STATE OF VERMONT
PUBLIC SERVICE BOARD

Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificate of Public Good and other approvals required under 30 V.S.A. § 231(a) for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent-nuclear fuel

Docket No. 7862

SUPPLEMENTAL BRIEF OF ENTERGY NUCLEAR VERMONT YANKEE, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC.

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SUPPLEMENTAL BRIEF OF ENTERGY NUCLEAR VERMONT YANKEE, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC.

Petitioners Entergy Nuclear Vermont Yankee, LLC (“ENVY”), and Entergy Nuclear Operations, Inc. (“ENOI”; together, “Entergy VY”) respectfully submit this supplemental brief in response to the Public Service Board’s (“Board”) Order of October 30, 2013 allowing the parties to address new issues and recommendations raised in the parties’ reply briefs. Several parties raised new points in the form of various proposed conditions on any Certificate of Public Good (“CPG”) that may issue to Entergy VY for continued operation of the Vermont Yankee Nuclear Power Station (“VY Station”) after March 21, 2012 and until December 31, 2014, including the storage before and after December 31, 2014 of spent nuclear fuel (“SNF”) derived from such operation. Entergy VY addresses these new proposed conditions in this brief.

INTRODUCTION

Following Entergy VY’s announcement that the VY Station will voluntarily cease operation in December 2014, certain parties proposed in their reply briefs that the Board should impose conditions on any CPG authorizing continued operation until that date. The Board should reject those conditions for three principal reasons:

First, as Entergy VY has emphasized throughout these proceedings, radiological decommissioning and the storage of SNF are preempted from this Board’s consideration,
meaning that any condition related to these areas is preempted as well. Several of the proposed conditions fall squarely within these preempted areas.

Second, many of the conditions are constitutionally impermissible because they lack any nexus to and/or are disproportionate to the limited relief requested by Entergy VY’s petition (the ability to operate the VY Station during the thirteen months between now and December 2014), and thus run afoul of either or both of two federal constitutional provisions. These conditions would, if adopted by the Board, require Entergy VY pay in excess of $100 million for the privilege of operating the VY Station through December 2014, a mere 13 months beyond its current CPG (which Entergy VY maintains has not yet expired because of the timely renewal provision of Vermont law, 3 V.S.A. § 814(b)). Such conditions bear no rational relation to Entergy VY’s CPG petition; instead, they are attempts to change the terms of the 2002 sale of the VY Station from its prior owner to Entergy VY. Accordingly, they would violate the Takings Clause, which requires that any conditions attached to a license have a nexus and be proportionate to the benefits granted in that license, and the Equal Protection Clause, which forbids a state from singling out a class of one for punishment or adverse treatment.

Third, the proposed conditions are belatedly asserted and most, if not all, such conditions lack an evidentiary basis in the record. For example, as to the Public Service Department’s (“Department”) proposal that Entergy VY provide millions of dollars to finance a post-shutdown economic transition, any such proposal could and should have been made earlier in the case because it was theoretically relevant both to the Department’s requested relief of an immediate shutdown and to Entergy VY’s requested relief of operation through 2032; in either scenario, there would have ultimately been a shutdown and (if the Department’s evidence and legal position is to be believed) a reason to require funding of a transition. Not only did the
Department fail to suggest the need for a transitional fund, it sponsored a witness (Mr. Unsworth) whose central theory was that the economy will adjust on its own in the absence of the VY Station.

For these reasons, explained in more detail below, the Board should grant Entergy VY’s petition for a CPG authorizing continued operation through December 2014 without imposing the onerous conditions now proposed by certain parties.

ARGUMENT

I. MANY OF THE PROPOSED CONDITIONS ARE FEDERALLY PREEMPTED

Cir. 2004) (“[T]he AEA confers on the NRC authority to license and regulate the storage and disposal of [SNF].”); Docket 7082, Pet. of Entergy VY for a CPG to construct a dry fuel storage facility at the VY Station, Order of 4/26/06 at 15 (recognizing federal preemption of state-level regulation of SNF management).

As part of this federal regulation, the NRC reviews each plant’s decommissioning fund to ensure that it is adequate to cover the costs of decommissioning, and the NRC has considerable authority to ensure that decommissioning is completed. See Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 418 (2d Cir. 2013) (“Vermont’s … economic argument regarding the State’s potential future liability for decommissioning costs is also of little weight … [because] [n]uclear power plants must provide periodic reports to the NRC concerning the status of such funds for the purpose of providing ‘reasonable assurance that funds will be available for the decommissioning process.’”) (quoting 10 C.F.R. § 50.75(a)); see also tr. 2/12/13, Vol. II, at 61:4-6 (Cloutier). The NRC analyzes the adequacy of funding in the VY Station decommissioning trust on an annual basis and may take action to ensure adequate accumulation of funds in the trust. 10 C.F.R. § 50.75(e)(2); tr. 2/12/13, Vol. II, at 66:18-67:6 (Cloutier). Because the federal government has reserved for itself exclusive jurisdiction in these areas, any condition tied to radiological decommissioning or SNF storage would infringe upon such authority.1 See, e.g., United Nuclear Corp. v. Cannon, 553 F. Supp. 1220, 1232 (D.R.I. 1982) (holding preempted a state law requiring a bond to cover any radiological decommissioning funding shortfalls).

