STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8880

Joint Petition of NorthStar Decommissioning Holdings, LLC	)
NorthStar Nuclear Decommissioning Company, LLC, NorthStar	)
Group Serviced, Inc., LVI Parent Corporation, NorthStar Group	)
Holdings, LLC, Entergy Nuclear Vermont Investment Company	)
LLC and Entergy Nuclear Operation, Inc., and any other	)
necessary affiliated entities to transfer ownership of Entergy	)
Nuclear Vermont Yankee, LLC, and for certain ancillary	)
approvals, pursuant to 30 V.S.A. secs. 107, 231, and 232	)

NEW ENGLAND COALITION MOTION FOR PARTIAL SUMMARY JUDGMENT: THE BOARD'S ORDERS IN DOCKETS 7862 & 6545 CAN BE AMENDED ONLY PURSUANT TO VRCP 60(B)

Summary

One of the principal requests the Joint Petitioners have made of the Board is that the Board issue an order authorizing the Joint Petitioners to depart from the terms of the Board's Orders in Docket No. 7862, issued on March 8, 2014 ("Docket No. 7862 Order") and Docket No. 6545 issued on June 13, 2002 and amended on July 11, 2002 ("Docket No. 6545 Order") governing site restoration. The terms which the Joint Petitioners seek to vacate include:

A) The prohibition against rubblization (Docket No. 7862 and Docket No. 6545).

B) The requirement that funds for site restoration -- which the State of Vermont has a compelling interest in, and regulates -- be held in a trust fund separate from the exclusively NRC-jurisdictional decommissioning trust fund (Docket No. 7862).

C) The requirement that site restoration commence promptly *after* completion of radiological decommissioning and Nuclear Regulatory Commission ("NRC") license termination for Vermont Yankee (Docket 7862).

D) The requirement that ENVY provide a "parent guarantee" from the Entergy Corporation, which was not a party to the proceedings, for site restoration costs (Docket No. 7862).

Each of these components of the Board's Order in Docket Nos. 7862 and 6545 were part of the final judgments in those matters.

If the Joint Petitioners wish to amend the Board's orders in Docket Nos. 7862 and 6545 to delete these components of the orders, their sole remedy is the filing and service of motions under Board Rule 2.221 and Vermont Rule of Civil Procedure 60(b) to reopen Docket Nos. 7862 and 6545. The motions must be served on each of the parties to those Dockets – many of whom are not parties to this Docket -- so that each of those parties will have the opportunity to be heard. The Board then must rule on whether the standards of Rule 60(b) have been satisfied.

The New England Coalition respectfully submits that the doctrines of issue preclusion and claim preclusion, Board Rule 2.221 and Vermont Rule of Civil Procedure 60(b) each bar re-litigation of those issues outside of Docket Nos. 7862 and 6545. At present, the Board lacks authority to amend or delete any of the terms of the final order it issued in Docket Nos. 7862 and 6545.

The New England Coalition files this motion now to obtain affirmation from the Board that the protective conditions it imposed in Docket Nos. 7862 and 6545 relating to site restoration will remain in effect unless and until the Rule 60(b) motions are served, filed and granted. This issue is ripe for decision now. It would be a waste of the Board's and the parties' time and resources for the Board and the parties to prepare for and go through a trial and post-trial briefing on all of the other issues in this complicated litigation and then rule after trial that the Joint Petition cannot

be granted because the relief requested from the terms of the orders in Docket Nos. 7862 and 6545 should have been but had not been obtained under V.R.C.P.60(b).

Motion for Partial Summary Judgment

The New England Coalition moves pursuant to Board Rule 2.219 and V.R.C.P. 56 for partial summary judgment. The New England Coalition seeks an order rejecting the Joint Petitioners' requests that the Board modify the terms of the Board's Orders in Docket Nos. 7862 and 6545. The Board lacks authority to grant that relief without the filing of a motion under V.R.C.P. 60(b), on notice to each of the parties in Docket Nos. 7862 and 6545, and submission of proof that satisfies the standards of V.R.C.P. 60(b).

Statement of Undisputed Facts

The following facts are not genuinely disputed.

1. The Department of Public Service and Entergy Nuclear Vermont Yankee entered into a Memorandum of Understanding ("Docket No. 7862 MOU") in Docket 7862. Docket No. 7862 Order p.2.
2. The Board approved and adopted the MOU in its order dated March 28, 2014. Docket No. 7862 Order p.2.
3. The Board explicitly relied upon the commitments in the MOU as the basis for its order. Docket No. 7862 Order p.94.
4. The Board incorporated each of the terms of the MOU into its order. Docket No. 7862 Order p.95.
5. Entergy Nuclear Vermont Yankee ("ENVY" or "EVY") and Entergy Nuclear Operations, LLC ("ENO") were parties in Docket No. 7862. Docket No. 7862 Order p.2.

