NEW ENGLAND COALITION'S AMENDED 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.¹

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

On pages 15-16 of the Order, the Board has it that.

And:
"Plaintiffs also note this Court's observation that "[t]he legislature has clothed [the Board] with judicial power...." North v. City of Burlington Electric Light Department, 125 Vt. 240, 242, 214 A.2d 82, 84 (1965). But North goes on to state that this judicial power is to be used "to entertain proceedings and determine the facts upon which the existing laws shall operate....." Id. (emphasis added). In the earlier case of Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 20 A.2d 117 (1941), we elaborated upon the public service commission's role:
The public service commission is an administrative body, clothed in some respects with quasi judicial functions ... and having, in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly. It is a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction. It only has such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation.
NEC argues that the Board should not approve the MOU or grant an amended CPG on the grounds that Entergy VY has failed to demonstrate that it can act as a fair partner to the State of Vermont. While NEC states that some of the agreements contained in the MOU could provide a benefit to the State, NEC contends that the Board cannot rely on any of the commitments made in the MOU given Entergy VY's past behavior. Accordingly, NEC urges the Board to reject the MOU and reiterates its arguments that Entergy VY should not be granted a CPG on the basis of its failure to demonstrate that it is a trustworthy partner to the State of Vermont and that it is has not shown that Plant operation will not have an adverse impact under a number of the criteria of Section 248.

What NEC actually said however something quite different and the Board should now accordingly characterize and consider NEC's position anew:

There is nothing however to distinguish this MOU from past Entergy-DPS MOU's except that this one is much stronger on vague promises of consultation and good faith efforts and reservations of decision-making to Entergy. Had Entergy made more clear and binding commitments to action in the pre and post-operational period to DPS and Entergy might have had some claim rehabilitation of Entergy's fair-partner status, but that was not a feature of the MOU.

In consideration of the foregoing the Board must either reject the MOU outright or affirm the hearing rights of the interveners by addressing their concerns in an order that may with the Board's informed discretion [include] CPG conditions that may in fact offset Entergy's failure to achieve fair-partner status under a 30 V.S.A. § 231(a) determination, including “assessments of technical and managerial competence, of financial strength and soundness, and of matters related to reputation and conduct (often stated as whether the owner, manager or operator will be a fair partner for Vermont).” Docket 7862, Am. Pet. of Entergy VY for amendment of CPG, Order of 6/19/13 at 7 (citing Docket 7770, Am. Joint Pet. of Central Vt. Pub. Serv. Corp., Order of 6/15/12 at 23).

P.17 NEC Brief [Emphasis Added]

**Interpreting Section One, Paragraph Two of the CPG**

The Board's Order has it,

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 intervener'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.

Impermissible Delegation of Authority

The MOU provides that issues accepted by the Board for adjudication will now be decided by the MOU signatory parties; among them the timing of decommissioning, brought by Vermont Public Interest Research Group ("VPIRG"), sufficiency of decommissioning funds brought by NEC, site-release standards brought by NEC, and once-through-cooling brought by
Connecticut River watershed Council ("CRWC") and Vermont Natural Resources Council ("VNRC"). Board acceptance of the MOU as the basis for a CPG without conditions constitutes an abdication and illicit delegation of the authority and duty to decide final resolution of the issues and to adjudicate any reported deviation from compliance with the Board's decision and order.  

2 3 V.S.A. § 214, allows delegation of authority, power or duty, but also establishes limits to that delegation, which are not in keeping with the Board's acquiescence or compliance to conditions of the MOU:

A secretary, commissioner or director may delegate any authority, power or duty other than a specific statutory authority of the office to a designee; and a board or council in its discretion and with the approval of the governor may delegate to the commissioner of the department any of its authority, power or duty other than a specific statutory authority except those necessary to its rule making and quasi-judicial functions.[Emphasis added]

Decision by a known tribunal is vital to the belief that justice is being done. Id. at 378. Here, the order issuing in this matter provides the only available evidence we have whether or not the judgment and discretion prescribed by the legislature to be exercised by the Board was in fact so exercised. The signing of the document by the Board's executive secretary is not sufficient, for that function is so primary and so basic to the implementation of the statute as to be non-delegable. See Relco, Inc. v. Consumer Product Safety Commission, 391 F. Supp. 841, 845 (S.D.Tex.1975). The resulting order is therefore invalid and the matter must be remanded to the Board.


