STATE OF VERMONT
PUBLIC SERVICE BOARD

Investigation into (1) whether Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., (collectively, "Entergy VY"), should be required to cease operations at the Vermont Yankee Nuclear Power Station, or take other ameliorative actions, pending completion of repairs to stop releases of radionuclides, radioactive materials, and, potentially, other non-radioactive materials into the environment; (2) whether good cause exists to modify or revoke the 30 V.S.A . § 231 Certificate of Public Good issued to Entergy VY; and (3) whether any penalties should be imposed on Entergy VY for any identified violations of Vermont statutes or Board orders related to the releases	)	Docket No. 7600

IBEW REPLY BRIEF

Comes International Brotherhood of Electrical Workers, Local 300 ("IBEW"), by undersigned counsel, and provides its Reply Brief on the "scope of the Board's jurisdiction to take action in response to the releases of the contaminants at issue in this docket."

Summary

Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively, "Entergy VY" or "ENVY")), the Department of Public Service ("DPS"), IBEW, Conservation Law Foundation ("CLF"), New England Coalition ("NEC"), Vermont Public Interest Research Group ("VPIRG"), the Vermont Natural Resources Council ("VNRC") and the Connecticut River Watershed Council ("CRWC"), jointly, filed briefs. The Agency of Natural Resources ("ANR") filed testimony in this docket but appears not to have filed a brief. In any event, IBEW addressed the effect of ANR's testimony regarding application of the Board's jurisdiction in its Brief and Renewed Motion to Close the Docket.

VPIRG in its brief takes a pass on the preemption matter in this Docket and the relief requested by CLF and NEC, supported, in part, by VNRC and CRWC:

> VPIRG does not take a position as to the extent of the Board's authority under the Supremacy Clause to respond to the unique facts that the Board now has before it in this docket. Brief at 1.

VPIRG focuses on arguing that any ruling regarding preemption and the Board's jurisdiction is limited to this case and does not apply to limit the Board's authority in Docket No. 7440 and that of the General Assembly regarding relicensing of Vermont Yankee to operate beyond March 21, 2012.

Neither IBEW nor any other party argue that recognizing preemption of the Board, on the record in this docket, and closing this Docket alters in any way the effective jurisdiction of the Board in Docket No. 7440 or the authority of the legislature regarding relicensing. Indeed, the Board's orders opening the Docket (Order dated February 25, 2010) and implementing the Prehearing Conference (Order dated March 18, 2010) was very clear about the stated purpose of the docket.: the docket afforded the parties the opportunity to develop a factual record to determine whether the jurisdiction of the Board applied concerning the release of radionuclides from the pipe leaks at Vermont Yankee. For a statement of the applicable preemptive Federal jurisdiction see *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Conservation & Dev. Comm'n,* 461 U.S. 190, 222-223, 103 S.Ct. 1713, 1732, 75 L.Ed.2d 752 (198).

In the Order, dated February 25, 2010, the Board stated:

> Accordingly, we conclude that we are not preempted from taking action in response to the leaks at Vermont Yankee, to the extent that the leaks may have economic and other nonradiological-health-and-safety consequences and to the extent that our action neither conflicts directly with the NRC's exercise of its federal jurisdiction nor frustrates the purposes of the federal regulation.

> Unfortunately, none of the parties has presented a close analysis of the extent of any federal preemption focused on the specific facts presented here. Order, at page 7.

The Board stated in its Order, dated March 18, 2010:

> However, at this time, the Board has been presented only with generalized information and unspecific concerns. No party has presented any factual information through testimony or affidavits showing the particular harms that may be occurring, or what relief the Board could and should order to redress any such harm. Nor do we have a properly supported motion requesting that we direct Vermont Yankee to cease or modify operation to ameliorate these harms. CLF previously filed a motion asking us to issue an order requiring Entergy VY to demonstrate why it should not be shut down; due to the absence of sufficient information on the releases and their potential effects, we opened this investigation instead. We want to stress, however, that if a party were to present us with facts demonstrating that rapid action was necessary to avoid identifiable harm to concerns within our jurisdiction, to the extent that we are not preempted by federal law, we are prepared to act quickly.
>
> Considering the lack of detailed information on the presented releases, their potential effects and the need for action, it is appropriate that we begin by requiring Entergy VY to explain what has happened, what is occurring now, and what actions are being taken to address the releases. . . .
>
> Following Entergy VY's filing, other parties may engage in discovery on the testimony and file responsive testimony.
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> During the prehearing conference and in filings in Docket 7440, Entergy VY raised the issue of whether the Board had jurisdiction to order relief in this proceeding. We have previously recognized that certain aspects of the operation of Vermont Yankee are subject to the exclusive jurisdiction of the Nuclear Regulatory Commission. At the same time, as we explained in our Order opening this investigation, the Board retains substantial jurisdiction to regulate areas of traditional state concern. We would like parties to address the jurisdictional questions more specifically prior to hearings, once the testimony has been filed and specific requests for relief have been made. Order at 2-3.

