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September 18, 2015

HAND DELIVERED

Susan Hudson, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620

Re: 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 to construct a second independent spent fuel storage installation ("ISFSI") at the Vermont Yankee Nuclear Power Station
Docket No. 8300

Dear Mrs. Hudson:

Enclosed for filing please find an original and six copies of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.'s ("Entergy VY") Objection to Admission of Prefiled Testimony of Raymond Shadis Submitted on Behalf of New England Coalition.

Thank you for your attention to this matter. Please contact me with any questions.

Very truly yours,

GRAVEL & SHEA PC

Matthew S. Stern

MSS:lmd

Enclosure

cc: Service List (e-mail and mail)

bcc: Tim Ngau, Esq. (e-mail)
Mr. George Thomas (e-mail)

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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) Docket No. 8300
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)

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STATE OF VERMONT
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Docket No. 8300

OBJECTION TO ADMISSION OF PREFILED TESTIMONY OF
RAYMOND SHADIS SUBMITTED ON BEHALF OF NEW ENGLAND COALITION

Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, “Entergy VY”), by its attorneys, objects pursuant to Vermont Public Service Board (“Board”) Rule 2.216(C) to the admissibility of the Prefiled Testimony of Raymond Shadis submitted on behalf of New England Coalition (“NEC”) on August 21, 2015. As explained in the memorandum of law below, Mr. Shadis’ prefiled testimony should be excluded because it (1) addresses issues that are irrelevant to this proceeding; (2) exceeds the limited scope of NEC’s intervention allowed by the Board; and (3) addresses areas that are preempted by federal law.

Memorandum

Evidentiary matters before the Board are governed by 3 V.S.A. § 810. Board Rule 2.216(A). Section 810 provides, in pertinent part:

In contested cases:

Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the

superior courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. . .

3 V.S.A. § 810(1).

In determining whether evidence should be admitted over an objection in a contested case, the Board must thus examine whether the evidence is relevant, material, or not unduly repetitious. The Board must also determine whether the evidence is admissible under the Vermont Rules of Evidence. Finally, if the evidence is not admissible under the Vermont Rules of Evidence, the Board must determine whether the evidence is “necessary to ascertain facts not reasonably susceptible of proof” under these rules and whether “it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.” 3 V.S.A. § 810(1).

Mr. Shadis’ testimony generally concerns two topics neither relevant nor material to the criteria that are to be considered in this docket under 30 V.S.A. § 248 and 10 V.S.A. § 6522. First, he compares his experience with Maine Yankee, during its decommissioning and development of an ISFSI, to the “quality of public participation at Vermont Yankee.” Shadis pf. at 5-8. Second, Mr. Shadis opines that the Department of Energy (“DOE”) is unlikely to remove spent fuel from the site before 2073 and, as a result, unspecified “mitigating actions” should be required of Entergy VY. *See* Shadis pf. at 8-13.

The first portion of his testimony is irrelevant, immaterial and beyond the scope of NEC’s intervention in this docket. The second is irrelevant and immaterial because the testimony is completely silent about what those “mitigating actions” would be and contravenes the Board’s July 7, 2015 order to the extent that such “mitigating actions” are related to Mr. Shadis’ preempted concerns about the radiological safety of the spent fuel and/or issues

regarding operation and management of the ISFSI. Mr. Shadis' testimony should therefore be excluded in its entirety.

I. MR. SHADIS' TESTIMONY ABOUT HIS EXPERIENCE WITH MAINE YANKEE AND ITS PUBLIC PARTICIPATION PROCESS IS IRRELEVANT AND BEYOND THE ALLOWED SCOPE OF NEC'S INTERVENTION.