Also,

This Court has long adhered to the "deep-rooted principle of law that the delegate of power from the sovereign cannot without permission recommit to another agent or agency the trust imposed upon its judgment and discretion." Thompson v. Smith, 119 Vt. 488, 501, 129 A.2d 638, 647 (1957), In Wabash Railroad v. City of Defiance, 167 U.S. 88, 17 S.Ct. 748, 42 L.Ed. 87 (1897), the United States Supreme Court stated that "the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions." Id. at 100, 17 S.Ct. at 752. In other words, "when authority to exercise the police power within a defined sphere is delegated by the state to a municipal or other public corporation, the authority is inalienable in the corporation, and it cannot in any manner be contracted away or otherwise granted, delegated, diminished, divided, or limited by the corporation." 6A E. McQuillin, Municipal Corporations § 24.41, at 116-17 (3d ed. rev. 1988).

Such authority is in the nature of a public trust conferred upon the legislative body of the corporation for the public benefit, and it cannot be exercised by others. Arkansas-Missouri Power Co. v. City of Kennett, 78 F.2d 911, 920 (8th Cir.1935). Therefore, if a public corporation enters into a contract that barters away or otherwise restricts the exercise of its legislative or police powers, then the contract is ultra vires and void ab initio. Byrd v. Martin, Hopkins, Lemon & Carter, P.C., 564 F.Supp. 1425, 1428 (W.D.Va.1983), aff'd, 740 F.2d 961 (4th Cir.1984); see also Arkansas-Missouri Power Co., 78 F.2d at 922 ("any contract whereby legislative authority or duty is attempted to be delegated by a city is absolutely null and void.") and 6A E. McQuillin, Municipal Corporations, at 117 ("contracts ... which embarrass in any degree the municipal power of regulation of affairs are ultra vires....").
The Board's Determination That Entergy is a "Fair Partner" is premature

Entergy has yet to build a sufficient record of demonstration to restore its reputation as a bad actor.

As Dr. Asa S. Hopkins, the Department’s witness during the initial and rebuttal phases of this proceeding testified,

"the fair partner relationship with Entergy VY had not been irretrievably lost. The Department has “commonly been able to restore that trust through . . . demonstration over time of a rebuilding of that trust relationship.” Tr. 2/26/13, Vol. I, at 133:5-23 (Hopkins).

As stated by the Board,

“assessments of technical and managerial competence, of financial strength and soundness, and of matters related to reputation and conduct (often stated as whether the owner, manager or operator will be a fair partner for Vermont).” (Order Docket 7770 of 6/15/12 at 23).

Entergy's "reputation" clearly remains in the dumps. Only faithful fulfillment of the MOU conditions may serve to alleviate the common distrust.

NEC Complaints about the 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.

The Board's Order says,

If NEC "failed to apprehend" until the end of the final day of the MOU technical hearings on January 31, 2014, that the merits of the MOU were under review for possible acceptance as the resolution of the litigation, then the cause of NEC's misapprehension does not lie with the Board's process: the MOU technical hearings were noticed for this very purpose; an opportunity was provided at a lengthy status conference four weeks before the MOU technical hearings for all
parties to discuss the proposed scope of the MOU technical hearings.

In fact, NEC inquired at the 'lengthy status conference" if the prohibition on "additions" in the MOU referred to additions within the MOU or additions to the Order. The Board invited DPS and Entergy to answer, both said that it depended on the individual proposed condition but that NEC could inquire into that at the hearing.

At the hearing Chairman Voltz interrupted NEC's line of questioning on what kinds of CPG conditions Entergy would consider a material change to the MOU with:

