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	)	Docket No. 8300

ENTERGY VY'S OPPOSITION TO NEC'S MOTION TO ADMIT NEW EVIDENCE

Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy VY"), by its attorneys, submit the following memorandum in opposition to the New England Coalition's ("NEC") Motion to Admit New Evidence ("NEC's Motion"). NEC had more than ample time to develop its evidence during the approximately ten-month discovery schedule in this docket and should have presented this evidence at the technical hearing, where Entergy VY's witnesses could have addressed NEC's position. The evidentiary record closed following completion of the technical hearing on February 23, 2016. NEC has not provided an adequate basis to: (1) obtain relief under Rule 60(b); (2) justify reopening the record; or (3) provide a sufficient foundation for the evidence offered. NEC's Motion should be denied.

gravel & shea | ATTORNEYS AT LAW
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369
A PROFESSIONAL CORPORATION

Discussion

I. THERE IS NO BASIS TO REOPEN THE RECORD UNDER V.R.Civ.P. 60(b) OR BOARD PRECEDENT.

A. NEC Cannot Satisfy The Standards Of Rule 60(b).

In its Motion, NEC relies upon V.R.Civ.P. 60(b) as a basis for reopening the record "in response to alleged fraud or mistake of Entergy witnesses." NEC's Motion at 1.[1] NEC relies on Rule 60(b)(1), (2) and (3), arguing that surprise, newly discovered evidence that could not have been discovered earlier, or fraud on the part of Entergy VY's witnesses justify reopening the record. *See* NEC's Motion at 1-2. NEC cannot justify reopening the record under any of the Rule 60(b) criteria.

First, NEC cannot reasonably claim surprise by anything that Entergy VY's witnesses testified to at the technical hearing. The issues that NEC raises – technical issues about the Holtec 100U system and the viewshed of the Project – were fully discussed in Entergy VY's prefiled testimony as early as June 30, 2014. NEC had more than sufficient time to develop evidence about these issues prior to the technical hearing.

Second, the Board may admit newly discovered evidence under Rule 60(b)(2) only if "the new evidence is 'of such a material and controlling nature as will probably change the outcome.' Rule 60(b)(2) 'generally applies when the parties are unaware of evidence existing at the time of the judgment and, through no fault of their own, discover that evidence only after the judgment.'" *Petition of Vermont Gas Systems, Inc.*, Docket 7970, Order of 1/8/2016 at 20-21

[1] Rule 60(b) does not directly apply here because the Board has not yet issued a final order. *See* Vol. 12, *Moore's Federal Practice* § 59.13[3][c] (Matthew Bender 3rd Ed.) (a motion to reopen to take additional evidence is distinct from a Rule 59 or Rule 60(b) motion); *see also Caracci v. Brother Int'l Sewing Mach. Corp.*, 222 F. Supp. 769, 771 (E.D. La. 1963), *aff'd*, 341 F.2d 377 (5th Cir. 1965). If the Board applies the criteria under Rule 60(b) as guidance, however, NEC has not satisfied the criteria.

(citing Docket 7970, Order of 10/10/2014 at 7; *Tobin v. Hershey*, 2002 VT ¶ 11, 174 Vt. 634, 638, 820 A.2d 982, 986-87). Again, NEC had ample time to collect this evidence before the technical hearing. The evidence offered by NEC does not meet the standard established by Rule 60(b)(2).

Finally, "[t]o prevail on a Rule 60(b)(3) motion, the moving party must show that the conduct complained of prevented a full and fair presentation of the movant's case," and must "demonstrate the existence of fraud, misrepresentation, or other misconduct by clear and convincing evidence." *Id*. (citing *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir. 2004); *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 631 (2d Cir. 1976)). As discussed further below, George Thomas and Harry Dodson testified consistently in their prefiled testimony in response to questions about the Holtec 100U system and the viewshed of the Project, respectively. Their testimony did not interfere with NEC's full and fair opportunity to present its case. Moreover, NEC has not made *any* showing that Mr. Thomas or Mr. Dodson testified fraudulently or made any misrepresentations during their testimony. NEC merely disagrees with the testimony they offered. NEC had a full and fair opportunity to cross-examine Mr. Thomas and Mr. Dodson during the technical hearing. For whatever reason, NEC chose not to offer the newly proffered evidence on cross-examination. A regrettable tactical decision is not grounds to grant a party relief under Rule 60(b). *Okemo Mountain v. Okemo Trailside Condominiums*, 139 Vt. 433, 436 (1981).