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1 The NRC would not allow the removal of such funds from the decommissioning trust to create a separate trust for site restoration at this time because the decommissioning trust can only be used for “legitimate decommissioning trust activities,” 10 C.F.R. § 50.82(a)(8)(i)(A), defined as “remov[ing] a facility or site safely from service and reduc[ing] residual radioactivity to a level that permits [release],” id. § 50.2.
Under these legal principles, the following proposed conditions are preempted:

First, the Department’s request (at 41) that Entergy VY be required to make a $60 million payment (plus an additional amount to be determined later) into a separate fund for site restoration is preempted to the extent the Department seeks such a condition because it believes that Entergy VY lacks sufficient funding even to accomplish radiological decommissioning. See Dep’t Reply Br. 20 (arguing that Entergy VY “underestimated radiological decommissioning costs”).

Second, the Department’s request (at 38) that any Board order “make clear that site restoration contemplates release of portions of the site for reuse, even if radiological decommissioning or site restoration for the entire site has not yet been completed,” infringes on the NRC’s ability to determine when a site should be released. See 10 C.F.R. § 50.82(a)(11).

Third, the Department also seeks (at 38-39) for the Board to require Entergy VY to conduct a site restoration study to assess non-radiological hazards and the steps/costs of remediation. But the Department has not demonstrated that the remediation of non-radiological hazards can be accomplished separate and apart from the remediation of radiological hazards; in fact, the record evidence is to the contrary. See tr. 6/17/13, Vol. I, at 22:8-25:7 (Cloutier) (testifying that asbestos in the cooling tower is assumed to be removed during the radiological decommissioning). Because there is no evidence that non-radiological hazards can be remediated separately from radiological hazards, state regulation of such remediation is preempted. See Brown v. Kerr-McGee Chem. Corp., 767 F.2d 1234, 1242 (7th Cir. 1985) (holding preempted state requirement to remove non-radioactive waste when the radioactive and non-radioactive materials are inseparable).
Fourth, to the extent the Department’s condition (at 37) asking the Board to “clearly define Entergy’s responsibilities with respect to site restoration” can be read to require Entergy VY to remove portions of structures that extend deeper than three-feet below grade (which WRC also seeks (at 26-27)), the condition is preempted as based on nuclear-safety concerns. That the condition is so motivated is clear from, inter alia, the undisputed fact that non-nuclear sites are not required to remove structures deeper than three-feet below grade. Entergy VY Initial Br. 37-38.

Fifth, WRC’s proposed condition (at 13) that would require Entergy VY to make “retroactive contributions” of $159 million to the decommissioning trust fund directly addresses radiological decommissioning (and funding for same) and is preempted.

Sixth, in the same vein, WRC’s request (at 15) that the Board condition continued operation of the VY Station on the requirement that Entergy VY make a $2.36 million payment into the decommissioning trust to pay for storage of SNF generated by the April 2013 refueling would infringe upon the NRC’s exclusive jurisdiction over funding for decommissioning and SNF. And WRC’s request (at 15) for a condition requiring payment of $17.6 million for transfer of SNF from wet to dry storage during the operation of the VY Station clearly infringes upon the areas of SNF regulation and radiological safety. WRC seeks to evade such preemption by arguing that “the Board retain[s] an interest in the financial management of preempted activities.” WRC Reply Br. 8. But as Entergy VY has explained throughout this docket, preemption cannot be so easily avoided by pointing to an economic or financial consequence of a preempted area. Entergy VY Initial Br. 19-20; Entergy VY Reply Br. 4-5.

Seventh, WRC further seeks (at 16-25) to invade the NRC’s exclusive field by seeking to require Entergy VY to use prompt decommissioning (DECON) at the VY Station, rather than
SAFSTOR.\(^2\) The NRC explicitly permits the use of SAFSTOR. U.S. Nuclear Regulatory Commission, Regulatory Guide 1.184, Decommissioning of Nuclear Power Reactors (2000), at 1.184-2. The Board itself has acknowledged as much, determining in Docket No. 6545 that “if the decommissioning-trust funds [are] insufficient to complete the immediate decommissioning upon plant closure, Vermont Yankee could be placed in SAFSTOR to allow the funds to increase in value until sufficient funds exist . . . .” Docket No. 7082, Order of 4/26/2006 at 69; see also Exh. WRC-Cross-15 at § 9.

\textit{Eighth}, WRC also seeks (at 14) to require Entergy VY to replace the value of a below-market power purchase agreement (“PPA”) (at least $40 million). Such a condition is preempted because a demand for a favorable PPA itself is preempted and/or unconstitutional. \textit{See} Entergy VY Initial Br. 9; Entergy VY Reply Br. 14-15; \textit{see also} Entergy Nuclear Vt. Yankee, 733 F.3d at 431 (holding Entergy VY’s dormant Commerce Clause challenge unripe in absence of a completed PPA, but noting that “we do not suggest that any PPA providing favorable pricing for Vermont residents would pass muster under the dormant Commerce Clause,” and giving several “example[s]” of PPAs and requirements that would likely violate the dormant Commerce Clause).