Tr, 01/31/2014- Lines 13-25 CHAIRMAN VOLZ: Yeah. Mr. Shadis, I think maybe you misunderstand the nature of the proceeding, the scope of the hearing we are having today and yesterday which [is] whether we should approve this MOU or not. If we don't approve the MOU, we're going to continue with the other case. So the issues before us are should we approve the MOU or not. It seems like you're trying to suggest that well, it might be okay to approve the MOU if you connect a whole bunch of conditions on it. Well I think that's before us are should we approve the MOU or not. It seems like you're trying to suggest that well, it might be okay to approve the MOU if you connect a whole bunch of conditions on it. Well I think that's actually an argument to not approve the MOU. And I think that's kind of what Mr. Twomey is suggesting. And then if -- if we should put a whole lot of conditions on it in order to find it to be in the public good, then we should go back to the case that we had before and litigate that and issue a CPG with all those kinds of conditions in it. So the question that I think Mr. Recchia framed it yesterday was what the Department's position, if I understand it correctly, and I want people to correct me if I've got this wrong, is that the question is, is the MOU better than the alternative of going forward with the underlying case or not. And if it is, then they recommend we should approve it. So if you think it should have additional conditions that aren't there, I think that's an argument for why we shouldn't approve it. You can recommend them I suppose, but I think what Mr. Twomey is struggling with is we don't have a record related to the MOU to do that kind of thing

We have the underlying case. So I don't know if anybody else wants to -- if either the Department or the company thinks I misstated anything that we would want to correct.

MR. JUMAN: No.

CHAIRMAN VOLZ: Okay. So I think that's where we are. [Emphasis Added]

Clearly, the Board is asking for assistance in interpreting the very point which the Board in the Order says that everyone but NEC understood by that point in the proceedings.

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 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.

The Board appears to be proceeding as if this MOU presents no unusual constraints on the Board's duty to review the evidence and make findings of fact.

But it, as the preceding discussion demonstrates, it does.

Further the MOU would deprive the Board of its authority to condition Certificates of Public Good in ways, within its own discretion, that would advance justice and promote the public good.

**Conditioning the CPG**

The Board has entertained and incorporated memoranda of understanding in previous dockets. Most are memorialized in the Board's Order and Finding of Facts in VPSB Docket No. 7082, April 26, 2006 and repeated here.

- Memorandum of Understanding among Entergy VY, VYNPC, CVPS, GMP, and the Department, dated March 4, 2002 ("Docket 6545 MOU") (This MOU is part of PSB Docket No. 6545 regarding the sale of Vermont Yankee to Entergy.)
- Memorandum of Understanding among Entergy VY, Entergy Nuclear Operations, Inc., and the Department, dated November 5, 2003 ("Docket 6812

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3 As stated in Morse v. Ward, 102 Vt. 433, 436, 150 A. 132, cited in State v. Hedding, 122 Vt., 172 A.2d 599, "That it is the duty of the court to conduct a trial with the utmost impartiality and fairness is elementary and fundamental." This guarantee is afforded a respondent by the Vermont Constitution, Chapter II, § 28.
MOU”) (This MOU is part of PSB Docket No. 6812 regarding power uprate.)


And from the Board's Order in Docket 7195, 9/18/2006,

- Memorandum of Understanding ("MOU") related to the steam dryer that Entergy VY and the Department agreed to on February 14, 2006,

All of these memoranda are fundamentally different than the MOU among the Department, the Agency for Natural Resources, and Entergy that is proposed in Docket 7862.

While all of the foregoing memoranda are predicated on the understanding that they must be accepted or rejected intact and unaltered by the Board, none of them requires that Board issue no other CPG conditions, related no matter how distantly to subjects broadly roped into MOU; or not related to subjects (e.g., NPDES permit) mentioned in the MOU at all.

That's Different.

An Amended Order and Conditioned CPG

Amendment of Board's Order of March 28, 2014 to more accurately reflect the position of New England Coalition, amending the Board's basis for reliance on the MOU, and the addition of the Conditions set out below

(1) would make the Order stronger, set on firmer legal footing, and more just and equitable,

(2) clarify and make more accurate the Board's discussion of New England Coalition's issues and position,

(3) to restore confidence in the hearing process.
Proposed CPG Conditions:

- The Board should require establishment of a community decommissioning advisory panel, featuring prompt identification and incorporation of stakeholders. Parties with a well-identified interest, including representative of the parties to Docket 7862 should be invited to participate. The advisory panel process, modeled similar to those at Maine Yankee, Connecticut Yankee, and Yankee Rower, should render decommissioning and site restoration processes completely open and transparent. The Condition would go a long way to restoring public trust in Entergy, the Department and the Board.

