STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their certificates of public good and 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	)	Docket No. 7440

RESPONSE OF THE DEPARTMENT OF PUBLIC SERVICE TO ENTERGY'S MOTION TO DEFER PROCEEDINGS OR TO SEEK AN ENLARGMENT OF TIME

On February 29, 2012, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. ("Entergy") filed a motion requesting that the Board delay these proceedings pending the resolution of motions filed by Entergy in the United States District Court for the District of Vermont and the United States Court of Appeals for the Second Circuit. In the alternative, Entergy has asked that the Board require all other parties to this docket to respond to the Board's February 22, 2012 questions regarding the effect of the district court's decision on this proceeding before Entergy (the only party in this docket who was also a party to that proceeding) has to respond. For the reasons set forth below, the Department strongly believes the motion should be denied.

I. Procedural History

On January 19, 2012, the federal district court granted judgment in *Entergy v. Shumlin*, ruling in pertinent part that:

> 1. Act 160, which enacted sections 248(e)(2), 248(m) and 254 in title 30 of the Vermont Statutes, is preempted by the Atomic Energy Act; and
>
> 2. A single provision within section 6522(c)(4) of title 10 of the Vermont Statutes, enacted as part of Act 74, stating "Storage of spent nuclear fuel derived

> from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter," is preempted by the Atomic Energy Act.

Entergy v. Shumlin, Docket No. 1:11-cv-99 (D.Vt. Jan. 19, 2012)("District Court 1/19/12 Order") at 99.

The court entered a permanent injunction which provided, in pertinent part:

> 1. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing Act 160 by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down after March 21, 2012 because it failed to obtain legislative approval (under the provisions of Act 160) for a Certificate of Public Good for continued operation, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.
>
> 2. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing the single provision within section 6522(c)(4) of title 10, enacted as part of Act 74, stating "Storage of spent nuclear fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter," by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down or to prevent storage of spent nuclear fuel after March 21, 2012 because it failed to obtain legislative approval (under the same preempted provision) for a Certificate of Public Good for storage of spent fuel, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.

Id. at 100-101.[1] The Court otherwise left Vermont's statutory and regulatory scheme, and its oversight of Vermont Yankee, intact. The Vermont Attorney General has appealed the Court's order.

On February 22, 2012, the Board issued a Memorandum re: Procedural Issues which sought responses from the parties on a number of issues relating to the district court's decision. Some of the questions related to the continued application of the non-preempted portions of Act

[1] The district court also enjoined the Board "from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market power purchase agreement between Plaintiffs and Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states." *Id.* at 101.

74 to this docket, and the resultant ability of Entergy to store spent nuclear fuel after March 21, 2012.

On February 27, 2012, Entergy filed in the district court a "Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60(b)." ("Entergy 60(b) Motion"). In its motion, Entergy seeks to have the district court amend its judgment by adding the following rulings:

> a) declaring 10 V.S.A. § 6522(c)(2) and (c)(5) invalid, as preempted by the Atomic Energy Act;
>
> b) permanently enjoining Defendants, as preempted by the Atomic Energy Act, from enforcing 10 V.S.A. § 6522(c)(2) by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down because the "cumulative total amount of spent fuel stored at Vermont Yankee" exceeds "the amount derived from the operation of the facility up to, but not beyond, March 21, 2012;"
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> c) permanently enjoining Defendants, as preempted by the Atomic Energy Act, from enforcing 10 V.S.A. § 6522(c)(5), by bringing an enforcement action, or taking other action, to compel Vermont Yankee to curtail operations for failing to comply with that provision;
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> d) permanently enjoining Defendants from taking any action designed to, or having the effect of, forcing Vermont Yankee to curtail operations pending a decision by the PSB on Plaintiffs' petition for a CPG for continued operation of Vermont Yankee, and any judicial review of that PSB decision; and
>
> e) granting such other and further relief as the Court deems appropriate.

Entergy 60(b) Motion at 1-2.[2]

II. The Board Should Deny the Motion

A. This Docket Should Go Forward

Entergy's recent filings with the district court provide no basis for the Board to stay its hand.

The district court specifically noted in its decision:

[2] Entergy seeks identical relief in an "Expedited Motion for Injunction Pending Appeal." Entergy also filed a motion with the Second Circuit Court of Appeals for a limited remand to consider its motions.

> This Court's decision is based solely upon the relevant admissible facts and the governing law in this case, and it does not purport to resolve or pass judgment on the debate regarding the advantages or disadvantages of nuclear power generation, or its location in this state. Nor does it purport to define or restrict the State's ability to decline to renew a certificate of public good on any ground not preempted or not violative of federal law, to dictate how a state should choose to allocate its power among the branches of its government, or pass judgment on its choices. The Court has avoided addressing questions of state law and the scope of a state's regulatory authority that are unnecessary to the resolution of the federal claims presented here.

Entergy v. Shumlin at 4. The district court's decision thus allows the Board to continue with its proceedings and to decide the issues of state law that are properly before the Board. The Board should do so and should reject Entergy's efforts at delay.

The Board must comply with the district court's injunction. The Board's memorandum is simply a list of questions that will enable the Board to structure this proceeding in compliance with that injunction after input from the parties. Given its role as plaintiff in that case, Entergy should be prepared to answer those questions. There is no reason to delay this proceeding for Entergy's benefit.

B. Entergy Should File First

As noted above, Entergy is both the petitioner in this docket and also the plaintiff in *Entergy v. Shumlin*. Entergy thus has it backwards when it suggests that the other parties in this docket should respond first to the Board's queries. Entergy should be required to set forth its position on March 2 and explain how the district court's ruling ought to affect this proceeding. Requiring Entergy to set forth its position first, and the other parties to respond, will sharpen the presentation of the issues.. Moreover, the Board proceeding ought to move forward regardless of the eventual outcome of Entergy's recent filings at the federal district court because substantial and important jurisdiction resides in the PSB, including the ability to grant or deny a CPG for continued operations under all aspects of Vermont law not preempted by the Court ruling under

appeal, even if the Court were to "clarify" its narrow holding regarding Act 74.

Accordingly, Entergy should be required to file its responses on March 2 and the remaining parties, including the Department, should then be able to respond on March 7, after they have reviewed Entergy's submission.

CONCLUSION

For the reasons stated herein, the Department respectfully requests that the Board deny Entergy's motion and require it to file responses to the Board's February 22, 2012 Memorandum on March 2 and permit the other parties to respond by March 7.

Dated at Montpelier, Vermont, this 1st day of March, 2012.

VERMONT DEPARTMENT OF PUBLIC SERVICE

By:_____

John Beling, Director for Public Advocacy

cc: Service list