\textbf{II. SEVERAL PROPOSED CONDITIONS ARE CONSTITUTIONALLY IMPERMISSIBLE BECAUSE THEY LACK A NEXUS TO, AND/OR ARE DISPROPORTIONATE TO, THE REQUESTED OPERATION PERIOD AND THUS ARE UNCONSTITUTIONAL}

Several parties, including the Department and WRC, seek to exact from Entergy VY more than $100 million in exchange for a CPG authorizing operation through December 2014. Such conditions bear no relation to this limited period of operation and, further, seek to impose

\(^2\) The Vermont Public Interest Research Group (“VPIRG”) proposes (at 3) a similar condition that is preempted for the same reason.
onerous requirements on a Vermont business that is no longer profitable. Neither the Department nor WRC points to any case law justifying such conditions and, in fact, such conditions would be unconstitutional, seeking only to punish Entergy VY.

It is well-settled that a Board like this one may attach conditions to a permit only “so long as there is a ‘nexus’ and ‘rough proportionality’ between the [condition] that the government demands and the social costs of the applicant’s proposal.” Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (citing Nollan v. Cal. Coastal Comm’n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)). This principle, an application of the “unconstitutional conditions” doctrine, prevents “the government from engaging in out-and-out . . . extortion that would thwart the Fifth Amendment right to just compensation.” Id. (quotation omitted). In this regard, the government “may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” Id. Such conditions include “so-called ‘monetary exactions,’” which must also satisfy these nexus and rough proportionality requirements. Id. at 2599.

The conditions proposed by the Department and WRC fail this test, as they would require Entergy VY to pay far in excess of $100 million for fewer than two years of continued operation. In fact, none of the proposed conditions meets both the requisite nexus and rough proportionality requirement, as no link exists between such conditions and the continued operation of the VY Station through December 2014. The Department effectively concedes as much, grounding its proposals not in anything related to operation between now and December 2014, but instead on the notion that “this is likely the Board’s last chance to meaningfully control Entergy’s conduct
as a regulated entity and establish a precedent deterring similar misconduct by other regulated entities.” Dep’t Reply Br. 11.

First, the Department asks (at 41) this Board to require the VY Station to deposit $60 million (plus an additional amount that the Department proposes to be determined later) in a separate fund for site restoration. But such a requirement bears no relation to Entergy VY’s Second Amended Petition seeking—at most—an additional 13 months of operation from today (or 33 months if measured from March 21, 2012). Site restoration has no link to the current petition, as operating until December 2014 does not create the requirement for site restoration or make it any more or less expensive. Indeed, the need to restore the site following the decommissioning of the VY Station accrued at the time the VY Station was built. When Entergy VY purchased the VY Station in 2002, Entergy VY was required to commit to restoring the VY Station site. At the time, this Board approved the sale of the VY Station when, just as today, there was a significant shortfall between the balance of the decommissioning trust fund and the expected decommissioning cost. See Docket 6545, Investigation into General Order No. 45 Notice Filed by Vt. Yankee Nuclear Power Corp., Order of 6/13/2002 at 63 (“Docket 6545 Decision”) (decommissioning trust fund balance was approximately $304 million while the expected decommissioning cost was $621 million)³. If there was no need for a separate site restoration fund in 2002 in order to justify the grant of a CPG, then no need exists now; certainly there is no evidence in the record showing a change in circumstances creating such a need. To require a $60 million-plus payment now as a condition of continued operation for little more than a year cannot in any sense be viewed as having a nexus to, or being proportional to, Vermont

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³ The lower cost estimate in the decommissioning study cited by the Board in Docket 6545 relative to the most recent estimate reflects in part an assumed 10-year further delay in the removal of SNF by the U.S. Department of Energy. Tr. 2/12/2013, Vol. II, at 65:7-21 (Cloutier).
Yankee’s operation through 2014. It instead would amount to a tax of more than $4 million per month on such operation.

Second, because the VY Station provides an economic benefit each year it operates, no link can be made between continued operation of the VY Station through 2014 and Entergy VY being required to provide several million dollars in transitional economic assistance, as the Department urges (at 42-44). Such assistance—if needed at all—would be needed whether the VY Station shuts down today or in December 2014. And the absence of such assistance does not negate the fact that Entergy VY’s continued operation through December 2014 will confer an economic benefit on the State and its residents (as compared to a shutdown today) and will provide a transition period for these affected parties to plan for and to adapt to the loss of this benefit. Thus, this condition cannot reasonably be linked to continued operation.

Third, any request by the Department (at 37) or WRC (at 26-27) that Entergy VY decommission the site by removing structures to more than three-feet below grade (or restoring the site “to the condition in which it existed prior to the construction of the VY Station,” Dep’t Reply Br. 38) similarly has no nexus with operating through 2014, but rather is tied to the requirement to restore the VY Station site—a requirement that exists wholly separate and apart from such operation. The Department estimates (at 32) that such a requirement could cost more than $100 million, thereby placing an additional tax on continued operation of several million dollars per month.\footnote{Moreover, had the Department or the Board intended to impose such a hugely costly requirement upon ENVY (rather than allowing it to remove structures to three-feet below grade as the decommissioning cost study relied upon by the Board and ENVY in Docket 6545 had assumed, see Entergy VY Initial Br. 37-38), they were required in all fairness to make that explicit before Entergy VY’s purchase of the VY Station.}
Fourth, WRC’s proposed condition (at 11-13) of “retroactive contributions” of $159 million to the decommissioning fund is, by its very terms, linked not to any period of continued operation, but to the previous decade of operation. Such a condition cannot be connected to the continued operation of the VY Station through December 2014.

