STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 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 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	)

Order entered: 6/1/2016

ORDER RE: NEW ENGLAND COALITION POST-HEARING MOTIONS

I. Introduction

In this proceeding, the Vermont Public Service Board ("Board") is considering a request from Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy VY"), to authorize site preparation for, construction of, and storage of spent nuclear fuel ("SNF") at a second Independent Spent Fuel Storage Installation ("ISFSI"), as well as site preparation for and construction of a 200-kilowatt ("kW") diesel electric generator to provide a backup source of power (together, the "Project") at the Vermont Yankee Nuclear Power Station (the "VY Station"). The Board convened an evidentiary hearing on February 23, 2016.

Subsequent to the hearing, the New England Coalition ("NEC") filed three motions asking the Board to reopen the record to admit additional evidence or take official notice of additional information under 3 V.S.A. § 810. These motions are opposed by Entergy VY. In this Order, we deny the three motions.

II. Motion to Admit New Evidence

On March 11, 2016, NEC filed a motion requesting the Board to admit additional evidence into the record. NEC seeks to introduce the following additional evidence:

(1) Two documents from Holtec International related to an underground storage module for storing spent fuel and high-level radioactive waste;

(2) A document from the California Coastal Commission related to underground storage of spent fuel; and

(3) A satellite view photograph of the Vermont Yankee site and an affidavit related to the visibility of the proposed ISFSI.

NEC asks the Board to reopen the record to include these documents. NEC asserts that, even though V.R.C.P. Rule 60(b) does not appear to apply, the Board should use the criteria in that Rule in evaluating the appropriateness of reopening the record. In particular, NEC cites to Rule 60(b)(1)(mistake, inadvertence, surprise), 60(b)(2) (newly discovered evidence), and 60(b)(3) (fraud, misrepresentation, or other misconduct).

Substantively, NEC contends that the additional documents are necessary to correct statements that Entergy VY witnesses made during the evidentiary hearings. NEC cites to testimony of Entergy VY witness George Thomas stating that installation of the underground Holtec storage system (referred to as the 100U) could raise concerns with groundwater. NEC argues that the two Holtec documents and the report of the California Conservation Commission rebut this concern. Further, NEC asserts that it could not reasonably anticipate that the Entergy VY witness's testimony would conflict with the information in the documents.

As to the satellite photograph and affidavit, NEC argues that they are necessary to respond to testimony of Entergy VY witness Harry Dodson concerning the visibility of the ISFSI from certain vantage points. NEC maintains that it could not have anticipated Mr. Dodson's statement, which NEC contends is incorrect.

Entergy VY urges the Board to reject NEC's motion. Entergy VY observes that Rule 60(b) itself does not apply because the Board has not yet issued a final order. However, applying the Rule 60(b) criteria as proposed in NEC's motion, Entergy VY states that NEC cannot justify reopening the record under any of the criteria. Entergy VY argues that the issues NEC seeks to add testimony on were fully discussed in Entergy VY's prefiled testimony and that NEC had ample time to develop evidence on them prior to the hearings. Entergy VY also asserts that NEC has shown no indication of fraudulent testimony or misrepresentations.

As to the general concept of reopening, Entergy VY acknowledges that this is a matter within the Board's discretion. However, Entergy VY argues that the additional information is not highly material and thus should not be admitted.

In its comments, the Department of Public Service ("Department") argues that NEC's motion is premature because there is no order from which NEC may seek relief under Rule 60(b). As to substance, the Department asserts that NEC's inability to anticipate the testimony of Entergy VY's witnesses does not meet the standard of Rule 60(b)(1). To the contrary, the Department asserts that the testimony of Mr. Thomas and Mr. Dodson was not surprising in light of their prefiled testimony. The Department contends that any unavailability of evidence during the hearings stems more from NEC's trial preparation choices than from actual surprise.

More broadly, the Department acknowledges that the Board has the discretion to reopen the evidentiary record. Nonetheless, the Department asserts that reopening the record would be unfair as it would deprive other parties of the ability to challenge the evidence or explore the issues raised by the new evidence.

