

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6300

Investigation into General Order No. 45 Notice filed)
by Vermont Yankee Nuclear Power Corporation re:)
proposed sale of Vermont Yankee Nuclear Power)
Station and related transactions)

Order entered: 2/14/2001

PRESENT: Michael Dworkin, Chairman
David Coen, Board Member

ORDER DISMISSING PETITION

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I. Motions to Dismiss and for Summary Judgment

The Vermont Yankee Nuclear Power Station ("Vermont Yankee") provides approximately one-third of all the electric power used in Vermont. Today's Order closes one significant chapter in the history of that plant. In this Order, we dismiss the present proceeding in which we considered the sale of Vermont Yankee (as amended). We find that the proposed purchase price does not reflect the fair market value of Vermont Yankee and thus cannot, as a matter of law, be found to promote the general good. Our decision to terminate this docket will permit Vermont Yankee Nuclear Power Corporation ("Vermont Yankee Corporation") to re-evaluate its decision to sell the station. If it appears that a sale of the facility will promote the general good, Vermont Yankee Corporation may proceed with an auction or other process that will ensure that the sale occurs at a price reflecting the fair market value of Vermont Yankee. We stress that fair market value, like the general good of the state, is a matter of more than mere cash payment and incorporates many elements. *See also*, the original Scoping Order in this proceeding.¹

Background

On October 20, 1999, Vermont Yankee Corporation, Green Mountain Power Corporation ("GMP"), and Central Vermont Public Service Corporation ("CVPS") (collectively, the "Petitioners") filed the original petition for approval of the sale of Vermont Yankee to AmerGen Energy Company, L.L.C. ("AmerGen"). The proposal was a complex one involving several inextricably interrelated agreements for purchase of the nuclear power station and for long-term power-purchase commitments. Overall, the proposal was described (even by one Petitioner's own financial analyst) as "break-even from a financial point of view."²

1. Order of 1/21/00 at 4.

2. Donaldson, Lufkin and Jenrette, CVPS's adviser, concluded that the sale was "essentially break-even from a financial point of view." Exh. CLF-2 at 1. Furthermore, "[a]ny variation in the assumptions used in our analyses will have material effect on the results." *Id.*

Our review included fourteen days of evidentiary hearings, a period during which the parties presented and cross-examined 28 witnesses between May 10 and June 14, 2000. On that evidentiary record we were prepared to deny the original petition.³

However, on October 26, 2000, the Petitioners (joined by AmerGen) and the Vermont Department of Public Service ("Department"), asked us not to rule upon their original petition, but instead to permit them to negotiate a second, modified sales proposal (which they ultimately filed on November 16, 2000).⁴ In our Order of November 17, 2000, we agreed to consider AmerGen's second proposal, as embodied in the settlement, as an amendment to its original petition (the "Amended Petition").⁵ Anticipating the substantive review of the second proposal, we stated that "the fair market value of the plant is a critical aspect of the question before us" and that demonstrating that the "proposed sale provides an economic benefit to the state of Vermont or that the price that AmerGen would pay reasonably reflects the market value of Vermont Yankee," was a necessary (if not sufficient) element of the approval of such a petition.⁶

On January 12, 2001, Entergy Nuclear Corporation ("Entergy") requested that the Board dismiss the AmerGen proposals.⁷ In support of that motion, Entergy filed a commitment to meet or exceed all elements of AmerGen's Amended Proposal and, in particular to offer a purchase price of \$50 million: more than twice the figure of \$23.8 million in AmerGen's amended proposal.⁸ Entergy offered to back its proposal with a bond of \$26.4 million dollars, as a security

3. *See*, Order of November 17, 2000.

4. Order of 10/26/00.

5. *See* Order of 11/04/99 (Opening investigation); Order of 10/26/00 (Granting delay in issuance of Order on original petition); Order of 11/17/00 (Board agrees to review "revised transaction" and subsequent events involving recent sales of other nuclear power plants).

