NEW ENGLAND COALITION'S MOTION TO AMEND THE VERMONT PUBLIC SERVICE BOARD'S ORDER OF MARCH 28, 2014

Now comes intervener, New England Coalition ("NEC"), by and through its pro se representative, Raymond Shadis, and respectfully submits New England Coalition's Motion to Amend the Vermont Public Service Board's Order of March 28, 2014

I. INTRODUCTION

The purpose of this motion is to amend the Board's Order of March 28, 2014 so as to make it more just and equitable, to clarify and make more accurate the Board's discussion of New England Coalition's issues and position, and to restore confidence in the hearing process by amending the Board's basis for reliance on the MOU.

NEC wishes to make clear from the onset that this Motion in no way intends rejection of the MOU, nor does this Motion intend to suggest that the Board should violate Section One of the MOU,

In the event that by March 31, 2014, the Board has not granted Entergy VY such a CPG that approves this MOU substantially in its entirety and contains conditions that do not materially alter, add to, or reject what is provided for by this MOU, each Party agrees that this MOU may terminate, if such Party so determines in its sole discretion and provides written notice within ten (10) days of Board issuance of its order, whereupon each Party shall be placed in the position that it occupied before entering into this MOU.

Rather, NEC herein moves that the Board amend its interpretation of MOU Section One from a
prohibition against any CPG condition emanating from the evidentiary record in Docket 7862 (First and Second Amended CPG applications) to an interpretation that preserves the integrity of the MOU (accepting it in its entirety, while restoring the lawful prerogative of the Board to condition any CPG, i.e., simply that the MOU resolves issues between the MOU signatories and provides benefits that weigh heavily in favor of issuance of a CPG.

That said, it is NEC's perception that acceptance of the MOU as the sole basis for a CPG is problematic in that certain elements of the MOU require that the Board surrender or delegate its authority and duty to make findings of fact and decisions, make amendments, require reports, and take enforcement actions on issues already brought forward by the parties.

NEC proposes that the Board find and issue amendments to remedy or compensate for at least some of what it perceives to be legally ethically, equitably problematic in the March 28th Order.

II. DISCUSSION

A. The Board misstates NEC's position with respect to the handling of the MOU and NEC's understanding thereof.

There is nothing unusual about our proceeding in this fashion. We therefore reject NEC's suggestion that our willingness to accept a settled outcome in a contested case proceeding signals any preferential treatment of any kind for the signatories of the MOU. NEC's position is puzzling at best, given that our process is entirely consistent with the Administrative Procedures Act, which governs how the Board conducts its proceedings and which expressly authorizes the Board to accept stipulations and settlements in order to informally dispose of contested cases.

And citing,

3 V.S.A. § 809(d) ("Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.")

Consulting the Vermont Rules of Civil Procedure, NEC finds an apparent contradiction
governing disposition of contested cases via settlement in Rule 54. Rule 54 specifically addresses the circumstance of multiple claims for relief and rights of multiple parties when a settlement is concluded between "fewer than all of the parties."

NEC believes that in its "MOU Brief" it correctly cited, but the Board ignored, the following:

V.R.C.P. Rule 54. Judgments; Costs b) Judgment Upon Multiple Claims or Involving Multiple Parties. -- When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating the claims and the rights and liabilities of all the parties.

NEC respectfully offers that the apparent disparity between 3 V.S.A. § 809(d) and V.R.C.P Rule 54 is governed by the presence or absence of parties other than the settling parties. Thus, if there were only two parties, the Board would be following the V.R.C.P.

Even the MOU does not claim to resolve all issues between all of the parties; but only between the signatory parties.

MOU @21. This MOU is to be construed consistent with the Board's jurisdiction under state and federal law. This MOU resolves all issues between the Parties to this MOU in Docket No. 7862 with respect to all agreements set forth herein. [Emphasis Added]

In support of the foregoing principles, as articulated in its "MOU Brief," NEC has provided a precedent involving nearly identical circumstances in a federal matter where Entergy was the applicant and NEC was the petitioner. When Entergy and NRC Staff agreed to take resolution of an NEC Contention (materials wear re-analysis) into Post-hearing space, the NRC Atomic Safety and Licensing Board conditioned license renewal on resolution of the issue before close-of-record and with an opportunity for the intervenors to review the re-analysis and if the intervenors chose
to submit a new contention.

USNRC- LBP-08-25 Partial Initial Decision-November 24, 2008, ADAMS ML08329331

The ASLB found that [as in the MOU] the Staff-approved Entergy "Commitment" contained elastic and subjective language.

Each of the fourteen underlined words or phrases in Commitment 27 leaves a significant element or issue to the discretion, option, or technical judgment of Entergy and the NRC Staff... For example, as Mr. Fair [NRC Staff] agreed ...subject to NRC objection, Entergy gets to decide these issues... [and]... while the Entergy-NRC process would be in public, the public would have no right to participate in, or challenge, these discretionary judgment decisions.[cite omitted]

...As we explain below, awarding Entergy a license now, and allowing it to postpone the performance of the necessary “analysis-of-record”...would violate the intervenor’s right under Section 189(a) of the Atomic Energy Act to have a hearing on an issue material to the licensing decision.78 To defer determining such a significant safety issue until after the license has already been issued would impermissibly remove it from the opportunity to be reviewed in the hearing process.

Had the Board not ignored the NRC precedent that NEC provided it might well have been stimulated to find a way to address intervenor's rights, placate Entergy, and still secure what is beneficial to the state in the MOU. If the Board will consult V.R.C.P 54 and case law in other Vermont agencies, the Board will find that even settlements between regulators and the regulated does not necessarily terminate the intervenor's right of due process.

The Board has several times in the Order taken the opportunity to list the opportunities granted to NEC and the other intervenors to participate in the process by pleadings, discovery, cross-examination and the like .NEC agrees that this is part of due process, but it is worthless if the process is not capped by a "fair and impartial' adjudication of the facts, evidence, and pleadings; and application of applicable law. In other words fairness is not just a matter of allowing an opportunity for inquiry and expression, fairness is fair consideration of the fruits of that inquiry and expression.

It is not too late to undo the confusion between the right to full and fair consideration and the weighing of net-benefits. One result of choosing between choosing allegedly-discretionary procedural paths – trial or a deal, in a matter that has proceeded through protracted litigation and, at the request of two parties, well beyond final briefs, is that the public will rightly perceive that the right to a full
and fair hearing as guaranteed by the Vermont Constitution, has a price on its head when it is brought before the Vermont Public Service Board. The Board can somewhat remedy this by moving from the position that all CPG (not MOU) conditions proposed by the parties are not worthless or precluded by the MOU and, upon review, appropriately conditioning the CPG.

III. CONCLUSION

The Board is respectfully requested to amend the Order of March 28, 2014 in ways that address the foregoing valid concerns,

Respectfully submitted,

Raymond Shadis

Signed and Dated at Edgecomb, Maine - April 7, 2014
STATE OF VERMONT  
PUBLIC SERVICE BOARD

Second 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  

Docket No. 7862

CERTIFICATE OF SERVICE

NOW COMES Raymond Shadis, Pro Se Representative, and hereby certifies that New England Coalition’s Motion to Amend the Vermont Public Service Board’s Order of March 28, 2014 was served upon the individuals listed in the attached Service List, and sent to the same via email, on April 7, 2014.

Dated at Edgecomb, Maine, April 7, 2014

Copy to: Service List

By:

New England Coalition, Inc.
Second 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

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