mitigation strategies is a subset of the site reuse, regional planning, local environment, and aesthetics package; and solidly within scope. NEC would add that NEC's diligent search of ENVY's cost estimates has been unable to find any line item for mitigation of site reuse, regional planning, local environment, or aesthetics impacts of the proposed project. NEC can only conclude that these few 'land-use' areas, acknowledged by the Federal Courts to be subject to state regulation, have been relegated to 'miscellaneous costs' or otherwise accorded little value by the petitioners.

ENVY accuses Mr. Shadis of failing to comprehend T. Michael Twomey's May 11, 2015 testimony to which his Surrebuttal is directed because, as Mr. Twomey explained (p. 3:3-6), "Entergy Corporation's parent guarantee, not expected DOE recoveries, provides the credit support ("collateral" in Mr. Shadis's terms) for the borrowings to fund the non-operations spent fuel management expenses."

But what Mr. Twomey said was,

As stated in my supplemental prefiled testimony dated May 11, 2015, Entergy VY intends to pay for spent fuel management costs in two ways. First, costs for the construction of the second Independent Spent Fuel Storage Installation (“ISFSI”) pad, procurement of dry storage systems and transfer of the fuel from the spent fuel pool to the ISFSI will be funded by two revolving credit facilities totaling approximately \$145 million. Entergy VY plans to repay borrowings on these credit facilities with funds recovered from the U.S. Department of Energy (“DOE”) for breach of its contract to remove spent nuclear fuel from the VY Station.[Emphasis added]

Plainly, ENVY's "plans to repay borrowings...with funds recovered" is an offering of security to the lender, or in Mr. Shadis terms, collateral. Nowhere in Mr. Twomey's testimony are "credit facilities" identified. Nowhere in Mr. Twomey's testimony do the words, "parent guarantee" appear. One cannot "comprehend" that which one cannot, in its absence, apprehend. NEC avers that Mr. Shadis's use of the term collateral was appropriate in this instance.

Collateral may be defined as follows:

OxfordDictionaries.com

Collateral 1 [noun] Something pledged as security for repayment of a loan.

MerriamWebster.com

Full Definition of collateral. 1: a collateral relative. 2: property (as securities) pledged by a borrower to protect the interests of the lender.

ENVY claims that Mr. Shadis disregards the Board's order in Docket No. 7082 in which NEC was a party,

...we conclude that, on the basis of the record evidence, from the period after the plant's closure at which time Vermont Yankee can access the full decommissioning funds, adequate financial assurance exists for the management of spent fuel at Vermont Yankee." Docket No. 7082 at 70

To NEC's best recollection and upon review of the record, NEC believes that the Board made no findings in Docket 7082 regarding the main focus of Mr. Shadis's testimony: adequate funding for mitigation of negative impacts in the areas of site reuse, regional planning, local en-

vironment, or aesthetics. Mr. Shadis did not disregard nor did he contest the Board's conclusion regarding adequate financial assurance for management of spent fuel except to caution that we should now be contemplating the possibility that the ISFSI will not be vacated, thus opening the possibility of demolition and removal, for extended time frames not discussed in Docket 7082.

ENVY restates and repeats without support its complaints (stated above) that (1) the Board did not grant NEC permissive status to address the adequacy of financial assurances for spent fuel management under 10 V.S.A. § 6522(b)(1) or the use of NDT funds, (2) Mr. Shadis's testimony in A7 is not reasonably related to issues of the local environment, the reuse of the Vermont Yankee property, regional planning and development, or aesthetics, (3) the portion of Mr. Shadis's surrebuttal testimony appearing in A7 at pages 4-5 is outside the scope of NEC's limited intervention in this matter. In relevant part in A-7, Mr. Shadis testifies,

Secondly, says Mr. Twomey, "Entergy VY plans to fund operational spent fuel management activities from the nuclear decommissioning trust ("NDT")."

There are, I believe, two things very wrong with this statement: there appears to be no funding assurance plan in place to cope with the possibility that spent fuel management may be required beyond decommissioning and beyond the expenditure of any surplus in the trust.

And further, if ENVY insists on paying for non-decommissioning post-operational expenditures out of the NDT there appears to be a risk that fund growth will be offset completely with no backup plan on the table. We have no assurance that financial straits brought on by a depleted NDT will not impede ENVY's mitigation of the ISFSI's potential negative impacts on site reuse, regional planning, local environment, and aesthetics.

II. MR. SHADIS'S TESTIMONY IN ANSWERS 8 AND 9 ADDRESSES ISSUES THAT ARE RELEVANT TO THIS PROCEEDING AND THAT ARE NOT FEDERALLY PREEMPTED.

ENVY complains that "... Mr. Shadis's opinions about the DOE's timely removal of spent nuclear fuel are irrelevant to this proceeding and preempted." *See* Entergy VY's Objection to Admission of Prefiled Testimony of Raymond Shadis Submitted on Behalf of New England

Coalition, dated September 18, 2015, at 4-7.

ENVY displays a disturbing lack of ability to follow a simple logical progression: Negative impacts on local environment, the reuse of the Vermont Yankee property, regional planning and development, and/or aesthetics will continue so long as the ISFSI remains operational and/or in place; the ISFSI cannot be demolished and removed until the ISFSI is vacated. It cannot be vacated until the last of the fuel is removed.