B. The Record Is Closed After The Completion Of The Technical Hearing And Should Not Be Reopened Absent Highly Material Evidence.

As a matter of practice, the evidentiary record is closed after completion of technical hearings. *See, e.g., Investigation into regulation of Voice of Internet Protocol ("VoIP") Services*, Docket 7316, Order of 3/23/2009 at 2 ("The evidentiary record in this case has been

closed since the end of the technical hearing on November 18, 2009 [sic]."); *Petition of Vermont Transco LLC*, Docket 7752, Order of 7/13/2012 at 48 (same). The Board's practice is in accord with normal procedure in contested cases, that is, the evidentiary record is closed after the completion of trial. *See, e.g., In re Rake*, 363 B.R. 146, 150-51 (Bankr. D. Idaho 2007) (record closed at the conclusion of hearing and attempt to add new testimony after the record is closed is improper).

A motion to reopen the record to submit additional evidence is subject to the tribunal's discretion. *See Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 331, 91 S. Ct. 795, 803 (1971). The Board has indicated in the past that it "would be inclined to open a closed record for the admission of late material only if it appeared highly material." *Petition of Alpine Haven Water Company, Inc.*, Docket 5947 Order of 8/31/2000 at 2. As discussed further below, the evidence NEC seeks to offer is not "highly material," and therefore the record should not be reopened.

II. THE HOLTEC 100U DOCUMENTS OFFERED BY NEC ARE NOT NEWLY DISCOVERED EVIDENCE AND SHOULD NOT BE ADMITTED.

NEC seeks to admit several documents that purport to provide information about the Holtec 100U system and the ISFSI at the Humboldt Bay Power Plant. *See* NEC's Motion, Attachments 1, 2 and 3. NEC claims these documents should be admitted now because it "did not see the need to ply Mr. Thomas with cross-examination exhibits regarding the Holtec 100U" at the technical hearing and was "surprised" by Mr. Thomas's testimony. NEC's Motion at 2. That is not a sufficient justification to reopen the record in this case. NEC had more than enough time to collect evidence on this issue. Entergy VY filed its petition and prefiled testimony on June 30, 2014. It filed its supplemental prefiled testimony on May 11, 2015. Even estimated

most conservatively, NEC had over eight months to develop its case, including sufficient time to notice a deposition of Mr. Thomas for the purpose of discovering what he might say about the Holtec 100U under cross-examination at the technical hearing.

The viability of the Holtec 100U system was at issue in this docket since Entergy VY's filing in June 2014. *See* Thomas pf. at 21:1-18. Even before that, Entergy VY stated in its 45-day prefiling notice that "Entergy VY's review of the HI-STORM 100U system determined that it would be significantly more difficult and substantially more expensive to install as compared to the above ground HI-STORM 100, particularly if the system were used for the spent fuel already moved into casks on the existing ISFSI." *See* Entergy Nuclear Vermont Yankee Second Dry-Fuel-Storage Facility and Related Modification 45-Day Advance Notice, May 14, 2014.

NEC's Motion does not even attempt to argue that the Holtec 100U documents are "newly discovered evidence." To the contrary, Attachment 1 of NEC's Motion contains a 2015 copyright by Holtec International. Attachments 2 and 3 of NEC's Motion are also dated in 2015. Assuming the documents are what NEC purports them to be, they were readily available to NEC prior to the technical hearings. NEC could have used all of this information to cross-examine Entergy VY's witnesses. NEC chose not to. Moreover, NEC could have deposed and/or cross-examined Mr. Thomas or the ANR's witnesses on the groundwater issues concerning the Holtec 100U system. It also could have issued a subpoena to Holtec under V.R.Civ.P. 45. NEC cannot use its brief or its late-filed motion to attempt to admit new evidence after the technical hearings have closed.

NEC's attempt to offer this evidence now is also improper because it deprives Mr. Thomas of an opportunity to respond to and explain the documents. For example, and by way of a proffer, had Mr. Thomas been asked about the underground ISFSI at Humboldt Bay described

in NEC's Motion, Attachment 3, he could have explained that the system *is not* a third application of the Holtec 100U, but rather a unique application of a modified HI-STAR 100 system that was installed in a designed underground concrete vault. The Humboldt Bay Power Plant is a very small, 65 MW reactor that was put into SAFSTOR status in 1984. Because of the age of the spent nuclear fuel at Humboldt Bay, the length of time the fuel has cooled, and the relatively low decay heat associated with it, the ISFSI storage casks do not require the normal atmospheric cooling, thus allowing for underground storage without fear of overheating.[2] The Humboldt Bay example is therefore inapplicable to the Vermont Yankee Nuclear Power Station (the "VY Station").