The first portion of Mr. Shadis' prefiled testimony presents an irrelevant and immaterial account of his role "as an active and contributing participant in the Maine Yankee decommissioning and Independent Spent Fuel Storage Installation (ISFSI) experience." *See* Shadis pf. at 3. Mr. Shadis describes the process at Maine Yankee and his tours of ISFSIs at other nuclear facilities. Shadis pf. at 6-7. The entirety of his testimony on this subject pertains to *other* nuclear plants and has no relevance to the Vermont Yankee Nuclear Power Station (the "VY Station"). *See* Shadis pf. at 5-8. At most, Mr. Shadis' testimony provides a critique of the Board's process in § 248 proceedings and the Nuclear Decommissioning Citizens Advisory Panel. Neither critique has any relevance to the substantive issues in this proceeding, which center on whether the second ISFSI satisfies the Section 248(b) criteria and Section 6522 of Title 10 and not how the requirements of those statutes compare to what was done elsewhere. Mr. Shadis' testimony about his experience with Maine Yankee and the public participation process conducted under another state's regulatory scheme should be excluded as irrelevant and immaterial.

Even if Mr. Shadis' prefiled testimony would have any relevance to the VY Station, his critique of the "public participation" process regarding the site's decommissioning and the ISFSI is outside the scope of the interests that the Board permitted NEC to address in this docket. Specifically, the Board granted NEC "permissive intervention limited to the interests it has articulated in the Project's impacts on the local environment, the reuse of the [VY Station]

property, regional planning and development, and aesthetics.” Docket 8300, Order of 7/7/15 at 5. These interests do include a determination of what a “meaningful public participation” process would be for decommissioning in Vermont. That decision has already been made in 2014 by the Vermont General Assembly in Act 178 by forming the Nuclear Decommissioning Citizens Advisory Panel. *See* H.855, 2013-2014 Sess. (Vt. 2014). Mr. Shadis’ testimony recommending that the Board consider “the possibility of a very different licensee approach to decommissioning and the establishment of an ISFSI,” Shadis pf. at 3, is not related to any particularized interest of NEC in the *Project’s impacts*,¹ much less any of the limited particularized interests enumerated by the Board in its order authorizing NEC’s permissive intervention

II. MR. SHADIS’ TESTIMONY ABOUT THE REMOVAL OF SPENT FUEL FROM THE VY STATION IS IRRELEVANT AND/OR PREEMPTED.

In the second portion of his testimony, Mr. Shadis states a concern that the DOE will fail to timely remove spent nuclear fuel from the VY Station, resulting in an effectively permanent ISFSI that will prevent the eventual reuse of the VY Station site. He then suggests in the last paragraph of his three-page response to Question 9 that “mitigating actions” should be put in place. But Mr. Shadis never identifies what those “mitigating actions” would be; he instead merely invites the Board to discuss them (presumably during the technical hearings which would

¹ NEC was granted limited intervention to address “the interest it has articulated in the Project’s impacts. . .” Docket 8300, Order of 7/7/15 at 5. As an intervenor, NEC may address a “specific particularized interest that may be affected by the outcome of a proceeding. Simply raising generalized concerns is not sufficient to support intervention.” *Application of Seneca Mountain Wind, LLC*, Docket 7867, Order of 10/5/12 at 2; *see also Invest. into alleged violation by Vermont Gas Sys., Inc.*, Docket 8328, Order of 11/6/14 at 3-5.

violate the Board's rule requiring that evidence be prefiled, *see* Board Rule 2.213). Mr. Shadis' invitation to discuss a completely unidentified set of actions is irrelevant to this proceeding.

To the extent there is any substance to the second portion of Mr. Shadis' testimony, it relates to such topics as the impact of "plant derived radionuclides" (Shadis pf. at 8), the potential for "a malevolent assault on the ISFSI" (*id.* at 9), "a recent high level waste task force meeting" (*id.* at 11(1)), the President's Blue Ribbon Commission Report on how the federal government should discharge its responsibilities for accepting spent fuel (*id.* at 11(2)), and the NRC's Long Term Storage Rule and the possibility of spent fuel "canister failure" (*id.* at 11-12(3)).