6. Order of 12/15/00 at 2-3.

7. In addition, as we stated in our Order of December 28, 2000, we recognized the Citizen Action Network's ("CAN") renewal of a motion to dismiss, and the New England Coalition on Nuclear Pollution ("NECNP") and the Vermont Public Interest Research Group ("VPIRG") joining with CAN in its motion. Order of 12/28/00 at 3; Letter of J. Yelverton to S. Hudson, January 12, 2001, at 1.

8. *See* Entergy filing of January 12, 2001, Exhibit EN-2 at 3.

instrument ensuring the presentation of that proposal in any multi-party sale proceeding following dismissal of AmerGen's pending proposal.⁹

On January 19, AmerGen filed its third, and latest, proposal ("Amergen's Third Proposal"). In that filing, Amergen offered to forego a \$90,000 per day price reduction that was set out in its first and second proposals. In a supporting affidavit, Amergen indicated that the foregone price reduction, combined with an extraordinarily (and unilaterally) accelerated closing date would produce an overall transaction value that, it argued, would approximate or better Entergy's offer.¹⁰

On January 29, 2001, counsel for New England Coalition on Nuclear Pollution ("NECNP"), filed a Motion for Summary Judgment, arguing that AmerGen's Amended Petition should be rejected since there was no genuine issue of material fact about its inconsistency with the necessary criteria for approval.¹¹ That motion was joined by the Vermont Public Interest Resource Group ("VPIRG") and the Citizens' Awareness Network ("CAN").

Thus, over the course of these proceedings, the Board has been asked to consider the following four proposals for the sale of Vermont Yankee:

- (i) the Original Petition of AmerGen and the Petitioners, characterized as "break-even from a financial point of view;"¹²
- (ii) the Amended Petition of November 16, 2000, with a purchase price of \$23.8 million;¹³

9. Entergy also submitted an alternative bid that it publicly characterized as containing "substantial additional value in exchange for a 60-day period of exclusive negotiation." The amount of that bid was presented on a confidential basis, and was contingent on an exclusivity period that has not been granted. The Board has not considered it in coming to the decision set out in today's Order. Tr. 1/29/01 at 55 (Brown).

10. We conclude that AmerGen's Third Proposal would be a material amendment to either the original or the amended petition. See tr. 1/29/01 at 55-57. AmerGen did not seek leave to amend its original petition, and all other parties (including AmerGen's contractual partners) have either opposed or been silent on granting such leave. As we note below, we do not authorize this new amendment. See, Vt PSB Rule 2.204(g).

11. NECNP & VPIRG's Motion for Summary Judgment and Reply to Vermont Yankee Objection to Release of Board Order, January 29, 2001. See also tr. 1/29/01 at 10-11 (Dumont).

12. See note 2 above.

13. Amended and Restated Asset Purchase Agreement, November 15, 2000, at § 3.3(a)(ii); the Amended Petition also contained changes from the Original Petition, including replacing the original fixed-price Power Purchase Agreement with one that tracked market prices, but was capped at rates near market levels.

(iii) Entergy's Offer of January 12, 2001, matching or exceeding the Amended Petition, with a purchase price of \$50 million;¹⁴ and

(iv) AmerGen's Third Proposal, valued (by AmerGen) at \$1.5 million over the Entergy Offer.¹⁵

Summary of Decision

In today's Order, we reject the Amended Petition and rule that (absent further order of this Board) this Docket shall be closed ten business days following the filing of a Performance Bond from Entergy in substantially the form described below. We conclude that because the purchase price in AmerGen's second proposal (the Amended Petition) does not reflect the fair market value of Vermont Yankee, AmerGen and the other Petitioners have not put forward facts that would permit the Board to find that the second proposal promotes the general good of the state.¹⁶ Accordingly, we grant Entergy's motion to dismiss. In addition, we find that if we ruled on the merits of the motions for summary judgment, no genuine issues of material fact exist, and we would grant NECNP, VPIRG, and CAN's motion for summary judgment.