We deny NEC's request to reopen the record to include additional evidence. To the extent that NEC's request is based upon Rule 60(b), it is without merit. Rule 60(b) applies after final judgment, not before.

As to the substance of NEC's arguments, we are unpersuaded. It is clear that it is within this Board's discretion to reopen the evidentiary record to admit additional evidence and, if need be, to schedule additional hearings. We did this recently in Docket 7970. In that case, after our final Order, we held hearings on a Rule 60(b) motion to set aside our judgment (the second such motion in the case). After the close of evidentiary hearings in June of 2015, additional relevant information was submitted to us in the form of a memorandum of understanding between two parties. We then scheduled further hearings to allow the presentation of testimony and cross-examination on the new evidence and related matters.[1]

In the instant proceeding, we do not find any basis for reopening. All of the evidence that NEC now seeks to present was available to it prior to hearings. For example, the visibility of the

1. *Petition of Vermont Gas Systems, Inc. for a certificate of public good*, Docket 7970, Order of 1/8/16, generally.

second ISFSI from different vantage points was clear from the initial filings and during the site visit we conducted on June 4, 2015. Similarly, there is no evidence that the design information on the Holtec 100U system is new. NEC could have presented this information in testimony or used it to cross-examine witnesses. To the extent that NEC was surprised by the live testimony of witnesses during the hearing process, it had the opportunity to seek a continuance from the Board to allow it to respond. Such an approach would have allowed the Board and other parties to address the issues during evidentiary hearings. It would also have been less prejudicial to other parties who have filed briefs based upon the evidence. NEC elected not to pursue any of these avenues and has not shown any good cause for the Board to now allow it to change its tactical decisions. Moreover, admitting the evidence now would place other parties at a disadvantage because they would not be able to offer further rebuttal or explanation of the material.

III. Motion to Take Judicial Notice

On April 14, 2016, NEC filed a motion asking the Board to take judicial notice of two newspaper articles that it contends are relevant to this proceeding and "illuminate facts vitally material to a decision." The first article contains a photograph that demonstrates that the ISFSI would be visible from the site of the facility owned by Vermont Electric Power Company, Inc. and Vermont Transco, LLC (collectively, "VELCO") adjacent to the VY site. NEC argues that introduction of the first photograph is necessary to rebut testimony from Mr. Dodson that the ISFSI would be visible only from certain vantage points. In particular, NEC cites to testimony from Mr. Dodson in which he discusses the visibility of the ISFSI from the property boundary. NEC argues that, because the VELCO facility is not owned by Entergy VY and the ISFSI is visible from it, Mr. Dodson's testimony is incorrect.

The second article contains a photograph that, according to NEC, shows that mitigating measures such as berms and foliage planting are in place at the Maine Yankee Atomic Power Company ("Maine Yankee") ISFSI. NEC raises extensive legal argument concerning the scope of permissible aesthetic mitigation under Nuclear Regulatory Commission ("NRC") rules, using the photograph to illustrate its point.

Entergy VY opposes NEC's motion. As to the photograph from the VELCO facility, Entergy VY states that it was actually taken from a position along the security fence. Thus, it does not show what is visible from the property line, which Entergy VY states was the subject of Mr. Dodson's testimony. Entergy VY thus argues that the photograph is irrelevant for the purpose NEC seeks to use it.

As to the photograph from Maine, Entergy VY asserts that the measures taken at Maine Yankee are irrelevant. Entergy VY contends that it is the site-specific security plan required by the NRC that determines the nature of aesthetic mitigation. In this instance, Entergy VY states that testimony on the record show that under, its security plan, Entergy VY may not add obstacles to a good line of sight.