Fifth, in the same vein, WRC’s request (at 14-15) for nearly $20 million for what it claims are the additional costs of storing SNF resulting from the April 2013 refueling ($2.36 million) and the transfer of SNF from wet to dry storage during the operation of the VY Station ($17.6 million, regarding already extant material) seeks to transform decommissioning costs into a condition on continued operation. The VY Station will have to incur these costs regardless of whether the VY Station operates until December 2014 or shuts down today. Moreover, WRC’s proposed condition makes no provision for the fact that ENVY will recover these costs as a result of the U.S. Department of Energy’s breach of its contract with ENVY to remove this SNF. Entergy VY Initial Br. 39-40.

Sixth, and similarly, WRC’s request (at 16-25) that the Board prevent the VY Station from using SAFSTOR does not have any relation to an additional period of operation of fewer than two years (and would foreclose an option for Entergy VY that the Board has already explicitly acknowledged exists).

Seventh, WRC argues (at 15-16), that Entergy VY should pay now for the costs of a second dry cask storage pad. But this cost will be incurred whether or not the VY Station continues to operate until December 2014, and therefore no basis exists to grant a CPG only if the VY Station makes such a payment now. This proposed condition again ignores the fact that ENVY will recover these costs as a result of the U.S. Department of Energy’s breach of its contract with ENVY to remove this SNF. See Entergy VY Initial Br. 39-40.
Eighth, as no evidence demonstrates the need to balance a social cost from operation of the VY Station through 2014 with the approximate value a VY Station PPA would have conferred on Vermont, valued at $16 million per year of operation, no adequate ground can exist to require Entergy VY to make a payment of $40 million to continue to operate through 2014, as WRC argues (at 13-14).

Ninth, WRC requests (at 6-7) an order that Entergy Corporation be held jointly and severally liable for decommissioning expenses, but WRC provides no rationale tying such a request to continued operation through 2014. Indeed, WRC concedes (at 6-7) that its request dates back to concerns regarding the corporate structure in place since Entergy VY purchased the VY Station in 2002. See Docket 6545 Decision at 109-17 (recognizing that ENVY was an LLC that “limit[s] the legal liability of the owners of the entity” and requiring as a condition of acquisition only certain specific enumerated financial support from Entergy Corporation). WRC’s request thus arises from concerns over Entergy VY’s ability to satisfy already extant obligations.

Tenth, as to the Department’s throwaway suggestion (at 45 n.21) that Entergy VY be required to continue to make Clean Energy Development Fund (“CEDF”) payments and deposit all escrow payments with the State upon issuance of a CPG, such a condition ignores the State legislature’s enactment (after March 21, 2012) of an onerous generating tax, which Entergy VY has paid and continues to pay. The legislative history of the tax shows that it was designed in part to replace the expiring CEDF payments. Tr. 6/17/2013, Vol. II, at 135:22-137:11 (Twomey). Moreover, the enactment of that tax potentially prevents the satisfaction of a condition for release of the escrowed funds to the State. Exh. EN-TMT-4 at § 4.d.i.b.
Eleventh, the condition banning “rubblization” (that is, breaking clean concrete into small pieces and burying it on-site) that the New England Coalition (“NEC”) proposes (at 17-18) seeks to change the site restoration requirements, which, again cannot be linked to the limited period of continued operation and attempts to change the terms of the sale of the VY Station to Entergy VY.

These enumerated conditions are independently invalid under a similar line of cases under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court in Village of Willowbrook v. Olech, 528 U.S. 562 (2000), explained that courts “have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that [it] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” Olech, 528 U.S. at 564; see also In re Town Highway No. 20, 2012 VT 17, ¶¶ 39-40 (discussing federal and state case law).

Even apart from the constitutionally protected nexus and rough proportionality requirements described above, there is no rational basis for treating Entergy VY differently from other CPG applicants. Thus, these proposed conditions are nothing more than an effort to punish Entergy VY. For instance, the Department provides no legal basis for its condition seeking to impose employment transition costs on Entergy VY and points to no instance in Vermont history where the Board imposed a similar condition. Recent history confirms that Entergy VY has been singled out by Vermont for improper treatment, as one federal appellate court already has characterized the State’s regulation of the VY Station “as a form of blackmail.” Vt. Yankee Nuclear Power Corp. v. United States, 683 F.3d 1330, 1346 (Fed. Cir. 2012) (“It would not be inaccurate to characterize the [Clean Energy Development Fund] fee as a form of blackmail for the state approval of the [dry fuel storage facility] construction.’”). Thus, the onerous conditions
discussed above, which have never been imposed on a non-nuclear facility by the State, must be rejected as violative of equal protection as well.

