

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 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

April 8, 2016

Docket 8300

NEW ENGLAND COALITION'S ANSWER TO THE OPPOSITION OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE AND ENTERGY NUCLEAR VERMONT YANKEE TO NEW ENGLAND COALITION'S MOTION TO ADMIT NEW EVIDENCE

I. INTRODUCTION

The New England Coalition ("NEC"), by and through undersigned *pro se* representatives, submits the following Answer to the opposition of the Vermont Department of Public Service ("DPS") and Entergy Nuclear Vermont Yankee ("ENVY") to New England Coalition' Inc.'s Motion to Admit New Evidence.

The Public Service Board ("Board" or "PSB") concluded a technical hearing on February 23, 2016 as part of its review of the petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (together "Entergy") for a certificate of public good to construct a second independent spent fuel storage installation storage pad and related improvements, including installation of a 200kW diesel generator

NEC submitted a Motion to Admit New Evidence ("Motion")., dated March 11, 2016.

The DPS and ENVY oppose the Motion with Oppositions, dated March 30, 2016 and March 29, 2016, respectively.

II. DISCUSSION

A. DPS

DPS argues that the Motion is (1) premature under Vermont Rules of Civil Procedure ("V.R.C.P.") Rule 60(b), and (2) the relief NEC seeks [admission of new evidence] would be prejudicial to the other parties to the proceeding. DPS further argues (3) that Rule 60(b) is not intended to remedy bad strategic choices, such as not preparing the new evidence for cross-examination.

1. The Motion is **not premature** under Rule 60 (b). DPS unfairly ignores the actual content of NEC's motion in which NEC explains that it is the Rule 60(b) criteria that NEC is proposing to inform the Board's discretion as to whether or not to accept the proffered new evidence.

NEC is relying on V.C.R.P. Rule 60 (b) for the criteria applicable to reopening a record, although 60(b) appears to apply to those situations where a decision has already been rendered. NEC trusts that 60(b) criteria bound the present situation in which we are post-hearing and at the eve of submitting final briefs. The Board should evaluate the question of admitting new evidence at this juncture based upon V.R.C.P. 60(b) criteria; (1)(mistake, inadvertence, surprise), 60(b)(2)(newly discovered evidence), and 60(b)(3)(fraud, misrepresentation, or other misconduct).

In accord with the spirit and letter of V.C.R.P. Rule 60 (b), the evidence that NEC presents is in response to alleged fraud or mistake of Entergy witnesses, could not have been reasonably submitted earlier, is in all other ways admissible, and is material to a fair, informed decision. Further, admission of such evidence lies fully within the Public Service Board's discretion to admit or reject.

NEC Motion - page 1, paragraph 2

2. The relief NEC seeks [admission of new evidence] would **not be prejudicial** to the other parties to the proceeding. Again, DPS ignores the actual content of NEC's motion in which NEC explains,

Finally, admission of the proffered new evidence will not unduly burden any party because (1) the information is very limited in scope and volume, and (2) the information is easily verifiable as to source and accuracy and, (3) may readily be responded to in Briefs or Reply Briefs or in such interim comments as the Board may entertain.

NEC Motion – page 1 and 2, last and first paragraphs

The relief NEC seeks could only remotely be seen as prejudicial if the other parties were denied an opportunity to discover or respond; however such denial of opportunity has not been issued. The parties had the opportunity to ask any questions of NEC the parties may have had and the parties had the opportunity to challenge the veracity and/or authenticity of the information provided in NEC's proposed new evidence, but for the exception of ENVY's challenge to the admissibility of Mr. Turnbull's Declaration, they did not. At its discretion, the Board may yet invite argument on the issues brought forward in NEC's Motion:

(e) Evidence on Motions. -- Except as provided in Rule 78(b)(2), when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition, or on a written statement, agreed to and signed by the parties or their attorneys. V.C.R.P. 43 (e)

3. DPS writes,

Nothing prevented NEC from preparing this type of evidence for potential use at a technical hearing. It simply chose not to do so. Rule 60(b) does not provide protection in the wake of these kinds of tactical choices.