US Department of Energy ("DOE") projections for removal of spent fuel have historically been unreliable. Further, as the DOE will confirm, its schedules for the removal of spent fuel, Acceptance Priority Ranking and Annual Capacity Reports, have always been considered iterative documents. No one can predict with assurance what the next iteration will say. Therefore DOE projections cannot reasonably be relied on for critical planning purposes. Thus the Board's findings as to the duration of impacts on applicable Section 248 criteria must, in order to be credible, be weighted by some form of probabilistic assessment.

ENVY and the Board should understand NEC's concern. Mr. Shadis's testimony simply relates some of the many considerations that should go into that assessment (e.g., What do other federal agencies see regarding fuel storage and removal? What is the scope and size of DOE's task? Should Vermont and ENVY prepare for delays?) The purpose of this investigation and of Mr. Shadis's testimony is not to lay ground for illicit meddling in what is federally regulated; rather it is to search out how state non-preempted regulation can be best applied to affect the public good, in particular under Section 248.

ENVY complains further, that the Board cautioned NEC that "this proceeding is not a forum for litigation issues that are within the jurisdiction of the Nuclear Regulatory Commission." Docket 8300, Order of July 7, 2015, at 5. Nevertheless, ENVY says that Mr. Shadis continues

to offer preempted testimony disagreeing with the NRC's determination regarding the sufficiency of the NDT to pay for both decommissioning and operational spent fuel management expenses based on his opinion about the perceived improbability of DOE removing spent nuclear fuel from the Vermont Yankee station before 2072.

Mr. Shadis did not disagree with NRC nuclear decommissioning trust fund assurances as far as they went, however he pointed out that NRC did not apparently take into consideration a post-license termination period of ISFSI operation. NRC takes no note of the state criteria with respect to which NEC was allowed to intervene. Mr. Shadis carefully and consistently related his concerns to funding for mitigation of adverse affects of the ISFSI on issues permitted by NEC's limited intervention status. NRC, by contrast, focused its financial assurances on radiological decommissioning and license termination. In a footnote ENVY provided the following:

See, e.g., [Entergy] Letter, October 27, 2015, to VT. Chief Assistant Attorney General:

The NRC staff found that the exemption allowing Entergy to use the decommissioning trust fund for certain spent fuel management costs will not adversely impact Entergy's ability to complete radiological decommissioning and terminate the Vermont Yankee operating license. The staff's conclusion was based on its determination that there are sufficient funds in the Vermont Yankee decommissioning trust fund to complete radiological decommissioning activities, as well as to conduct spent fuel management.

<http://vydecommissioning.com/wpcontent/uploads/2015/10/ML15253A581.pdf>.

NEC respectfully points to the fact that NRC is discussing only radiological decommissioning and not any other form of site cleanup: most certainly not regional planning or aesthetics

NEC would now like to point out a few things with respect to ENVY's apparent obsession with federal preemption.

(1) It is not the speech that is preempted. It is the Board's consideration for regulatory

purposes of the preempted subject matter that is preempted. The Board cannot use its investigatory or regulatory powers to frustrate the federal scheme for the use of nuclear materials (e.g., impede a federal license for nuclear-related activity) . As explained in the Maine Yankee case,

[W]hile defendants have claimed authority to consider Maine Yankee's "financial capacity" (e.g., to deal with future economic contingencies related to spent fuel disposal) in determining whether to issue a Site Law permit, they of course cannot employ a 'financial capacity' requirement to indirectly regulate in the field of spent nuclear fuel storage. ...That is, the state cannot stand in the way of Maine Yankee's operational fuel storage plans, once they approved by the NRC, on grounds that the cost of future transfer or handling of the spent fuel may be high and plaintiff cannot post security satisfactory to the state to cover any economic contingencies.

Maine Yankee Atomic Pwr. Co. v. Bonsey, 107 F. Supp. 2d 47, 55 (D. Me. 2000).

NEC and its witness do not for a minute suggest crossing the threshold of preemption into nuclear regulation no matter how subliminal.

(2) If ENVY's wide preemption net were cast in this proceeding then most of the testimony of Entergy witnesses Twomey and Thomas would be "preempted". NEC contends that if mere discussion of federal activity is preempted, then the Board cannot rely on its judgment of anything that ENVY offers regarding its conformance to NRC regulations or any federal communications. In ENVY's preemption galaxy, the Board's decisions and decision-making process become irrelevant to the basic question of the "preemptive" nature of the information in question. If the Board cannot consider certain information in formulating its decision, then the information becomes immaterial. If it becomes immaterial, then of necessity it becomes irrelevant and inadmissible. NEC proffers that it does not matter if the "preempted" information is brought forward by the Department of Public Service, the petitioners, or the intervenors. In NEC's view, it has become a disturbing pattern in the many dockets involving ENVY that ENVY introduces topics

that then, according to ENVY, cannot be responded to because they are "preempted."

Conclusion

Mr. Shadis's surrebuttal testimony at A7, A8 and A9, pages 4-10, is within the scope of NEC's limited intervention and relevant to this proceeding. Such portions of his testimony as are related to the transfer, delivery and possession of spent nuclear fuel are clearly intended to inform the state's response to the effect of ENVY and federal actions on concerns that are entirely within the state's jurisdiction. Mr. Shadis's testimony should be admitted, untouched and in its entirety. ENVY's objections are facetious and entirely without merit. Further, ENVY's reliance on selective partial quotations and misquotes and mischaracterizations of witness testimony are reprehensible, beneath the dignity of this tribunal and should be repudiated or otherwise sanctioned by the Board.

Dated at Brattleboro, Vermont,

This First Day of February, 2016.

A handwritten signature in black ink, appearing to read 'C. Turnbull', with a stylized flourish at the end.

Respectfully Submitted on Behalf of New England Coalition
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