III. THE RECORD EVIDENCE DOES NOT SUPPORT THE NEW CONDITIONS PROPOSED BY THE DEPARTMENT, WRC, VPIRG, AND NEC

A. The Department

1. Site Restoration

The Department’s request for a CPG condition requiring Entergy VY to prepare a site-restoration study by June 30, 2014, and to set aside a dedicated, site-restoration fund (to be prefunded with a $60-million deposit, plus an additional amount later) lacks support in the record and is inconsistent with the Department’s own agreement in the Docket 6545 MOU. See Dep’t Reply Br. 37-41; see generally exh. WRC-Cross-15. First, the Department ignores its own agreement in the Docket 6545 MOU as to how Entergy VY is to demonstrate funding sufficiency for these activities. Second, the Department discounts evidence in this Docket demonstrating that, with implementation of SAFSTOR, funds in the VY Station’s decommissioning trust will grow sufficiently to fund decommissioning, SNF management, and site restoration. Entergy VY discusses these points in turn.

First, as demonstrated in Entergy VY’s Reply Brief (at 18-19, 29-30), the Department and Entergy VY are parties to the Docket 6545 MOU, which the Board approved as to the relevant site-restoration provisions. The MOU thus establishes Entergy VY’s obligations with respect to site restoration and its provision of financial assurances. Specifically, Section 9 of the Docket 6545 MOU obligates Entergy VY to demonstrate the sufficiency of funding for decommissioning the VY Station, including SNF management and site restoration, at “the time of evaluation of the decommissioning fund for NRC in connection with the post shutdown decommissioning activities report [PSDAR]” that must be submitted to the NRC. Exh. WRC-
Cross-15 at § 9. Under the NRC regulations, Entergy VY is obligated to submit the PSDAR to the NRC within two years following a permanent cessation of operations at the VY Station. See 10 C.F.R. § 50.82(a)(4)(i). Thus, under the Docket 6545 MOU, Entergy VY’s obligation to demonstrate sufficiency of funding has not yet been triggered. At that time, Entergy VY must demonstrate—through a site-specific study (for which provision is made in Section 6 of the MOU)—the sufficiency of funding for these activities, including site restoration (or provide additional funds or other acceptable financial assurances). Exh. WRC-Cross-15 at § 9. Moreover, under Section 9, that demonstration may include implementation of SAFSTOR. Id.

Second, although Entergy VY is not now obligated to demonstrate sufficient funding for decommissioning, SNF management, and site restoration, the record evidence already demonstrates that, with implementation of SAFSTOR, the VY Station’s decommissioning trust has sufficient funds to fund these activities. Entergy VY Initial Br. 32-37, 39-40; Entergy VY PFD 146-48; exh. WRC-Cross-15 at §§ 3, 9. Moreover, any change in the agreed-upon terms from the Docket 6545 MOU would be particularly egregious because in this docket Entergy VY has not petitioned for authority to decommission the VY Station. See generally Second Am. Pet. of Entergy VY (Aug. 27, 2013). Indeed, Entergy VY already possesses such authority. Docket 6545, Order of 7/11/2002 at 17.

The Department’s proposed requirement that ENVY fund a dedicated site restoration trust attempts to circumvent its commitment in Section 9 of the Docket 6545 MOU to allow ENVY to use SAFSTOR to accumulate sufficient funding for “decommissioning, including site restoration and spent fuel management.” Exh. WRC-Cross-15 at § 9. The Department expressly agreed there that sufficient funding—without any dedicated site restoration trust—could be established by “the implementation of SAFESTOR or other forms of delayed decommissioning.”
Id. This express agreement was reaffirmed in 2009, when then-Governor Douglas vetoed a legislative attempt to amend the same agreement by requiring the use of DECON rather than SAFSTOR. In that year, the General Assembly passed a bill that would have prohibited Entergy VY from using SAFSTOR to decommission the VY Station. See H.436, Gen. Assem., 2009-10 Sess., An Act Relating To Decommissioning Funds of Nuclear Energy Generation Plants (Vt. 2009). Governor Douglas, in issuing his veto, explained that “[i]t was understood that Entergy, pursuant to an NRC finding of fund adequacy, would not make financial contributions to the decommissioning trust account and that the SAFSTOR method of extended decommissioning was permissible.” House Calendar, 1st Day of Special Session, at 7 (June 2, 2009), http://www.leg.state.vt.us/docs/2010.1/calendar/hc090602.pdf. Thus, to “honor[] the State’s commitments,” Governor Douglas, vetoed the bill. So, too, should this Board, for all of the reasons stated above, honor the terms of the sale of the VY Station to Entergy VY, and reject the site restoration conditions now proposed by the Department.

2. Transitional Economic Assistance

Although the Department sought to deny the VY Station any authority for continued operation (and its own expert opined under a theory of natural economic adjustment that the area would recover on its own, Unsworth surreb. pf. at 3:18-20), the Department now argues for the first time that a pre-2032 shutdown will result in laid-off employees and necessitate employment assistance from the State. Dep’t Reply Br. 42-44. The Department, however, provides no legal or factual basis for the imposition of a condition requiring Entergy VY to fund such assistance. Not only should the condition be rejected, but the Board should not permit additional proceedings on this point, for several independent reasons.