DPS Opposition Page 3, Paragraph 2

Seeking out new evidence was undertaken as soon as reasonably possible following issuance of the hearing transcript. **Preparing or not preparing the evidence in question for cross-examination was not a tactical choice.** The evidence clearly impeaches the purportedly factual statements of Entergy witnesses Thomas and Dodson on matters of critical materiality. NEC prepared for the Technical Hearing with the assumption that all witnesses sworn to tell the truth and whole truth would do so. NEC was under no obligation to seek out or prepare contradictory evidence in anticipation of false and misleading sworn testimony. The surprise was not so much in the content of the Thomas and Dodson testimony but in the track that it took and the fact that it was affirmed and embellished under oath. Mr. Thomas' testimony was shocking in his apparent

inability to summon significant details. Given Mr. Thomas' apparent competence and candor as a witness in previous dockets, nothing in his prefiled testimony prepared NEC for testimony that clearly was less than the whole truth.

DPS does affirm NEC on one indispensable point:

The Board does, however, have the discretion to reopen the evidentiary record. See *Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 356, 618 A.2d 1295, 1305 (1992)
DPS Opposition, Page 3, Last Paragraph

B. ENVY

Where NEC has already answered specific assertions in the ENVY Opposition by addressing them in the preceding section, NEC respectfully requests that the Board apply those answers where appropriate in the ENVY Opposition.

In its introduction, ENVY states its position that NEC has not provided an adequate basis to: (1) obtain relief under Rule 60 (b), (2) justify reopening the record; or (3) provide sufficient foundation for the evidence offered.

Further, ENVY complains about the quality and admissibility of the evidence submitted by NEC and the "trespass" alleged against Mr. Turnbull in walking up to the exclusion fence at the Vermont Yankee site in order to test the assertions of fact by Witness Dodson that the proposed ISFSI site was visible from nowhere but the far side of the Connecticut River.

1. ENVY's assertion that NEC has not satisfied the criteria under Rule 60(b) has been largely addressed and refuted in the foregoing "DPS" section with perhaps the sole exception of whether the new evidence is "of such material and controlling nature as will probably change the outcome." NEC argues that the Board cannot issue a decision without supporting findings of fact which in turn must be based on record evidence. That evidence in turn must be largely based on

the testimony and supporting exhibits provided by competent, reliable witnesses. The evidence that NEC seeks to now offer, of itself, factually refutes the testimony of Entergy witnesses concerning alternatives, mitigation, and aesthetics. It may therefore reasonably be inferred the ENVY witnesses' testimony was false and incomplete as in less than the whole truth.

In order to issue a decision the Board must find under 30 V.S.A. § 248 (b) Before the public service board issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment or construction will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment and the public health and safety.

It should be kept in mind, when weighing the materiality of the new evidence and whether it justifies opening the record, that the decision that NEC is asking for is not a denial of the petition, rather it is a condition requiring a more thorough examination and exposition of the 248 criteria and potential alternatives that might find relief from negative impacts on those criteria. Certainly, evidence applicable to requisite examination of the §248 criteria is material to a decision as whether that criteria has been met.

2. ENVY's reference to ample opportunity for discovery on pages 1 and 10 of its Opposition is both irrelevant and facetious. NEC does not believe that the purpose of discovery is to find contradiction or root out falsehood. As it happened in Docket 8300, Entergy objected, with very few exceptions, to all of NEC's information requests, including dry cask system performance

data; data to which Witness Thomas only grudgingly and sketchily admitted, and which is included on the vendor's website, now offered as new evidence.