Positions of the Parties

All parties except AmerGen agree that neither the Original Petition nor the Amended Petition reflects the fair market value of Vermont Yankee. Even the Vermont Petitioners, aware of their legal obligation to inform this Board of both the favorable and the unfavorable elements of the pending Amended Petition, do not believe they can present evidence showing that the pending proposal promotes the general good of Vermont by recovering the fair market value of the plant.¹⁷

14. Prefiled Testimony of D. Keuter, at Exh. EN-2.

15. *See* AmerGen's Motion re: Merits of Entergy Filing and Proposal for Further Actions in this Docket January 22, 2001, at 3; Affidavit of Charles Lewis dated January 22, 2001, at 3.

16. The Petitioners have requested Board approval of the proposed sale under several different provisions of Vermont law. In essence, each of these statutory provisions requires the Board to find that the sale of assets will promote the general good of the state. *See* 30 V.S.A. § 109.

17. Vermont Yankee Corporation, GMP, and CVPS have a contractual obligation to support approval of the Amended Petition. At the same time, the contract recognizes their legal obligation to inform the Board of the best course of action, including whether the Amended Petition is consistent with statutory requirements. This duty

(continued...)

At the January 29, 2001, status conference, when asked "do you think we should dismiss this docket?," Vermont Yankee Corporation replied:

I think everything that Vermont Yankee [Corporation] has said is consistent with granting this dismissal. I don't think that there is any way, unless you inform us otherwise, that there is no standard that we can now meet in this docket that will satisfy you that the proposal before you promotes the general good of the state.¹⁸

Vermont Yankee Corporation observed that, if the standard of promoting the general good requires receiving fair market value for Vermont Yankee, then "it would be questionable whether there is any outcome at this point in time that could lead [the Board] to approve the transaction."¹⁹ Consistent with its obligation to comment on all aspects of the petition before the Board (an obligation explicitly recognized by AmerGen)²⁰ Vermont Yankee Corporation stated that "[o]nly if all prospective purchasers are permitted to bid on Vermont Yankee can the Board know if Vermont Yankee's market value is higher than Entergy's First Proposal (and by how much)."²¹

GMP agreed, asserting that it had concluded that Entergy's proposal would "provide more value to GMP and its ratepayers than would the existing sale agreement with AmerGen."²² GMP's counsel viewed that the Amended Petition as more favorable than continuation of the status quo, but added that, as to realizing fair market value for the plant:

17. (...continued)
overrides their obligation to AmerGen, as AmerGen has explicitly recognized. *See* tr. 5/10/00 at 15-20 (Schwiebert). Thus, informing the Board that the Amended Petition is not approvable under applicable legal standards is fully within their contractual rights and obligations. As Chairman Dworkin notified the company:

We think that under Section 6.6 (c) of the APA, you do have an obligation to comply with the law. That includes the obligation that you have both implicitly and explicitly set out by your obligation as a company certified in Vermont and certified by this Board and as a litigant in front of us and explicitly as we said in our questioning on May 10th and in November and in the prior order and as you recognized and as AmerGen recognized on May 10th on pages 15 to 20 of the transcript, you have an obligation to tell us what you think is best here. That supersedes any legal obligation that you have under the contract with AmerGen.

Tr. 1/29/01 at 17-18 (Chairman Dworkin).

18. Tr. 1/29/01 at 66 (Marshall).

19. *Id.* at 19-20.