Finally, the information offered by NEC is not "highly material" to the issues pending before the Board. None of the exhibits even purport to address the site conditions at the VY Station. Accordingly, they in no way contradict Mr. Thomas's testimony concerning the site-specific problems with placing the Holtec 100U system at the VY Station. *See* Tr. 2/23/16 at 16:19-19:3 (Thomas). NEC's brief also confirms that the Holtec 100U system will be more expensive, more time consuming and more technically difficult to implement than the proposed cask system. NEC's Brief, Requested Findings and Proposed Order at 17. The documents offered by NEC do not address any of those concerns. Rather than clarifying the issues for the Board, the documents submitted by NEC, offered in a vacuum without explanation by a competent witness about how they may apply or not apply to the VY Station, are devoid of any probative value.

[2] *See Dry Cask Storage, Pacific Gas & Electric – Humboldt Bay Power Plant – 10217* (available at http://www.wmsym.org/archives/2010/pdfs/10217.pdf).

III. NEC SHOULD HAVE BEEN AWARE OF ANY AESTHETIC ISSUES PRIOR TO THE TECHNICAL HEARING, AND THE UNRELIABLE STATEMENTS OF NEC'S *PRO SE* REPRESENTATIVE SHOULD NOT BE ADMITTED.

NEC claims that it was surprised by Mr. Dodson's testimony at the technical hearing that the Project will not be visible from the VY Station property fence line. According to NEC, there was "no way that NEC could have anticipated this astounding statement." NEC's Motion at 4. NEC claims that its representative, Clay Turnbull, "made two trips to the perimeter of the site" to obtain evidence to contradict Mr. Dodson. *See* NEC's Motion, Attachment 4. Mr. Turnbull's affidavit should not be admitted for numerous reasons.

First, there is no justification for NEC's late offer of evidence. At the technical hearing, Mr. Dodson testified that the Project will not be visible from the property fence line and that "[t]he only location where it would be visible from would be the Connecticut River and the hiking trail along the New Hampshire shore." Tr. 2/23/16 at 50:23-25 (Dodson). Mr. Dodson's testimony was entirely consistent with his prefiled testimony and exhibits.

If NEC had reviewed Mr. Dodson's testimony and exhibits, it certainly would have expected Mr. Dodson's response. In his June 30, 2014 prefiled testimony, Mr. Dodson stated that the Project will only be visible from "limited sections of the open water of the Connecticut River and portions of the banks of the river in Hinsdale, NH." Dodson pf. at 11:6-7. Mr. Dodson confirmed that in his supplemental testimony. *See* Dodson supp. pf. at 3:20-21 ("These are the only areas from which the Project will be seen by the public."). Additionally, Exhibits EN-HLD-4, 5, 15 and 16 clearly depict the vantages from which Mr. Dodson estimates the Project will be visible. He does not indicate any areas "from the fence line" in those exhibits. If NEC was surprised by Mr. Dodson's response, it was not because of any fraud or misconduct on the part of Mr. Dodson.

Mr. Turnbull's unsworn statement should also be rejected because it is inadmissible hearsay. Vermont Rule of Evidence 801 defines "hearsay" as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." V.R.E. 801. While broader evidentiary rules apply in administrative proceedings such that evidence not normally admissible under the Rule of Evidence may be admitted if "commonly relied upon by reasonably prudent men in the conduct of their affairs," Mr. Turnbull's unsworn statement does not meet that standard. *See* 3 V.S.A. § 810(1). Mr. Turnbull does not offer any basis for his statements to be relied upon, does not provide sufficient information to verify his contention that the ISFSI was observable from his position and does not indicate in any way that he is qualified to offer an opinion on aesthetics. Mr. Turnbull's unsworn statement also violates the Board's prefiling rule. *See* Board Rule 2.213(A) ("Within such time as may be directed by the Board, each party shall file the direct testimony and exhibits of each witness it proposes to call in support of its direct case."). Indeed, Mr. Turnbull is not even a witness in this docket.[3] The timing of Mr. Turnbull's unsworn statement also prevents any party

[3] For that matter, Mr. Turnbull's attempt to offer an "eyewitness declaration" as evidence in this case violates Rule 3.7 of the Vermont Rules of Professional Conduct, which requires that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." Mr. Turnbull is the *pro se* representative of NEC and has been since the outset of this case. Board Rule 2.201(B), *pro se* appearances, provides that "[t]his rule shall in no respect relieve any person or party from the necessity of compliance with any applicable rule, law, practice, procedure or other requirement. . . . [A]nyone appearing as a pro se representative shall be under all the obligations of an attorney admitted to practice in this state with respect to the matter in which such person appears." Mr. Turnbull is subject to the Vermont Rules of Professional Conduct and should not be permitted to act as both an advocate and witness.

