STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket 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 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	)	March 30, 2016

OPPOSITION OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE IN RESPONSE TO NEW ENGLAND COALITION, INC.'S MOTION TO ADMIT NEW EVIDENCE

I. INTRODUCTION

The Department of Public Service ("Department" or "DPS"), by and through undersigned counsel, submits the following opposition to New England Coalition, Inc.'s ("NEC") Motion to Admit New Evidence, dated March 11, 2016 ("Motion"). The Department opposes the Motion because it is premature under Vermont Rules of Civil Procedure ("V.R.C.P.") Rule 60(b), and the relief NEC seeks would be prejudicial to the other parties to the proceeding.

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. On March 15, 2016, The Department received NEC's

Motion, requesting that the Board admit five attachments into the evidentiary record, pursuant to V.R.C.P. Rules 60(b)(1), (2), and (3).

II. LEGAL STANDARD

Vermont Rule of Civil Procedure 60 applies in Board proceedings pursuant to PSB Rule 2.221. V.R.C.P. 60(b), in turn, states:

> On motion and upon such terms that are just, the court may relieve a party of a party's legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or inexcusable neglect; (2) newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . .

Rule 60(b) is not an "open invitation to reconsider matters concluded at trial, but should be concluded only in extraordinary circumstances. Docket 7970, *Order re: Rule 60(b) Reconsideration*, Oct. 10, 2014 at 7 (quoting *John A. Russell Corp. v.Bohlig*, 170 Vt. 12, 24 (1999)(internal quotations and citations omitted)). Likewise, Rule 60(b) "does not operate to protect a party from freely made tactical decisions which in retrospect may seem ill advised." Docket 7970, *Order Denying Rule 60(b)Motions*, Jan. 8, 2016 at 20 (quoting *Wild v. Brooks*, 2004 VT 74 ¶20)(internal citations omitted)).

III. ARGUMENT

On its face, NEC's Motion is premature. Rule 60(b) outlines the bases by which a party may seek relief from a judgment or order. Here, the Board has made no order from which NEC may seek relief.

NEC instead appears to argue that relief under Rule 60(b) is appropriate because it was "surprised" by and in "no way . . . could have anticipated" certain statements of Entergy witnesses George Thomas and Harry Dodson at the technical hearing. Motion at 2, 4. While it may be true that NEC did not anticipate the statements of Entergy's witnesses, that does not rise to the level of "mistake, inadvertence, surprise, or excusable neglect" contemplated in Rule 60(b)(1). The testimony of Mr. Thomas and Mr. Dodson gave at the technical hearing does not appear very surprising given the contents of their prefiled testimony..

NEC's Motion appears to seek to protect NEC from the sort of tactical error Rule 60(b) does not cover. In this case, NEC argues that the evidence it now seeks to admit would not be relevant to the proceeding but for the Entergy witness testimony at the technical hearing it did not anticipate. Even if the Board accepts that premise as valid, it is clear that NEC did not have the evidence it now seeks to admit ready for discussion, use, or admission at the technical hearing. 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.

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). Admission of the evidence included in the Motion would still be inappropriate even if the Board were to exercise its discretion and reopen the evidentiary record. Put simply, granting NEC's motion would unfairly prejudice the other parties to the proceeding. Granting the Motion would deny the other parties the ability to object to or challenge the admission of the evidence, or explore issues and cross-examine NEC witnesses related to the same. The Board would also be denied the opportunity to ask questions of NEC related to the evidence.

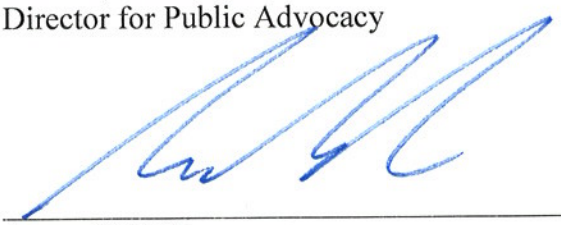
IV. CONCLUSION

Based on the forgoing, the Department respectfully requests that the Public Service Board deny NEC's Motion to Admit New Evidence, and limit its review to the evidentiary record that was established during the February 23, 2016 technical hearing.

Dated at Montpelier, Vermont this Thirtieth day of March, 2016

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE
Geoffrey Commons
Director for Public Advocacy



Aaron Kisicki
Special Counsel

cc: Docket 8300 Service List