

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

May 31, 2016
Docket No. 8300

**NEW ENGLAND COALITION'S REPLY
TO
ENERGY NUCLEAR VERMONT YANKEE'S OPPOSITION
TO
NEW ENGLAND COALITION'S MOTION FOR AN INTERIM ORDER**

I. INTRODUCTION

New England Coalition ("NEC"), by and through its Pro Se Representatives, Clay Turnbull and Raymond Shadis, herein Reply to Entergy Nuclear Vermont Yankee's ("ENVY") memorandum in opposition to the New England Coalition's ("NEC") Motion for an Interim Order ("Motion") and Amended Motion for an Interim Order ("Amended Motion"). NEC has not the time or the resources to answer every ENVY charge, allegation, misstatement and averment in its 23 page Opposition. Indeed many portions of ENVY's opposition are so poorly reasoned as to defy credulity, with purported "facts" so misconstrued as to render ENVY's recitation of them as unanswerable. Much of ENVY's Opposition is given to criticism of NEC's performance during the proceeding, especially during the Technical Hearings and in NEC's choice of language in post-hearing filings. All of ENVY's criticism and characterization of NEC may be, and perhaps should be, taken seriously and it is certainly open to argument. However, it is both irrelevant and immaterial to the matter at hand, NEC's Motion for an Interim Order. NEC respectfully submits

that it has adduced sufficient information and evidence to impeach the testimony of ENVY witnesses regarding ENVY's exploration of alternatives, mitigating alternatives, mitigation and aesthetic impact of the proposed Independent Spent Fuel Storage Installation¹. Review of all of these 30 V.S.A. § 248 considerations being essential to the Board's required findings, without which a Certificate of Public Good cannot be issued, NEC has brought forward its case.

II. DISCUSSION

A. ENVY's Preliminary Statement is unduly and improperly colored.

ENVY. " NEC's self-appointed role as a "watchdog" does not give it license to defame Messrs. Thomas and Dodson."

NEC's role, as represented in this case, is not "watchdog", it is intervenor, as assigned by NEC membership, the NEC Board of Trustees, and the Vermont Public Service Board. To allege as NEC has done that testimony is "false, misleading, and/or inaccurate" is not defamation of the witnesses nor does it as ENVY claims,

" ...exceed the bounds of legitimate advocacy and [cross] into sanctionable behavior."

NEC did not, as ENVY claims, levy a solitary " *accusation of alleged "fraud" (March 11, 2016 Motion to Admit New Evidence at 1)*. ENVY has once again selectively quoted. What NEC did was to repeat the language of the guiding rule, signaling sections 1 and 3 by choice of the first word in each section, fraud or mistake:

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).

¹ ...the Board adheres to the "bursting bubble" concept of rebuttable presumptions, that is, "whenever evidence sufficient to put a presumed fact in issue has been adduced by the party against whom the presumption operates, the presumption entirely disappears and is of no evidentiary significance, with the burden of persuasion resting where it was at the beginning of the litigation

In re Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for a certificate of public good to modify certain generation facilities at the Vermont Yankee Nuclear Power Station in order to increase the Station's generation output, Docket 6812, Order of 3/15/04 at 80 n. 156.

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. [Emphasis added]

Even if NEC were to refer only to ENVY's selected allegation of fraud (per Rule 60b), NEC's allegations do not rise to the level of defamation. Fraud does not necessarily go to motive or intent. A person may commit fraud unintentionally². Thus to say that one's testimony constitutes fraud does not necessarily impugn the witness's character or integrity. NEC has uttered no falsehoods regarding the witnesses. NEC has not, as an essential element of defamation of a quasi-public figure (one entering publicly into public controversy) would have it, held or displayed any malicious intent toward the witnesses. The gravitas of fraud is that the victim was deceived or misled, not that the perpetrator is a deceiver or misleader. In fact, in its initial filing regarding the testimony in question, NEC claimed surprise because its experience with witness Thomas in cross-examination had always positive:

Having had a very positive experience of cross-examining Mr. Thomas as an expert witness in several Vermont Yankee-related Public Service Board dockets, NEC anticipated that Mr. Thomas would have a solid command of the structural and operational features of an alternative cask system considered for his site. Accordingly, NEC did not see the need to ply Mr. Thomas with cross-examination exhibits regarding the Holtec 100U. NEC was thus surprised by Mr. Thomas' apparent lapses of memory and his unformed and un-informing responses as captured in the following transcript excerpts, which are a sharp contrast to detailed and often contradictory information readily available from Holtec and other authoritative sources and now offered as NEC Attachments One, Two, and Three NEC Motion to Admit New Evidence at 2, March 10, 2016

2 Fraud (<http://dictionary.findlaw.com/definition/fraud.html>)

1 a : any act, expression, omission, or concealment calculated to deceive another to his or her disadvantage

[types of fraud:]

constructive fraud

: conduct that is considered fraud under the law despite the absence of an intent to deceive because it has the same consequences as an actual fraud would have and it is against public interests (as because of the violation of a public or private trust or confidence, the breach of a fiduciary duty, or the use of undue influence) ...

fraud in law

: fraud that is presumed to have occurred in light of the circumstances irrespective of intent to deceive

intrinsic fraud

: fraud (as by the use of false or forged documents, false claims, or perjured testimony) that deceives the trier of fact and results in a judgment in favor of the party perpetrating the fraud

ENVY, "Entergy VY has completed a thorough investigation of the testimony challenged by NEC and is confident that NEC's claims are entirely without merit. Messrs. Thomas and Dodson testified truthfully after many hours of preparation and internal verification."

With the foregoing statement ENVY allows the reader to reasonably infer that ENVY coached or drilled its witnesses for "many hours" on what to say in response to anticipated questions. If so, it implicates ENVY in the final misleading product of "internal verification" as presented by its witnesses.

NEC admits to some puzzlement over ENVY's claim that *"Entergy VY has completed a thorough investigation of the testimony challenged by NEC and is confident that NEC's claims are entirely without merit."* Forgetting for the moment the self-serving nature of this vacuous statement, it does not provide a date when this *"thorough investigation"* was completed. Was there ever a period time when ENVY wasn't *"... confident that NEC's claims are entirely without merit"* or ENVY undertake its *"thorough investigation"* with a conclusion of *"confidence"* in hand? We don't know.

ENVY: In fact, NEC's position on Entergy VY's security requirements has been discredited by information independently provided by the Nuclear Regulatory Commission ("NRC"). See NEC's Disclosure of New Information Adverse to Previously Filed New England Coalition Positions.

NEC fears that the foregoing statement, both inaccurate and misleading, together with ENVY's selective quotation above, and similar slippery representations below may actually betoken ENVY's understanding of what constitutes candid representations to a this tribunal. NEC submits that it is something of an irony that ENVY chooses to defend the candor and integrity of its testimony which anything that is less than wholly candid.

NEC's *"NEC's position on Entergy VY's security requirements"* is not a monolith to be *'discredited'*, as ENVY would have it, by a single NRC Staff e-mail response to an NEC point-by-point inquiry. NRC did not *'independently'* provide information; NEC sought the information out and in turn promptly provided it to the Board and the parties. It was specific

narrowly drawn information regarding NRC regulation of security, which ENVY did not provide in any of its testimony or subsequent filings. As much as the NRC Staff provided the missing pieces on why and how staff requirements are safeguards information and how they can include specifics that are not detailed in 10 C.F.R. § 73, they also confirmed that visibility requirements under part 73 are not without limits and end at the owner control area boundary. They also explained that Maine Yankee and Vermont Yankee may have different security requirements primarily because Vermont Yankee has additional structures (e.g., spent fuel pool) requiring nuclear-related security.

This is not the case of a federal agency discrediting NEC 's position on security requirement with independently provided information.

B. HOLTEC's "differing opinions," as ENVY would have it, is not the issue.

ENVY has consistently tried to characterize the argument over the nature of the testimony of Mr. Dodson and Mr. Thomas as a struggle between differing opinions or different conclusions drawn from the identical set of facts.

It is not.

In the case of Mr. Thomas, ENVY now tries to paint a picture of differing opinions held by Mr. Thomas and HOLTEC.

But really, it is not. The subjective, equivocal, and relative language in Mr. Thomas' examination responses is plainly not the kind of information upon which \$100 million contracts are negotiated or even considered between engineering professionals.