3. ENVY complains that NEC did not lay adequate foundation for admission of the new evidence. The operative word here is adequate. ENVY does not say that NEC laid no foundation; just not adequate foundation. In its Motion, NEC carefully explained its perceived need to find the new information based on the testimony of ENVY witnesses and the critical importance of true and accurate information regarding especially, aesthetic considerations and mitigating alternatives. As to authenticity, NEC respectfully refers the Board to V.R.E. Rule 901,

Requirement of Authentication or Identification

(a) General provision. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

4. ENVY complains about NEC's Attachment 4, A sworn declaration of fact from Clay Turnbull about what he saw from areas of the Vermont Yankee property that are open to the public. ENVY refers to a letter sent by Attorney Nancy Malmquist advising of access forms to be filled out before a Board site visit to the ISFSI location. This NEC presumes is what ENVY offers as the "Notice" required before trespass becomes illegal trespass. Mr. Turnbull went on that site visit, this visit was to public areas and in no way a "site visit" in the sense that the Board site visit was within an owner control zone or exclusion area. In fact a Keene Sentinel article published the week of March 28, 2016 features a large photograph that centers on the ISFSI area apparently taken from approximately the same position as Mr. Turnbull viewed the casks. Had NEC only known we could have waited for the Keene Sentinel.

Here Mr. Dodson explains that the area traversed by Mr. Turnbull is open to the public,

Apr 13, 2009

Exhibit EN-12 April 13, 2009 Visual Analysis Proposed Vermont Yankee Perimeter Fence
Harry L. Dodson Dodson Associates, Ltd.

1-5. What is the project's impact on open space in the area? The proposed fence will have limited impacts on open space in the area. It will not reduce the amount of existing open space nor will it change the use of the space. The fence will function as a typical agricultural fence separating wooded areas from fields. In the few locations where it traverses the field, agricultural use will continue on both sides of the fence with access for tractors provided by a gate. Currently private property, public access to open space will not be affected by this state-mandated fence. Visual access to the site by the public from Governor Hunt Road will not be impaired by the fence. [Emphasis added]

Exhibit EN-12 Visual Analysis Proposed Vermont Yankee ...
psb.vermont.gov/.../7530 Vt Yankee Fence line Expansion

ENVY complains that Turnbull cannot serve both as a representative and a witness. The Board has well established precedents of allowing just that. Mr. Turnbull is available for any questions the Board or the parties might have, in writing or by any other means.

5. ENVY repeatedly refers to the Turnbull declaration as "unsworn." What they intend by that, NEC is unsure, but in hopes of resolving ENVY's concern, NEC refers to V.R.C.P. Rule

43 (Evidence (d) Affirmation in Lieu of Oath. -- Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

6. ENVY says that "NEC merely disagrees with the testimony they (Dodson and Thomas) offered." NEC replies that ENVY's statement is preposterous on face . NEC is plainly asserting that the Dodson and Thomas testimony was false and not the whole truth (respectively) and that ENVY knew this to be the case.

At issue are matters of objective fact and not simply opinion. Therefore the testimony of Dodson and Thomas cannot be relied on for findings of fact; therefore the Board cannot make findings on the relevant Section 248 criteria; Therefore the Board cannot, until this situation is remedied, issue an unconditional Certificate of Public Good or an unconditional order thereto.

7. ENVY and DPS argue that NEC has not provided sufficient evidence that Dodson and Thomas testimony is hopelessly tainted, but that is exactly what NEC is offering to do by this Motion Admit New Evidence.

III. CONCLUSION

For all of the good foregoing reasons the Motion to Admit New Evidence should be granted,

Respectfully Submitted
on Behalf of New England Coalition
This 8th Day of April, 2016

\



Clay Turnbull
Pro Se representative
New England Coalition Post Office Box 545
Brattleboro, Vermont 05320
cturnbull@necnp.org
802-380-4462



Raymond Shadis
Pro Se Representative
New England Coalition
Post Office Box 76
Edgecomb, Maine 04556

shadis@prexar.com
207-380-5994