6. The Docket No. 7862 Order was not appealed and became a final judgment. (The Board is asked to take judicial or administrative notice of its own records.)
7. Paragraph 5 of the MOU states that "site restoration" as used in the MOU refers to the period after radiological decommissioning has been completed. Docket No. 7862 MOU ¶ 5.
8. After radiological decommissioning has been completed, the NRC will terminate the license for the facility and NRC regulations will cease to apply to the site. Docket No. 7862 Order Finding 220, p. 83.
9. After radiological decommissioning has been completed and the NRC has terminated the license for the facility, the State of Vermont will have exclusive jurisdiction over site restoration. Docket No. 7862 Order p. 54; see also Finding 220, p. 83.
10. Paragraph 5 of the MOU states that ENVY, the Department of Public Service, the Agency of Natural Resources ("ANR") and the Department of Health ("DOH") shall work in good faith to develop site restoration standards "including that EVY shall not employ rubblization at the VY Station site (*i.e.*, demolition of above-grade decontaminated concrete structure into rubble that is buried on the site)." Docket No. 7862 MOU ¶ 5; Docket No. 7862 Order Finding 21 p.30.
11. The MOU and the Board order, while committing ENVY, the Department, ANR and DOH to negotiate about site restoration standards generally, intended that the prohibition against use of rubblization was not subject to further negotiation. The standards to be developed must include that standard. Docket No. 7862 MOU ¶ 5; Docket No. 7862 Order Finding 21 p.30 (stating that the standards to be developed "will prohibit EVY from employing rubblization.")

12. Prior to the Board Order in Docket 7862, there existed no requirement that ENVY create a fund separate from the decommissioning trust fund to pay for site restoration. The availability of funds for site restoration depended upon the existence of a potential surplus in the NRC-regulated decommissioning trust fund. Docket No. 7862 Order pp.46-50.
13. Paragraph 7 of the MOU imposed a requirement that a separate fund, not subject to NRC jurisdiction, be created and funded to pay for site restoration. Docket No. 7862 Order pp.46-50; MOU ¶ 7.
14. Without a separate fund, there was no guarantee that any funding would be available for site restoration. Docket No. 7862 Order pp.46-50.
15. The Board relied on the commitment to create this separate fund in approving of the MOU. Docket No. 7862 Order pp.46-50.
16. Paragraph 6 of the MOU imposed a requirement that site restoration occur promptly after radiological decommissioning had been completed. Docket No. 7862 Order Findings 102, 167, pp. 52, 72.
17. The Board made clear that the plan to perform site restoration after completion of radiological decommissioning would leave the State with exclusive jurisdiction to regulate site restoration. Docket No. 7862 Order p. 54; see also Finding 220, p. 83.
18. The Department of Public Service and Entergy Nuclear Vermont Yankee entered into a Memorandum of Understanding ("Docket No. 6545 MOU") in Docket 6545. Docket No. 6545 Order generally, *esp.* p.60.
19. The Board approved and adopted the Docket No. 6545 MOU with certain amendments. The amended version of the Docket No. 6545 MOU is set forth in Board Order Appendix D.

20. In both the original MOU and the amended MOU Section 3 states that "the site will be restored by removal of all structures, and, if appropriate, regrading and reseeding the land." Docket No. 6545 Order Appendix D; Docket No. 6545 MOU.

21. "Removal" means "the act of moving or taking something away from a place." Merriam-Webster.com.

22. The Docket 6545 Order required the moving or taking away from the VY site of all structures.

23. The demolition of above-grade decontaminated concrete structures into rubble that is buried *on the site* does not constitute the moving or taking away from the VY site of the structures.

24. The Board explicitly relied upon the commitment in the MOU to removal of all structures as a basis for its order. Docket No. 6545 Order p.60 (2002 Vt. PUC LEXIS 279, pp.165-166). The Board's Order states:

> 113. The MOU contains, and ENVY has committed to, no specific "greenfield" standards. However, Paragraph 9 of the MOU provides that ENVY will perform site restoration according to Paragraph 3 of the MOU which provides that "Site restoration shall mean that, once the [Vermont Yankee] site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the site will be restored by removal of all structures and, if appropriate, regrading and reseeding the land. Exh. VY-42 at P P3, 9; tr. 4/18/02 at 101-04, 172-89 (Sherman).
>
> Discussion
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> ENVY has committed to return the Vermont Yankee site to "greenfield" conditions. ENVY's witness Wells provided the following testimony:
>
> Q. But you're willing to go forward with the existing decommissioning trust fund, are you not?
> A. As is to meet the NRC minimum.