First, the Department cites no precedent for requiring a non-profitable company that is ceasing operation in this State to provide funding for transitional employment services. The
services provided by the Department of Labor in the instance cited in the Department’s brief were funded by federal grants. See, e.g., Anne M. Noonan, Commissioner, Vt. Dep’t of Labor, Annual Report Workforce Investment Act Title 1-B Program Year 2010, available at: http://www.labor.state.vt.us/Portals/0/WF%20Development/2010%20Annual%20Report%20%202010%20Final%20with%20tables%20for%20Rose.doc. The argument that the VY Station should pay the State because the VY Station is not profitable enough to continue operating defies logic.

Second, to the extent there were such precedent, the issue was present in this case from the outset, yet the Department failed timely to make its case on the issue. Whether the VY Station shut down immediately (as the Department initially argued should happen) or in March 2032 (as Entergy VY initially requested), the shutdown was going to result in the termination of tax payments and employee salaries, and thus trigger the Department’s claimed need for transitional economic assistance. Nonetheless, the Department never asserted that such assistance should be taken into account in determining the amount of economic benefit from continued operation. To the contrary, it put on a witness (Mr. Unsworth) whose central theory was that the community would naturally adjust on its own in the absence of the VY Station. Unsworth surreb. pf. at 3:18-20.

Third, and relatedly, the Department’s failure to present evidence on the amount of transitional economic assistance that will be needed means that there is “incomplete information in the current record” (at 43), which the Department proposes to redress by holding yet further evidentiary hearings in this docket. There is no need for such hearings given the lack of legal precedent for the Department’s proposal that Entergy VY pay these costs, and as a factual matter there is no basis to conclude that any such costs will overwhelm the economic benefits from
continued operation through December 2014 (which is the relevant standard, since Entergy VY need only show some economic benefit, Docket 6812, *Pet. of Entergy VY for a CPG to modify certain generation facilities at the VY Station in order to increase the Station’s generation output*, Order of 3/15/2004 at 25).

The Department relies on the Vermont Department of Labor’s website (for its Dislocated Worker Program) and on a gubernatorial website (for the proposition that the VY Station’s worker’s salary is almost twice the median household income in Vermont) to calculate that Vermont’s Dislocated Worker Program will have to pay $11,486 in dislocation costs for each laid off employee of the VY Station. Dep’t Reply Br. 43. The Department then multiplies that amount by the number of laid off employees to support its proposed condition requiring Entergy VY to make a one-time contribution of approximately $4,652,000 for dislocation costs. The Department claims that the Board must condition any CPG to require this payment to ensure that short-term dislocation costs do not “outweigh” what it claims is the “short-term benefit” of the VY Station’s operation through 2014. *Id.* In its Reply Brief (at 11-12), Entergy VY demonstrated that the advantages of operating the VY Station through 2014 are anything but short-term and include:

- $65 million in annual compensation to VY Station employees, including those residing in Vermont and elsewhere;

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5 Demonstrating the problem with permitting such argument to be made on non-record evidence, not subject to cross-examination, the Department fails to modify its number to reflect the percentage of VY Station employees who reside in Vermont. Exh. EN-RWH-4 at 1. Thus, because 65% of the VY Station workforce live outside Vermont, the Department should have reduced the number of laid off workers (405) by 65%. Correcting for this miscalculation would reduce the Department’s request to $1,628,200. Even this corrected number is not warranted, however, because the Department’s proposed condition has no support in the record or in precedent.
• a related multiplier effect, accounting for more than 1,000 jobs throughout the state resulting in $93.7 million in wages and $48.5 million in disposable income on an annual basis;
• a $44 million benefit in avoided greenhouse gas emissions, Entergy VY Initial Br. 19; and
• a contribution of $11.6 million to Vermont’s tax base each year the plant operates.

These benefits, all based on record evidence, show that benefits that the State and its residents will receive from the operation of the VY Station through 2014 dwarf the Department’s claimed disruption costs from shutdown (which will be incurred in any event whether the plant shuts down at the end of 2014 or earlier): The $11.6 million in tax payments to the State in 2014 alone is more than double the Department’s non-record-based guesstimate as to the employee-dislocation costs that the State may incur (and seven times the corrected number).

Finally, even if there were a legal or factual basis for a formal requirement that Entergy VY provide funding for transitional economic assistance, such a requirement is unnecessary because Entergy VY will voluntarily be making future severance and retention payments of $55 to $60 million. Exh. WRC-X at 3.

3. NPDES Permit And ANR Permitting Process

Claiming a need to reduce the risk through 2014 of environmental damage from the VY Station’s thermal discharge, a risk that the Department and other parties failed to prove in this docket, the Department now asks the Board to condition any CPG on compliance with the NPDES permit and ANR’s NPDES permitting process. See Dep’t Reply Br. 44. In its Initial and Reply Briefs (in Section VII), Entergy VY demonstrated that there was no harm to the
natural environmental from the VY Station’s thermal discharge, permitted under an NPDES permit that ANR issued. ANR itself, moreover, has authority to require Entergy VY to provide information and perform studies. See 10 V.S.A. § 1263(a)-(b) (ANR may prescribe the form of NPDES application and require applicant to submit additional information). Additionally, ANR can enforce compliance with any NPDES permit. Id. at § 1274(a). The Board should accordingly not impose a condition that would require the Board to police ANR’s permitting process because ANR has its own, full authority to regulate the VY Station’s thermal discharge.⁶

4. Compliance With Prior MOU Conditions

Entergy VY does not object *per se* to a redundant CPG condition that requires it to comply with other Board orders and MOUs. The Board should not, however, impose a requirement (tucked away in footnote 21 of the Department’s brief) that Entergy VY release from escrow payments the Department claims are owed to the CEDF and continue making such payments.