- The Board should reexamine its findings regarding Entergy's "fair-partner rehabilitation. A trail of deception and broken promises cannot be remedied by untested statements and yet more promises. Nor can "fair-partner" status be earned. The Board should make this clear by converting Entergy's claim to future good behavior from a qualifier for "fair-partner" to a condition for rehabilitation. Thus Entergy may demonstrate that is a fair-partner by fulfilling the agreements in the MOU and any other agreements that it has with the State earnestly and in good faith.

- Entergy should be required to make some restitution for use of the river as a heat sink for its operations that has likely, by a preponderance of the evidence, caused un-quantified harm to the aquatic community. The restitution may be in the form of establishing, for management by a suitable non-profit, a river restoration fund dedicated to fostering improvement in river fish stocks.

- Entergy should be required to enter into meaningful, good faith discussions with identified representative community, state and regional stakeholders for the purpose of building a
common vision, separate and apart from site restoration, for the Vermont Yankee site.

- Entergy must be required to agree that if the Board is called upon to enforce provisions of the MOU, Entergy will not take an adverse ruling as an occasion to exercise its discretion to then void the MOU as this would render any adverse decision by the Board subject to Entergy's pleasure and easily mooted. This is an authority that the Board cannot delegate.

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 10, 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 Amended 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 10, 2014.  

Dated at Edgecomb, Maine, April 10, 2014  

Copy to: Service List  

By: New England Coalition, Inc.  

By: Raymond Shadis
STATE OF VERMONT
PUBLIC SERVICE BOARD

Second Amended Petition of Entergy Nuclear
Vermont Yankee, LLC, and Entergy Nuclear
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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

SERVICE LIST

Susan Hudson, Clerk
Vermont Public Service Board
112 State Street, 4th Floor
Montpelier, VT 05620-2701

Geoffrey Commons, Esq.
Vermont Department of Public Service
112 State Street
Montpelier VT 05620-2601

Jolm H. Marshall, Esq.
Downs Rachlin Martin PLLC
90 Prospect Street
P.O. Box 99
St, Johnsbury, VT 05819-0099

Jon Groveman, Esq.
Vermont Agency of Natural Resources
103 South Main Street
3rd Floor Center Building
Waterbury, VT 05671-1-0301

George Clain, President
IBEW Local No. 300
3 Gregory Drive
South Burlington, VT 05403-6061

Peter H. Zamore, Esq.
Benjamin Marks, Esq.
Sheehy Furlong & Behm, PC
Gateway Square
30 Main Street - P.O. Box 66
Burlington, VT 05402

Donald J. Rendall, Jr., Esq.
Green Mountain Power Corporation
163 Acorn Lane
Colchester, VT 05446

L. Christopher Company
Executive Director
Windham Regional Commission
139 Main Street, Suite 505
Brattleboro, VT 05301

Kenneth C. Picton, Esq.
Dale A. Rocheleau, Esq.
Central Vermont Public Service Corporation
77 Grove Street
Rutland, VT 05701

Robert E. Woolmington, Esq.
Witten Woolmington Campbell & Boeppe, P.C.
P.O. Box 2748, 4900
Main St Manchester Center, VT 05255

Robert M. Fisher, Esq.
Fisher & Fisher Law Offices
114 Main Street
P.O. Box 621
Brattleboro, VT 05302-062 1

Richard Czapinski
P.O. Box 50
Adamant, VT 05640
James A. Dumont, Esq.
Law Office of James A. Dumont
15 Main St., PO Box 229
Bristol VT 05443

Sandra Levine, Esq.
Conservation Law Foundation
15 East State Street,
Suite 4 Montpelier, VT 05602-3010

J. Randall Pratt
Government Relations
Vermont Electric Cooperative, Inc.
42 Wescorn Road
Johnson, VT 05656

Sandra Dragon, President
Associated Industries of Vermont
P.O. Box 630
Montpelier, VT 05601

Jamie Fidel, Esq.
VNRC
9 Bailey Ave.
Montpelier, VT 05602

Kathleen M. Sullivan
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue,
22nd Floor New York, NY 10010
Robert B. Hemley,
Esq. Gravel and Shea
76 St. Paul Street,
7th Floor P. O. Box 369
Burlington, VT 05402-0369

Timothy Ngau, Esq.
Associate General Counsel-Nuclear NE Entergy Services, Inc.
1340 Echelon Pkwy
Jackson, MS 39213