> Q. Will it be adequate to meet the NRC minimum and also to return the site to greenfield condition?
> A. After a period of time.
> Q. Using SAF[E]STOR?
> A. Yes, sir.
>
> While directing ENVY to restore the Vermont Yankee site once it is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the MOU provides no definition of greenfield, nor standards by which to measure that status. Given Ms. Well's testimony, we interpret the term "restored" within the context of paragraph 3 of the Memorandum of Understanding to mean that, once the Vermont Yankee site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, "the site will be restored by removal of all structures and, if appropriate, regrading and reseeding the land."

25. Entergy Nuclear Vermont Yankee ("ENVY" or "EVY") and Entergy Nuclear Operations, LLC ("ENO") were parties in Docket No. 6545. Docket No. 6545 Order p.2.
26. The Docket No. 6545 Order was affirmed on appeal and became a final judgment. *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 2003 VT 53, 175 Vt. 368, 829 A.2d 1284.
27. The NorthStar entities have entered into a contract with Entergy Nuclear Vermont Investment Company, LLC ("ENVIC") and ENO by which NorthStar Decommissioning Holdings, LLC will purchase ENVY from ENVIC on detailed terms. Scott State 12/16/16 PFT generally and p.17; Steven Scheurich 12/16/16 PFT generally.
28. The three Entergy entities – ENVY, ENO and ENVIC – are in privity with each other because they have contracts governing their relationships. ENVIC owns ENVY and ENVY is in effect a subdivision of ENVIC. Docket No. 6545 Order Findings 126-135, p.80.

29. The NorthStar entities are in privity with ENVY, ENO and ENVIC because of the contract to purchase ENVY. Scott State 12/16/16 PFT generally and p.17; Steven Scheurich 12/16/16 PFT generally. (The Joint Petitioners have not yet produced in discovery the contract, despite discovery requests calling for its production.)

30. No motion under Board Rule 2.221 and V.R.C.P. 60(b) has been served or filed in Docket Nos. 7862 or 6545 to modify or vacate the terms referenced above. (The Board is asked to take judicial or administrative notice of its own records.)

31. The Joint Petition seeks to have each of these conditions vacated:

A) Elimination of the prohibition against rubblization. Joint Petition p.8 ¶ 3e; Scott State 12/16/16 PFT pp.18, 32; Discovery Response CLF:JP.1-16; Discovery Response DPS:NS-59. See also Discovery Response NEC:JP1-2(p).[1]

B) Elimination of the requirement that funds for site restoration -- which the State of Vermont has a compelling interest in, and regulates -- be held in a trust fund separate from the exclusively NRC-jurisdictional decommissioning trust fund. Joint Petition pp.5-6 ¶ 9; Scott State 12/16/16 PFT pp.22-24; Discovery Response CLF:JP.1-16; Discovery Response DPS:NS-59.

C) Elimination of the requirement that site restoration commence promptly *after* completion of radiological decommissioning and NRC license termination for Vermont Yankee. Joint Petition pp.5-6 ¶ 9; State 12/16/16 PFT pp.22-24; Discovery Response CLF:JP.1-16; Discovery Response DPS:NS-59.

D) Elimination of the requirement that ENVY provide a "parent guarantee" from the Entergy Corporation, which was not a party to the proceedings, for site restoration costs. Joint Petition pp.4-8, ¶ 6-9 and d-f; Michael Twomey 12/16/16 PFT pp.8-10; Discovery Response CLF:JP.1-16.

Memorandum of Law

[1] Joint Petitioners' prefiled testimony asks for relief from the prohibition in the Docket No. 7862 Board Order against rubblization. The prefiled testimony does not note that the Board's Order in Docket 6545 also addresses whether structures must be removed or may be demolished in place. However, Discovery Response NEC:JP1-2(p) acknowledges that the Board's order in Docket No. 6545 also pertains to site restoration.

The Board's Orders in Docket Nos. 7862 and 6545 were final judgments. ENVY and ENO were parties to both proceedings. ENVY and ENO and those in privity with them (such as ENVIC, and the NorthStar entities) are barred from relitigating, challenging, or collaterally attacking the terms of either judgment. Claim preclusion and issue preclusion both bar Joint Petitioners' requests. *Carlson v. Clark*, 2009 VT 17 ¶ 13, 185 Vt. 324, 970 A.2d 1269 (claim preclusion); *Trepanier v. Getting Organized, Inc.*, 155 Vt, 259, 265, 583 A.2d 583, 587 (1990) (issue preclusion).