As Mr. Twomey testified, Entergy VY has continued to make payments into escrow—both under the uprate MOU and the dry-fuel-storage MOU (and will continue to do so during the pendency of this proceeding). The escrow agreement, however, contains a provision establishing that the funds will not be released to the State if the State enacts a tax equivalent to the CEDF payments. Exh. EN-TMT-4 at § 4.d.i.b. The State did so in enacting the generation tax on May 15, 2012, which Entergy VY has paid. The Second Circuit will decide whether Entergy VY’s challenge to the generating tax will be allowed to proceed in federal court. *See Compl., Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 2012 WL 279560 (D. Vt. Oct. 25, 2012) (No. 5:12-cv-

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⁶ ANR proposes (at 8) similar conditions—requesting that Entergy VY comply with its NPDES permit and with the permitting process before ANR. Entergy VY has complied with its permit and the process, and will continue to do so under its already existing obligations.
00206-cr), appeal docketed, No. 12-4659 (2d Cir. 2012). Whether or not the suit is allowed to proceed, however, the escrow agreement payment condition for the release of funds to the State will not be satisfied and the escrowed funds will not be released to the State. As Mr. Twomey made clear, Entergy VY does not object to continuing MOU payments into the CEDF based on the VY Station’s operation after March 21, 2012, but it does object to paying twice. Tr. 6/18/2013, Vol. I, at 87:7-9, 89:8-23 (Twomey). The Board should not impose a condition requiring Entergy VY to pay into the CEDF escrowed funds when these same amounts are now already being collected through the State’s generation tax.

B. WRC

Relying on a selective reading of the Board’s decision in Docket 6545 and ignoring the NRC’s exclusive jurisdiction over financial assurances for decommissioning and SNF management (supra, at 6-7), WRC asks the Board to impose additional conditions to those proposed in its Initial Brief that would require (1) Entergy VY to pay into the VY Station’s decommissioning trust the amounts that Vermont Yankee Nuclear Power Corporation (“VYNPC”) would have paid after July 31, 2002, if it continued to own the plant and (2) that site restoration be completed by 2031. WRC Reply Br. 13, 26, 31.7

In its Reply Brief (at pages 18-20), Entergy VY demonstrated that the Docket 6545 MOU and the Board’s decision in that docket made clear that the Board understood SAFSTOR was possible and found that SAFSTOR would ensure the sufficiency of funding in the VY Station’s decommissioning trust for decommissioning, including site restoration. Specifically, the Board

7 WRC also has modified two conditions proposed in its initial brief—specifically those requiring a payment to the State in lieu of value from a PPA and to fund the cost of installing dry-fuel casks from post-March 21 operations on a new ISFSI (dry-storage facility)—to reflect the reduced operating period requested in Entergy VY’s Second Amended Petition. WRC Reply Br. 13-15. Entergy VY stands on its response to these proposed conditions in its Reply Brief (at 14-15 and 23-25).
found that implementation of SAFSTOR provided financial assurances of the plant’s ultimate
decommissioning, including management of SNF and site restoration, when comparing scenarios
in which VYNPC continued to own the VY Station or ENVY owned the plant:

Both the Department and ENVY operate from the assumption that
if either decommissioning costs are inadequate, or if the fund has
not grown sufficiently to pay all decommissioning costs, the
owners would be able to place Vermont Yankee in SAFSTOR
while the fund grows to make up the difference.

...[T]he SAFSTOR option provides a form of protection against
under-collected decommissioning funds. Using SAFSTOR, the
rate of return on the invested balance of the decommissioning fund
determines the time at which the fund balance equals the
anticipated costs, and decommissioning can be accomplished.

Docket 6545 Decision at 65 (footnotes omitted).

Nothing in the Board’s decision “bounds” site restoration by 2031 as claimed by WRC.
See WRC Reply Br. 26. To the contrary, neither the Docket 6545 Decision nor the Docket 6545
MOU place any time limit on when decommissioning must be completed, the Docket 6545
Decision noting only that the NRC requires decommissioning to be completed within 60 years.
Docket 6545 Decision at 65 n.126.

WRC points to no evidence—because no record evidence exists—as to what payments
VYNPC would have been required to make if that company continued to own the VY Station (or
whether any such payments would have been recovered from VYNPC’s regulated utility
sponsors’ ratepayers, including Vermont’s households and businesses). See WRC Reply Br. 12-
13. In fact, the Board found in its Docket 6545 Decision that selling the VY Station to ENVY
would eliminate ratepayer contributions, a “very positive aspect of the proposal before us,” and,
again, that SAFSTOR would provide protection for under-collected decommissioning funds.
Docket 6545 Decision at 65-66.
The Board should accordingly not rewrite its Docket 6545 Decision or the Docket 6545 MOU—based on no record evidence—by requiring Entergy VY to make payments into the decommissioning trust that it claims VYNPC would have paid, and the Board lacks jurisdiction and cannot, consistent with its Docket 6545 Decision, require that the VY Station be decommissioned and the site restored by 2031.