In the exercise of due diligence, the Board afforded the parties every opportunity to parties to so demonstrate factually: the Board authorized broad and extensive discovery, and permitted filing of expert testimony.

This docket is now at the crunch time, so speak, all of the above having occurred. IBEW submits, having reviewed both the testimony previously submitted and the briefs of the

proponents of relief (CLF, NEC, VNRC and CRWC), that the factual record demonstrates that the issues regarding the release of radionuclides from the leak at Vermont Yankee are issues within the exclusive jurisdiction of the NRC. The specific relief sought by the parties seeking Board sanctions – shutting down Vermont Yankee pending repair, revoking or conditioning the existing Certificate of Public Service, or sanctioning or fining ENVY[1] – are entirely preempted and exclusively within the province of the NRC. The NRC is the forum for parties to bring their issues[2].

This is a factual determination applied to existing law as recognized by the Board in its orders concerning this docket. There is no further need for further factual inquiries by hearings.

Any remaining matters related thereto can be addressed in Docket No. 7440, as the Board determines, through the vehicles of the Supplemental Vertical Audit 2010, and the Supplemental Public Oversight Panel Report, filed by the Department in that docket on April 30, 2010, and July 20, 2010, respectively.

The leak has been stopped and remediated; the urgency that existed and gave rise to the Board's concerns and its creation of this docket has been and are being addressed. The NRC, in conjunction with ENVY and applicable Vermont State Agencies, including the Department of Public Service and the Department of Health, are acting aggressively. The NRC itself is attending effectively to its jurisdictional responsibilities in favor of Vermont. Vermont Yankee

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[1]See Prehearing Order, March 18, 2010, at page 2.

[2]NEC, by its witness Mr. Raymond Shadis, is the only party filing testimony, September 8, 2010, on the Root Cause Analysis (RCA), per the procedural order, dated July 28, 2010. It is ironic that he filed, because, as IBEW has been informed, he petitioned and was granted an opportunity to address the NRC staff on the subject of his RCA testimony. Neither NEC nor CLF will be prejudiced by the Board closing this docket.

has operated safely and reliably throughout this time, has been refueled and repowered effectively.

ANR, VNRC and CRWC, regarding groundwater issues, have avenues to accomplish their concerns within that framework. The closing of Docket No. 7600 will not prejudice or impede them in their concerns and issues.

A description of these efforts, process and success are given in the September 1, 2010 and August 25, 2010, postings on the Vermont Department of Health website (http://healthvermont.gov/enviro/rad/yankee/tritium.aspx):

> **September 1, 2010**
>
> The results that follow are as reported by Vermont Yankee for tritium. As has been the trend over the past few months, concentrations of tritium in wells near plant structures, systems and components that may leak and contaminate the groundwater are generally decreasing. Wells near the Connecticut River continue their recent trend of leveling off with tritium concentration, perhaps indicating a peak. To date, gamma spectroscopy and special analyses for hard-to-detect radionuclides have not identified any other nuclear power plant-related radioactive materials in groundwater, drinking water, or river water.
>
> **August 25, 2010**
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> **Nuclear Regulatory Commission Inspection**
> Inspectors from the NRC returned to Vermont Yankee August 17 through August 20 to continue the groundwater protection inspection, and to begin the annual inspection of radiological effluents. Neither inspection is yet complete, nor are final results expected until later this year.
>
> A health physicist from the Vermont Department of Health accompanied two NRC health physicists and two NRC hydrogeologists on the inspection, and at meetings with Vermont Yankee's chemistry director, chemistry supervisor, its environmental monitoring program lead, radiation protection manager, and Entergy's contract hydrogeologist and health physicist. Major areas of discussion included Vermont Yankee's conceptual site model and dose assessments based on the tritium release.
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> The **conceptual site model** is being clarified by "down-hole" geophysical testing of drinking water wells used for drinking water at the plant, and at drinking water wells on Entergy-owned properties on Governor Hunt Road.
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> This testing is used to more precisely characterize the bedrock, and the separation of groundwater above the bedrock from drinking water under or within it. Pressure transducer data from the groundwater sampling wells will also be downloaded and

analyzed in the coming weeks to help further define the site model. This model should allow more accurate estimates of transport times for the movement of groundwater from buildings on site to the Connecticut River, and the total activity of radioactive tritium released from the leaking structures, systems and components. On August 19, the NRC obtained split samples from groundwater monitoring wells for independent radiochemical analysis.

Bounding dose assessments conducted by Vermont Yankee and Entergy consultants were also reviewed. These estimated doses to the public are small fractions of the state regulatory limits for public doses from liquid effluents and the NRC limits for offsite dose to the public. In particular, the dose estimated with current models is 0.00035 millirem per year. The Vermont Department of Health's limit for all radiological liquid effluents, including tritium, is 5.0 millirem per year. Further definition of the conceptual site model will allow for improvements in the dose assessment modeled for the tritium release. This is expected to be completed in 2010. The tritium dose assessment will be included in Vermont Yankee's complete effluent monitoring report by May 15, 2011.