Q. In your estimation what are the advantages of the 100U as opposed to upright or HI-STORM or above ground HI-STORM?

A. The advantages would be as Holtec states, which if I recall it's lower radiation levels, possibly a lower — a lower — they claim its more — they claim the system is more secure, and how they draw that conclusion I'm not sure.

Q. Did you — did you — and in your conversations with Holtec did you raise that

[groundwater] question?

A We discussed it. Yes.

Q. And what was their response?

A. **They feel that their system has been designed** to prevent the potential from groundwater and leakage.

Q. I believe —

A. So even though it was below ground water, the bottoms of the casks for the support pad were below ground water, **they felt it could be designed and it could be**

Thomas, Tr. 2/23/16 at 14

The detailed specifications as to dose and below grade, even below water table, engineering of HOLTEC technical literature (on their website) and in sworn technical testimony are quite devoid of feelings and unsupported or confusing claims. (see, emphasized testimony above.).

NEC was astounded that the lead engineer-project manager could not or would recall a single specific or a single specification number. Except for an estimate of \$30 million in additional cost for the v100U cask system, Mr. Thomas offered nothing objective or quantitative. His testimony was not forthcoming. It was misleading in that it was not an even-handed, professional, or disinterested representation of HOLTEC U-100 facts in which he was, or should have been, thoroughly inculcated.

ENVY brings up a 2005 NEC intervention before NRC regarding HOLTEC changes to its cask system certificate of compliance. In NEC's view, in 2005, the applicant's work on the changes was "technically indefensible." ENVY says NEC cannot have it both ways. This is a childish proposition and raises issues entirely irrelevant and immaterial to the issue at hand.

Notwithstanding, that NEC makes no claim that HOLTEC's technical submittals cannot be challenged in a technical setting and submitted to the regimens of NRC review, NEC's intervention contentions were thoroughly analyzed by NRC and dismissed. Had NEC won, ENVY might have a point.

NEC should point out that the plant managers at Calloway, San Onofre, and Humbolt Bay

nuclear power stations have signed contracts for below-ground 100U fuel storage based at least in part on HOLTEC representations. Each instance has occasioned republication of detailed HOLTEC 100U specifications.

C. The NRC Staff responses to NEC's query does not cure the testimony of Thomas and Dodson with respect to "security requirements."

Legal Definition of *misleading*:

possessing the capacity or tendency to create a mistaken understanding or impression — compare deceptive, fraudulent

<http://www.merriam-webster.com/legal/misleading>

Mr. Thomas

..I'll use that term generally, in the past, and the basis of his statement is what is the basis of the existing Vermont Yankee security plan.

Q. Which is?

A. Which is that certain - - well, first of all, the security plan [is] safeguards information, but it restricts the - - restricts the placing of obstacles that prevent the security forces from having a good line of sight around the protected area.

Q. **And that security plan is guided by NRC regulations?** [Emphasis added]

A. **Yes it is, and [10] CFR 73**

Tr. 2/23/16 at 21

As DPS and NEC heard it:

34. Screening measures around the Project are not possible at the VY Station in order to preserve line of visibility security requirements pursuant to NRC regulations. Dodson pf. [Emphasis added]

23;Tr.22-23 (Thomas).

DPS BRIEF at 10

Entergy has proposed not to install additional aesthetic mitigation measures around the Project, including the extension of the screening wall along the north side of the existing ISFSI to shield the Project on the north side.

The Department does not object to this decision. Entergy has represented that it is unable to extend the existing screening wall or execute other mitigation measures around the Project due to line of visibility security requirements pursuant to NRC regulations.

Further mitigation measures are therefore unreasonable [Emphasis added]

DPS BRIEF at 12

Based on ENVY's subsequent filings, it becomes clear that ENVY put together a security plan

which excludes obstacles to line-of-sight visibility out to an unspecified distance. Though it makes no sense in terms of security, it appears that the existing visual barrier wall is exempted. Presuming here, NEC supposes, that terrorists will not come from the east (by boat) but from the west (by taxi?). ENVY has not stated when this plan was executed and when it was filed with NRC. That makes a difference because ENVY likely knew it had potential mitigation evaluation obligations as far back as 2012.