C. VPIRG

Citing no record evidence, VPIRG proposes conditions that are unnecessary (because of obligations Entergy VY already has under previous Board orders and MOUs), preempted (as demonstrated above at 7 n.2) and unsupported by evidence to which Entergy VY has had the opportunity to respond. See VPIRG Reply Br. 2-3. The Board should reject VPIRG’s newly proposed conditions.

First, VPIRG first asks the Board to require Entergy VY to provide to the Department “no less frequently than” every 12 months the value of the VY Station’s decommissioning trust as well as a copy of any PSDAR that Entergy VY submits to the NRC. See id. However, the Docket 6545 MOU, approved by the Board in its Docket 6545 Decision, already obligates Entergy VY to provide to the Department semi-annual reports as to the status of the VY Station’s decommissioning trust and to prepare, to maintain, and to provide to the Department and the Board a PSDAR annually. Exh. WRC-Cross-15 at § 5; Docket 6545 Decision at 159.8

Second, VPIRG asks the Board to impose in any CPG a condition requiring Entergy VY to prepare detailed plans and methods for the VY Station’s decommissioning and site restoration (including the cost thereof), again no less frequently than every 12 months, to the extent not addressed in the VY Station’s PSDAR. VPIRG Reply Br. at 2-3. As noted, Entergy VY already

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8 Entergy VY also provides the monthly value of the VY Station’s decommissioning trust to the Department in response to its request under 30 V.S.A. § 206.
must prepare a PSDAR annually under the Docket 6545 MOU, and it is further obligated under that MOU to prepare a detailed, site-specific study of the cost of decommissioning, SNF management, and site restoration every five years. Exh. WRC-Cross-15 at §§ 6, 9. Entergy VY also is obligated under Section 9 of the Docket 6545 MOU to submit a site-specific study of these costs in connection with preparation of the PSDAR it submits to the NRC, which under the NRC’s rule will be due two years after the VY Station’s permanent cessation of operations at the close of 2014. Id. at § 9.

Third, in apparent recognition of the lack of record evidence for imposing the first and second conditions, VPIRG asks the Board to condition any CPG issued to Entergy VY to show cause why the Docket 6545 Decision should not be amended to implement the conditions it now proposes. See VPIRG Reply Br. 3. This show-cause proceeding would likely include presentation of additional evidence that could have been presented previously had VPIRG timely raised the issue. Accordingly, VPIRG’s proposed condition should be rejected.

D. NEC


9 NEC also proposes prompt radiological decommissioning of the VY Station based on the claim that funds in the VY Station’s decommissioning trust will grow sufficiently to fund $620 million in radiological-decommissioning costs by 2015 and that remaining funds will grow, by NEC’s “estimate,” sufficiently over the seven-year DECON period to fund site restoration. NEC Reply Br. 24. Citing Entergy VY’s Initial Brief, NEC argues that the cost of spent-fuel management will be recovered by Entergy VY from DOE (ignoring the fact that these costs must first be paid by ENVY and, after it ceases operation and has no revenues, the decommissioning trust is its only source of funds to make these payments). Id. at 21-24. In its Reply Brief (at 18-21), Entergy VY responded to WRC’s request for prompt decommissioning, demonstrating that the NRC’s jurisdiction over radiological decommissioning preempts the Board’s jurisdiction and that
NEC acknowledges that evidence on rubblization is “not in the record.” NEC Reply Br. at 12-13.\(^\text{10}\) The evidence it cites as purportedly supporting a condition requiring off-site shipment of concrete is, instead, testimony from another docket, Docket 7440, and reflects Entergy VY’s willingness to accept a proposed CPG condition in that docket as to how the VY Station should be decommissioned. By its Orders of 3/29/2012 and 1/9/2013 in Docket 7440, the Board recognized that circumstances had changed with the passage of time and therefore decided not to rely on evidence in Docket 7440 but instead to create a new record in what became this Docket 7862. The Board ultimately closed Docket 7440. Docket 7440, Pet. of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificates of Public Good and other approvals required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A. §§ 231(a), 248 & 254, for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent-nuclear fuel, Order of 3/29/2012 at 3; see also Docket 7440, Order of 1/9/2013 at 4 (closing Docket 7440).

Consequently, NEC’s support for a CPG condition prohibiting rubblization is not based on the new record the Board decided to create in its March 29th Order.

\[^\text{10}\] The record evidence only shows that TLG assumed shipment off-site in preparing its decommissioning-cost analysis. Exh. EN-TLG-2 at xv. See also Docket 7440, Thayer reb. pf. at 4:12-13.
CONCLUSION

The Board should reject all of the conditions proposed by certain parties in their reply briefs and grant Entergy VY’s Second Amended Petition.

St. Johnsbury, VT

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Respectfully submitted,

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