20. Tr. 5/10/00 at 17-20 (Schwiebert).

21. Letter of J. Marshall, Esq., to Susan Hudson, January 19, 2001, at 2.

22. Letter of J. Trout, Esq., to Susan Hudson, January 19, 2001, at 1.

I cannot represent to you that I could make such a showing and I could not represent to you that I could put on any witnesses who would testify to that. In fact the indications, as we have said in our filings, are to the contrary.²³

CVPS echoed Vermont Yankee Corporation's position:

two bids from Entergy, plus indications of interest in Vermont Yankee . . . by Dominion Resources and Constellation Energy, provide further support for CVPS's prior conclusion that "recent developments cause us to conclude that the revised transaction no longer represents the best market value option when compared to the likely (but not guaranteed) outcome of a timely auction."²⁴

The Department, originally a sponsor of the Amended Petition, now recommends dismissal stating that "the pending [Amended Petition] between AmerGen, the DPS and Vermont Yankee [Corporation] be rejected."²⁵ According to the Department, the "appropriate course at this point would be to close this docket."²⁶ The Department argues that the Board should take notice of the Entergy bid and the responsive filings, including AmerGen's responsive filing, and on that basis, grant the motion to dismiss.

Washington Electric Cooperative, Inc. ("WEC") has moved for the Board to close this Docket.²⁷ WEC maintains, first, that the proposal before the Board is inherently flawed, and second, that the Entergy offer is superior.

The Conservation Law Foundation ("CLF") does not request dismissal, but asks that because of the changed circumstances, we now rule substantively on the original petition. To achieve this outcome, CLF argues that the Board should reconsider the decision to allow the original amendment (*i.e.*, the Amended Petition) under Board Rule 2.204 (g) and now reject it as unreasonably delaying these proceedings. According to CLF, having rejected the Amended Petition, we should address and deny the original petition in light of Entergy's bid and AmerGen's subsequent offer.

23. Tr. 1/29/01 at 49 (Trout).

24. Letter of K. Picton, Esq., to Susan Hudson, January 19, 2001, at 1.

25. DPS Comments on Entergy Filing and Motions to Dismiss, January 18, 2001, at 1.

26. Tr. 1/29/01 at 29, 30-31 (Commons).

27. Motions and Comments, January 17, 2001, at 2-4.

NECNP and VPIRG, joined by CAN, originally moved for judgment on the pleadings pursuant to V.R.C.P. 12,²⁸ but subsequently converted their motion into a motion for summary judgment under V.R.C.P. 56.²⁹ NECNP and VPIRG argue that unless the Petitioners are willing to file a motion to withdraw pursuant to V.R.C.P. 41, then Courts proceed to summary judgment under V.R.C.P. Rule 56.

IBEW takes no position on whether the Amended Petition could be found to promote the general good, but does suggest further proceedings.

AmerGen continues to support the Amended Petition, but indicates that, if this Docket is closed, it wants to take part in further, separate, proceedings. While AmerGen objects to the dismissal of this Docket, it says that "if the Board should choose not to proceed with the AmerGen proposal, the Board should make the plant available to all comers."³⁰

Discussion of Motion to Dismiss

A motion to dismiss challenges the sufficiency of another party's averments. When considering a motion to dismiss under V.R.C.P. Rule 12, the Court must view the facts and pleadings in the light most favorable to the non-moving party.³¹ On this basis, the Amended Petition before us could not be dismissed unless it appears that AmerGen could prove no set of facts in support of it.³²

In considering a Rule 12(b)(6) Motion, a Court considers the matters set forth in the "pleadings." Black's Law Dictionary defines pleadings as: "formal allegations by the parties to a lawsuit of their respective claims and defenses, with the intended purpose being to provide notice

28. In our Order dated December 15, 2000, we adopted a schedule for review of and evidentiary hearings on the amended petition. Order of 12/15/00 at 1. The Petitioners and the Department filed the testimony as required. They also stated that it was likely that if Vermont Yankee were to be sold in an auction that it would sell for greater value than that represented by their amended proposal. CVPS also took this position. Letter of K. Picton, Esq., 12/15/00. In response to these filings, NECNP and VPIRG requested an immediate status conference to consider the implications of these statements. At the status conference on December 21, 2000, NECNP, and VPIRG joined an earlier motion by CAN to dismiss the petition. Order of 12/15/00 at 3.