Claim preclusion applies because there was a final judgment between the same parties (or those in privity with them) that addressed the same subject matter. *Carlson v. Clark, supra*. The fact that some of other parties differ is irrelevant so long as the party raising the objection and the party against whom it is raised were the same (or in privity), in both cases. *Blondin v. Brooks*, 83 Vt. 472, 479, 76 A. 184, 187 (1910) ("it is no objection to the application of the rule of *res judicata* that the parties to the former action include some who are not joined in the subsequent action. nor the converse; that the rule is applicable to all who were parties in both actions"). The New England Coalition raises the objection against ENO, ENVY and ENVIC (which is in privity with ENO an ENVY) and against each of the NorthStar entities (which are in privity with ENVIC, as well as ENO and ENVY).

Under claim preclusion (unlike issue preclusion), notions of public policy, fairness or equity are irrelevant. *Faulkner v. Caledonia County Fair Ass'n*, 2004 VT 123 ¶ 10, 178 Vt. 51, 869 A.2d. 103. Regardless of any arguments Joint Petitioners may raise that their proposed terms are preferable to the terms arrived at in Docket Nos. 7862 and 6545, claim preclusion applies. Removal of all structures was specifically required by the order in Docket No. 6545. Rubblization was specifically prohibited by the order in Docket No. 7862. Use of a separate trust fund, and

commencement of site restoration after radiological decommissioning when state jurisdiction is exclusive, were explicitly required by the order in Docket No. 7862. Creation of a separate trust fund for site restoration was explicitly required in Docket No. 7862. The judgments are binding on ENVY and ENO.

Issue preclusion also applies, although it is not necessary to address issue preclusion because claim preclusion applies. Issue preclusion applies because (1) preclusion is being asserted against one who was a party in the earlier action; (2) each issue was resolved by final judgment on the merits; (3) each issue is the same as the one raised in the later action; ;(4) there was full and fair opportunity to litigate each issue in the earlier action; and (5) applying preclusion in the later action is fair. *Trepanier, supra*. The answers to the first four criteria are obvious. As to fairness, the courts apply this together with the fourth factor, and where the incentives to litigate the issue were similar in both cases, fairness dictates application of preclusion in order to avoid relitigation of the same issues. *In re Tariff Filing of Central Vermont Public Service Corp.*, 172 Vt. 14, 31-33, 769 A.2d 668, 681-683 (2001). It is the burden of the party opposing preclusion to convince the tribunal that preclusion would be unfair. *In re Tariff Filing of Central Vermont Public Service Corp.*, *supra*.

Permitting re-litigation of any of the four issues would be particularly unfair because an alternative, fair means of addressing these issues is available – a motion under Board Rule 2.221 and V.R.C.P. 60(b), with notice to and opportunity to be heard by all of the parties in Docket Nos. 7862 and 6545. Rule 60(b) states:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have

> been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

One of the criteria of Rule 60(b)(5), for example, is that "it is no longer equitable that the judgment should have prospective application." If the Joint Petitioners cannot satisfy the standards of V.R.C.P. 60(b), it would be a distortion of the doctrine of issue preclusion to conclude that re-litigation of an issue would be fair. That would mean that an exception to issue preclusion overrides the criteria of Rule 60(b).

Therefore, the only remedy available to Joint Petitioners, if they wish to vacate terms that were imposed upon ENVY and ENO in Docket Nos. 7862 and 6545 is to seek relief under Board Rule 2.221[2] and Vermont Rule of Civil Procedure 60(b) in Docket Nos. 7862 and 6545, with notice to and opportunity to be heard by each party in those proceedings.

CONCLUSION

The Board should grant summary judgment to the New England Coalition by declaring that the following terms cannot be vacated in this proceeding: the requirement that structures be removed from the site, and the prohibition against rubblization; the requirement that funds for site restoration be held in a trust separate from the decommissioning trust fund; the requirement that site restoration commence promptly *after* completion of radiological decommissioning and NRC

[2] Board Rule 2.221 states that Vermont Rule of Civil Procedure 60 shall apply to all requests from relief from an order.

License Termination for Vermont Yankee; and the requirement that ENVY provide a parent guarantee from the Entergy Corporation for site restoration costs.

Dated at Bristol, Vermont this 5th day of May, 2017.

BY: /s/ James A. Dumont_____________
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