Before examining the reasonableness of the request for judicial notice, we point out that under the Rules of Evidence, the newspaper articles would not normally be admissible. In *Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.*, Docket 7862, we stated that: "It is widely recognized that newspaper articles generally constitute hearsay and do not fall within any of the exceptions to the hearsay rule."[2]

Thus, the question before us becomes whether, notwithstanding the fact that the information is hearsay, the articles may be admitted because the Board finds that they are judicially cognizable facts. Under Section 812 of Title 3, the Board may take official notice of judicially cognizable facts. That statutory provision states as follows:

> Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.[3]

As we observed in Docket 7862, the Vermont Supreme Court has interpreted the term "judicially cognizable" to mean one that is "'not subject to reasonable dispute in that it is . . . (2) capable of

2. Docket 7862, Order of 2/8/13 at 5.
3. 3 V.S.A. § 810(4).

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'"[4]

Applying this standard to the two newspaper articles, we must deny NEC's motion. By their very nature, newspaper articles do not meet the standard enunciated above, *i.e.*, facts that are capable of accurate and ready determination. We cannot readily verify that the information in the articles and photographs is accurate. Moreover, even if we accept the fact that the photographs are accurate depictions, it is not clear from the photographs exactly what is represented and how that information is relevant to the proceeding in this case. This is amply illustrated by the fact that Entergy VY and NEC do not agree on the location from which the photograph of the VY Station was taken or how the image relates to this proceeding. Thus, it is not clear of what "fact" NEC asks us to take judicial notice.

We also are concerned about the fairness of introducing the photographs into the record at this late date. Standing alone, it is not clear exactly what the photographs demonstrate. To supply the needed context, we would need to allow further cross-examination or briefing. The delays in issuance of a final decision in this proceeding that would result from reopening the record would be unfair to the other parties.

NEC's motion for judicial notice is denied.

IV. Motion for Interim Order

On May 10, 2016, NEC filed what it styled as a motion for an "Interim Order." In its request, NEC reiterates the substance of the two previous post-hearing motions and responses thereto. These filings, NEC argues, demonstrate that the testimony of Mr. Thomas and Mr. Dodson concerning mitigation and alternatives is "misleading, inaccurate, and less than the whole truth." NEC therefore asks that the Board issue an "Interim Order" addressing NEC's allegations and order a further investigation into the issues raised in the testimony. NEC cites *Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificates of Public Good* , Docket 7440 as precedent for the Board to take such an action.

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4. Docket 7862, Order of 3/29/13 at 5 (citing *In re Handy*, 144 Vt. 610, 612 (1984)).

Entergy VY filed an opposition to NEC's motion on May 24, 2016. Entergy VY argues that NEC's claims that the testimony of Mr. Thomas and Mr. Dodson was false, misleading, or inaccurate is "entirely without merit." Entergy VY asserts that NEC has failed to provide any evidence to support its assertions.

We deny NEC's motion for an interim order. NEC has not shown that the testimony of either Mr. Thomas or Mr. Dodson raises sufficient questions as to warrant further investigation. NEC's various filings amply demonstrate that NEC disagrees with the conclusions that the witnesses reached. NEC has also pointed to several statements that could be open for interpretation. However, the motion falls short of showing material statements that are false, misleading, or inaccurate.

In this regard, we find the comparison to Docket 7440 to be inapposite. In Docket 7440, the information that Entergy VY had not provided had a material impact on the proceeding.[5] By contrast, NEC has shown no such connection in its filings. Rather, NEC appears to be seeking an additional post-hearing opportunity to litigate matters that could and should have been explored through discovery and cross-examination much earlier in this case. We decline to allow NEC to disrupt the order of process in this Docket in this manner, especially in the absence of any compelling reasons to justify granting such relief.

SO ORDERED.

5. Docket 7440, Order of 2/25/10 at 1-2.

Dated at Montpelier, Vermont, this 1st day of June, 2016.

s/James Volz)
)
) PUBLIC SERVICE
)
s/Margaret Cheney) BOARD
)
) OF VERMONT
s/Sarah Hofmann)

OFFICE OF THE CLERK

FILED: June 1, 2016

ATTEST: s/Judith C. Whitney
Clerk of the Board

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