Further Discussion

As IBEW discussed in its Brief and Renewed Motion to Close, the submitted testimony of proponents of relief failed to provide basis for action on matters within the Board's jurisdiction. In fact, that testimony did not purport to do so or attempt to address the dividing line of Board jurisdiction and NRC jurisdiction. The briefs of CLF, NEC, VPIRG, VNRC and CRWC confirm that the same conclusion concerning their testimony.

To the extent that those briefs attempt to argue the testimony, most of it is speculative or conclusiory or misstated in their claims, not that which gives rise to a factual basis for Board jurisdiction.

For example, the VNRC-CRWC brief asserts that "it is indisputable that the leaks at Entergy VY have harmed the Connecticut River and groundwater." To be sure, the leak from the pipe contained radionuclides and it reached the ground water and the Connecticut River. Such was both unfortunate and unacceptable, a statement Entergy VY has agreed with. However, the bald statement that "it is indisputable" that such "harmed" the Connecticut River and the ground

water is unsupported by any analysis of the legal standard of harm and the concentrations of the tritium. Harmed is a legal conclusion not supported in the brief. The reference to EPA drinking water standards is not connected to any analysis of drinking water sources located by or affected Vermont Yankee and specific impacts of radionuclides concentrations over time on those sources. As such, the matter is disputable and requires full reference to the Federal standards and analysis of the harm. Further, the leak has been stopped, and the concentrations are decreasing, as the per the postings on the Vermont Department of Health website.

Given all the opportunity provided by the Board for discovery, analysis, and expert witness testimony, such statements in this and other briefs simply do not provide probative demonstration of factual matters establishing a zone of Board jurisdiction, one sufficient to grant any of the relief under consideration.

The Department's brief says that an ultimate conclusion about preemption cannot be reached without a Board order granting relief. At the same time, the Department's testimony, as previously discussed in IBEW's Brief, and in ENVY's Supplemental Brief, is pretty conclusive that the record and analysis thereof establishes the leak of radionuclides at issue in this docket provides no basis or need within the Board's jurisdiction for the relief sought.

In theory one could wait until an order is issued, but the Board afforded the parties the opportunity to develop a factual record through discovery and testimony to establish, if possible, whether sufficient factual grounds exist to provide jurisdiction to the Board. No testimony analyzed and presented a case of economic matters providing jurisdiction to the Board. That testimony simply reinforced the radiological issues of the radionuclide leaks herein which are within the unequivocal jurisdiction of the NRC – including the Department's testimony.

All told, the testimony from the Department witnesses does not support the existence of any impacts "from an environmental, land use, public health, reliability, and economic standpoint, including any potential increase in the cost of decommissioning" that the Board sought to examine. Prehearing Conference Memorandum Order, March 18, 2010, at page 3.

There is a record sufficient to close the docket and move on in Docket No. 7440. There is sufficient overlap so that Board's hands are not tied, as it sees fit, to ensure appropriate protection for Vermont in relicensing.

The argument to close the docket is not one of cost and time that would be expended for continuing with the docket, but one of clarity: we know substantially based on the record of the docket that the issues that would be pursued if the docket continued are radiological issues within the zone of the NRC's exclusive jurisdiction and outside the Board's jurisdiction.

The parties favoring sanctions miscomprehend the Board's position by suggesting that the Board might be "reversing itself" if it determined, based on the factual record that the matters of the radionuclide leak at Vermont Yankee are pre-empted. CLF brief at page 37.

The Board did not conclude that it had jurisdiction; it only stated that it might have jurisdiction, but that the parties had to establish a specific factual basis for that jurisdiction. The parties advocating sanctions have failed to so establish. In fact, they have established their issues are within the preemptive jurisdiction of the NRC.

To suggest that the Board is estopped from recognizing the NRC preemptive jurisdiction if supported – as it is herein – by the factual record of the case based on equitable arguments, including waiver by Entergy VY, has no basis. That would effectively have a state regulatory agency estopping the NRC from exercising its jurisdiction. That cannot be so.

The agreements made in the MOU in Docket No. 6545 regarding a promise by Entergy VY not to obstructive the agreement by asserting preemptive jurisdiction do not pertain to this docket and the issue of jurisdiction herein.

Closing the docket would not jeopardize the jurisdiction of the Board or of the legislature, under Vermont law, regarding the relicensing of the plant. In fact, it is time to turn to the unfinished business of Docket No. 7440.

WHEREFORE, the matter of the radionuclide leaks at Vermont Yankee is within the exclusive jurisdiction of the Nuclear Regulatory Commission, as established by the factual record of this docket, and the applicable existing law. It is time and purposeful now to close this docket.

Respectfully submitted,

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September 10, 2010

Certificate of Service

I hereby certify that this 10th day of September 2010, a copy of the foregoing IBEW Reply Brief was mailed to all parties of record, as stated in the service list to date and also was transmitted electronically.

/s/ Brian Lederer

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Brian Lederer