29. NECNP & VPIRG's Motion for Summary Judgment and Reply to Vermont Yankee Objection to Release of Board Order, January 29, 2001. *See also* tr. 1/29/01 at 10-11 (Dumont).

30. Tr. 1/29/01 at 84 (Schwiebert).

31. *Reynolds v. Sullivan*, 136 Vt. 1 (1978); *Bargman v. Brewer*, 142 Vt. 367 (1982).

32. *Assoc. of Haystack Property Owners v. Sprague*, 145 Vt. 443 (1985).

or what is to be expected at trial." Under Board Rule 2.105, the rules of civil procedure generally guide our determinations on rules of practice. Proceedings before the Board do not follow the exact framework of matters in civil court, so this guidance must often be by analogy rather than by direct reference. For example, AmerGen and the other petitioners initiated this proceeding by a *petition* rather than by a *complaint*. Similarly, parties do not generally file an "answer" in Board proceedings. Rather, other parties submit their responses in other forms, often including the prefiled testimony. Thus, for purposes of ruling on a Rule 12(b)(6) Motion in a Board proceeding, the pleading must include the responsive filings that other parties make to a petition (or amended petition). In this case, Entergy's "answer" to the Amended Petition appeared in the form of a letter accompanied by prefiled testimony. This filing is the relevant "answer" to the "complaint" set out in the Amended Petition; together with the Amended Petition and the parties' responses to Entergy, these are the pleadings relevant to Entergy's Motion to Dismiss.

We turn next to substantive consideration of Entergy's Motion, which rests on Entergy's assertion that its bid is so superior as to demonstrate that AmerGen's Amended Petition does not represent the fair market value of the plant. In assessing the legal feasibility of approving the Amended Petition, we look to the standard of promoting the general good, which AmerGen must meet in order to conclude whether or not to dismiss.³³ We have previously said that "the fair market value of the plant is a critical aspect of the question before us."³⁴ Consequently, in order to satisfy the legal standard, to meet its burden of persuasion, and to defeat a motion to dismiss, the pleadings must demonstrate that AmerGen's proposal could be found to reflect the fair market value of Vermont Yankee.

Our review of AmerGen's original proposal and the Amended Petition, even accepting all of Petitioners' facts as true, shows that Petitioners will be unable to meet this standard. Entergy's filing included a term sheet in which it demonstrated that it would meet or exceed all elements of the contract underlying the Amended Petition, including increasing the proposed purchase price from \$23.8 million to \$50 million, and offering a performance bond of \$26.4 million dollars to

33. *Levinsky v. Diamond*, 140 Vt. 595 (1982). See 30 V.S.A. § 109.

34. Order of 12/15/00 at 2-3.

secure that proposal.³⁵ This bid demonstrates a value for Vermont Yankee that is significantly in excess of AmerGen's second proposal. Without changing its bid, AmerGen could not produce facts altering the conclusion that its bid does not reflect the fair market value of Vermont Yankee.

In response, AmerGen does not make any claim that its second proposal reflects the fair market value of Vermont Yankee or that AmerGen's second proposal — the Amended Petition — offers equivalent or greater value and thus reflects the market value. Instead, AmerGen asserts that the timing of its bid, and a newly proposed modification of certain terms, create some benefit for its third proposal. However, AmerGen's alleged benefits depend on:

- (1) a unilateral material amendment to its pending Amended Petition which the Board has not permitted AmerGen to make;³⁶ and
- (2) an April 1, 2001, closing date that AmerGen cannot unilaterally deliver, that its necessary contractual partners have never agreed to, that its contractual partners state is an impossibility,³⁷ and that would require a substantive review scheduled in a way that would be unfair to the rights of other parties.