The entirety of this prefiled testimony of Mr. Shadis at pages 8 through 13 addresses preempted subject matter, which must therefore be excluded. As Mr. Shadis acknowledges, the Board's intervention order cautioned NEC that "this proceeding is not a forum for litigating issues that are within the jurisdiction of the Nuclear Regulatory Commission," Docket 8300, Order of 7/7/15 at 5; Shadis pf. at 4. The NRC has "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials," and "[u]pon these subjects, no role was left for the states." *Pac. Gas. & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (citations omitted).²

² *See also Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 409 (2d Cir. 2013) (radiological safety "represents an arena of field preemption that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance, thus precluding any regulation by the states."); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1250 (10th Cir. 2004) ("Under the federal licensing scheme...it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility."); *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004) ("[T]he AEA confers on the NRC authority to license and regulate the storage and disposal of [SNF]."); *Pet. of Entergy VY for a CPG to construct a dry fuel storage facility at the VY Station*, Docket 7082, Order of 4/26/06 at 15 (recognizing federal preemption of state-level regulation of spent nuclear

(...continued)

In fact, Mr. Shadis acknowledges that *Maine Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47 (D. Me. 2000), held that in accordance with *Pacific Gas and English v. General Electric Co.*, states cannot interfere with those aspects of a proposed ISFSI project that remain exclusively within the province of the NRC. *Maine Yankee*, 107 F. Supp. 2d at 54-55.³ Specifically, *Maine Yankee* provides that states “have no role to play, for example, in determining whether [a facility] should use dry cask storage on [its] site or some other storage vehicle. . . Nor does the state have any authority to prevent an on-site transfer of the spent fuel - clearly an operational and nuclear safety issue. Nor does the state have any say in the selection, or specifications regarding construction of the dry cask storage containers . . . or regarding whether the site and the installation, including the cask storage pads, are adequate to withstand the weight of the casks, or threats posed by natural phenomena such as earthquakes and tornados, or the threat of sabotage.” *Id.* at 55.

Mr. Shadis tries to avoid the Board’s limitation on the scope of NEC’s intervention by arguing that his testimony relates to reuse of the site because it is unlikely that DOE will remove spent fuel from the VY Station site before Entergy VY’s license terminates. Shadis pf. at 8-9. Even assuming that his single, unsupported statement brings his prefiled testimony within the

fuel management). The scope of federal preemption applies equally to decommissioning facilities and operational facilities. *See Missouri v. Westinghouse Elec., LLC*, 487 F. Supp. 2d 1076, 1086 (E.D. Mo. 2007).

³ In *Maine Yankee*, Friends of the Coast, the organization in which Mr. Shadis was a member, was denied intervention and offered instead an opportunity to submit an *amicus* brief. *Maine Yankee*, 107 F. Supp. 2d at 56-57. Entergy VY again suggests that permitting NEC to file an *amicus* brief addressing the matters on which it seeks to introduce relevant “evidence” through the Shadis prefiled testimony would be a more appropriate manner to consider NEC’s concerns in this case.

scope of NEC's allowed intervention,⁴ Mr. Shadis has not identified the "mitigating actions" he apparently thinks are necessary to address DOE's inaction or explained how the radiological concerns that apparently give rise to those actions avoid federal preemption and the Board's limitation on the scope of NEC's intervention. In any event, Mr. Shadis' concerns about the federal government's timely removal of spent nuclear fuel are more properly directed to Vermont's congressional delegation.

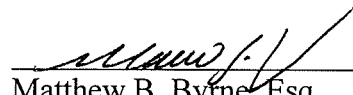
Conclusion

Mr. Shadis' testimony about his experience with other nuclear facilities is irrelevant, immaterial and outside the scope of NEC's limited intervention. The remaining portion of his testimony proposing unidentified "mitigating actions" is equally irrelevant and, to the extent it contains any substance, addresses issues of radiological safety, nuclear and operational safety, and the transfer, delivery and possession of used nuclear materials, which are within the

⁴ On page 9, Mr. Shadis' prefiled testimony offers the perfunctory conclusory statement that the ISFSI has "negative" effects "on regional planning, aesthetics, site reuse, and/or the local environment [that] will remain until the ISFSI is removed," but provides no facts or testimony supporting that conclusion or relating it to any of the specific and particularized interests for which the Board granted NEC limited, permission intervention. The testimony instead addresses NEC's true interests concerning the public participation process for decommissioning and the radiological safety aspects of spent fuel management.

exclusive jurisdiction of the NRC. Mr. Shadis' testimony should accordingly be excluded in its entirety.

Dated: Burlington, Vermont
September 18, 2015



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