The NRC Staff Responses make it pretty clear the visibility requirements do not extend beyond the security fence (owner-control) but no consideration has been given to mitigating measures there. NRC Staff also indicates that Vermont Yankee's particular requirements are linked to presence of guarded structures. Thus, the question arises about what happens to the strictures when all of the fuel is transferred to cask sometime in the 2020's? Will the intruder detection capability then revert to a twenty foot exclusion zone? ENVY hasn't said, but visual impacts would be as great or greater then.

D. The Peter Van der Does photo does contradict Dodson.

ENVY says, Taken at face value, the photograph offered by NEC's representative Peter Van der Does indicates that the roof of the North Warehouse is visible from a location north of the Vermont Yankee property boundary fence, which appears to be on an adjacent private property of the Miller farm. But that does not mean that the second ISFSI will also be visible from that location. The full height of the North Warehouse is taller than the casks will be. The top of the North Warehouse roof is approximately 24 feet, 7 inches above grade and the low end of the roof is approximately 16 feet above grade. The casks will be 18 feet and will sit on a 2-foot above grade pad, resulting in a total height of 20 feet above grade. See Dodson pf. at 3:14-15.

However, with a second look at this admittedly poor image, one can see to the left not only the lower edge of the roof (drip line) but also portions of the warehouse wall. ENVY claims

that the lower edge of the roof is 16 feet above grade and that the casks will extend 20 feet above grade. We are not told who measured the roof line or referred to any supporting documents. Even so, by ENVY's reckoning the casks will be visible from the vantage point of the Van der Does photo.

ENVY also complains that *the photograph offered by Mr. Van der Does was taken with a 185mm telephoto lens. Telephoto lenses distort and flatten the perspective of a scene such that structures appear closer than they actually are. In order to replicate the view presented in the photograph, an individual would require binoculars or some other visual aid.*

The photo data is printed next to the photo in the NEC submittal less anyone be misled by flattened "perspective." The immediate question however is not how large or small the casks may appear, but whether or not they may be visible from anywhere but the witnesses' easterly view shed on the Connecticut River and along the hiking trail on the New Hampshire shore.

Plainly, the photograph offered by Mr. Van der Does may be relied upon for the purposes offered by NEC.

NEC is not taking exception here to Mr. Dodson's opinions. Mr. Dodson stated as fact something that demonstrably is not fact; that the casks will only be visible only from the east and at considerable distance. It's now more than clear that this is not true despite ENVY's insistence on realigning the argument, nitpicking here and double-jointed there. Mr. Dodson appears to have based his aesthetic analysis in large part on this simple non-fact thus invalidating it.

III. CONCLUSION

Finally, ENVY says that none of what NEC says has any merit and "*NEC has even been forced by the NRC's rejection of its assertions to retract at least one.*" To say this is more than a little over-colored. In fact, following the hearings NEC dutifully searched 10C.F.R§ 73, in part in response to witness Thomas' invocation, and all that NEC found on visual restrictions was on a 20 foot exclusion zone. ENVY raised the question of NRC custom rules and secret guidance (though without substantiating references) and NEC inquired of NRC Staff. At the NEC office, it is called, "double-checking." And NEC, far from thinking badly of the practice, believes it to have real merit. In this case, ENVY, not the witness, is implicated in a hint of conspiracy to hide information from the Board and to evade the potential responsibility to investigate mitigating measures.

For all of the above stated good reasons, NEC respectfully requests that the Board issue an Interim Order addressing NEC's allegations of false, misleading, and/or inaccurate testimony.

The Board should order an investigation as it did in Docket 7440.

In the alternative, the Board should move directly to order ENVY to revisit the V.S.A. § 248 (b) criteria, subject to public scrutiny and public input along the lines of the process suggested in NEC's Brief and Reply Brief:

The petitioners shall cause to be undertaken a study of the project's impacts on site reuse, orderly development, regional planning, local environment, and aesthetics, with particular attention to mitigation and mitigating alternatives. The study is to be by professional measure thorough and undertaken in consultation with the affected public including advocacy stakeholders and the parties to this docket. The study shall include a detailed comparison of the currently proposed above ground storage and underground storage such as the 100 U system. The Petitioners may not begin construction of the proposed ISFSI. Parties will be accorded an opportunity to comment on the study and make recommendations regarding the Board's response to the study.

Respectfully Submitted
on Behalf of New England Coalition
This Thirty-First Day of May, 2016

A handwritten signature in black ink, appearing to read 'C. Turnbull'.

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