from cross-examining Mr. Turnbull on its contents and the efforts he made to obtain the information contained in it.[4]

In any event, Mr. Turnbull's unsworn statement does not establish any relevant facts. The statement does not establish precisely where Mr. Turnbull was located when he viewed the ISFSI casks. If Mr. Turnbull were inside the fence line (intentionally or otherwise), then Mr. Turnbull's statement would in no way conflict with Mr. Dodson's testimony. Similarly, the aerial Google Earth photograph offered by NEC in no way indicates where the Project may or may not be visible from on the ground. Mr. Turnbull's statement is unreliable and immaterial and should not be admitted.

IV. NEC HAD A FULL AND FAIR OPPORTUNITY TO ADDRESS ALL ISSUES IN THIS DOCKET.

NEC had a full and fair opportunity to develop all of this evidence prior to the technical hearing. Under the Vermont Administrative Procedures Act, parties to a contested case have the opportunity to respond and present evidence on all issues involved. 3 V.S.A. § 809(c). NEC had

[4] Mr. Turnbull took it upon himself to access Entergy VY property and attempt to take photographs without first obtaining permission from Entergy VY. While Mr. Turnbull claims that he did not knowingly cross any fence-line or pass any apparent property marker or trespass warning, he did in fact trespass on Entergy VY's property. As the Board is aware, Entergy VY does post its property against trespass, including posting notices in accordance with NRC security regulations. Regardless of whether Mr. Turnbull knowingly crossed onto Entergy VY's property, it is illegal to enter or remain on land that has been noticed against trespass. *See* 13 V.S.A. § 3705. Moreover, in connection with organizing the site visit in this proceeding, Entergy VY notified all parties, including NEC, that "in accordance with Entergy VY security procedures, no personal cameras, smart phones with cameras or other devices with camera/picture capabilities will be allowed on the Site Visit at the VY Nuclear Power Station (the "Station")." *See* Letter from Nancy S. Malmquist Esq. to Susan Hudson regarding Site Visit Procedure dated May 21, 2015. Entergy VY also notified all parties that they must complete a Visitor Access Request Form prior to accessing the property and that visitors are required to pass through several sets of security to access the site. *Id*. Mr. Turnbull knew or should have known that he was not permitted to access the site and take photos without prior authorization.

a full opportunity to explore these issues through three rounds of written discovery, multiple rounds of prefiled testimony, depositions and cross-examination.

In fact, there were multiple options available to NEC to develop this evidence. First, it could have requested a separate site visit under Vermont Rule of Civil Procedure 34(a)(2), which allows a party to request "to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)." V.R.Civ.P. 34. It could have also asked the Board to view the site from the perspective of the VELCO switchyard or other areas of potential aesthetic concern during the public site visit. Second, it could have and did avail itself of the opportunity to seek written discovery from Entergy VY and its aesthetics witness. NEC issued written discovery in every round of discovery available to it. Third, if it still had questions of Entergy VY's witnesses, it could have noticed their depositions. Fourth, it could have presented its own expert witness if it disagreed with Entergy VY's witnesses. Having decided not to take advantage of these numerous procedural tools, NEC should not be given an opportunity to reopen the record at this late date.

Conclusion

NEC had a full and fair opportunity to present any evidence it viewed important prior to or during the technical hearing in this case. NEC cannot satisfy any criteria under V.R.Civ.P. 60(b) to excuse reopening the record at this late date, and the immaterial and confusing evidence

seeks to admit does not warrant the relief NEC requests. Therefore, NEC's Motion should be denied.

Dated: Burlington, Vermont
March 29, 2016

Matthew B. Byrne, Esq.
Matthew S. Stern, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
mbyrne@gravelshea.com
mstern@gravelshea.com

John H. Marshall
Nancy S. Malmquist
Downs Rachlin Martin PLLC
90 Prospect Street, P.O. Box 99
St. Johnsbury, VT 05819-0099
(802) 748-8324
jmarshall@drm.com
nmalmquist@drm.com

- and -

Leslie A. Cadwell
Legal Counselors and Advocates, PLC
P.O. Box 827
751 Frisbie Hill Road
Castleton, VT 05735
(802) 342-3114
lac@lac-lca.com

For Petitioners