Although we find that the Entergy bid represents one measure of the market value of Vermont Yankee, other factors suggest that the actual market value may be greater. In particular, CVPS has indicated in its responsive pleadings that there are two other potential purchasers for Vermont Yankee, reinforcing the conclusion that the Amended Petition has less value than the market and thus cannot be found to promote the general good:

two bids from Entergy, plus indications of interest in the Vermont Yankee plant by Dominion Resources and Constellation Energy, provide further support for CVPS's prior conclusion that "recent developments cause us to conclude that the revised transaction no longer represents the best market

35. Entergy Proposal Bond, January 29, 2001.

36. *See* discussion below.

37. *See* tr. 1/29/01 at 23-24 (Chairman Dworkin/Schwiebert). *See also* Order of 12/28/00 at 2. Vermont Yankee Corporation stated that, notwithstanding its earlier request for an expedited schedule in order to obtain financing by April 1, 2001, its recent discussions with lenders demonstrated that Vermont Yankee Corporation would not be able to obtain financing by that date in any event. *Id.* at 2.

value option when compared to the likely (but not guaranteed) outcome of a timely auction."³⁸

Finally, and conclusively, AmerGen's *own* third proposal shows that the Amended Petition has less than fair market value, since AmerGen, itself, has indicated that it is willing to offer greater value for the facility.

Therefore, on the basis of the Parties' pleadings,³⁹ it is clear that AmerGen could prove no set of facts demonstrating that the Amended Petition is consistent with promoting the general good of Vermont by realizing the fair market value of the Vermont Yankee station. We are further assured that our conclusion is correct because we have seen no indication that additional information would change this determination.⁴⁰ For instance, no further testimony about the Amended Petition will alter the fact that Entergy's bid starts with all of the terms contained in the Amended Petition and adds further value to them. Vermont Yankee Corporation has assessed this increase in value as being in the range of \$20 million. Nor will further information about the Amended Petition alter the fact that AmerGen, itself, has attempted to provide "additional enhancements" to the Amended Petition that it alleges are more than a \$16 million dollar increase in value. Absent this critical facet, Petitioners have failed to allege facts, which, even if accepted as true, could support a finding that the Amended Petition promotes the good of the state. For this reason, we dismiss the Amended Petition, contingent on Entergy filing the Performance Bond described below.

Discussion Summary Judgment

Although we conclude that we should dismiss the Amended Petition under V.R.C.P. 12(b)(6), we could reach the same outcome upon adequate and independent grounds if we ruled on the Motion for Summary Judgment filed by NECNP and VPIRG and joined by CAN⁴¹ or if

38. Letter of K. Picton, Esq., to Susan Hudson, January 19, 2001, at 1.

39. *Condosta v. Grussing*, 144 Vt. 454 (1984)(when a court does not consider matters outside the pleadings, a motion to dismiss does not convert into a motion for summary judgment).

40. *Cf. In re Green Mountain Power Corp.*, 139 Vt. 368(1981).

41. These parties originally moved for judgment on the pleadings pursuant to V.R.C.P. 12(b)(6), but subsequently converted their motion to one for summary judgment under V.R.C.P. 56. See note 11, below.

the Board converted Entergy's Motion to Dismiss to a Motion for Summary Judgment.⁴² Under V.R.C.P. 56, a moving party is entitled to summary judgment "if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."⁴³ In a summary judgment the movant has the burden of proof, and the party opposing the summary judgment motion is to be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists.⁴⁴ We also regard allegations made in opposition to summary judgment as true, if supported by affidavits or other evidence."⁴⁵

The non-moving party also must have an opportunity to respond and submit affidavits to identify issues of material fact that would render summary judgment inappropriate. This is true whether the summary judgment arises from a motion or if the Board converts a Motion to Dismiss into a request for summary judgment. Here, we find that AmerGen and the other Petitioners have had ample opportunity to respond. The original Motion to Dismiss was filed in December and held under consideration. Moreover, as of January 12, 2001, when Entergy submitted its bid, AmerGen had before it another Motion to Dismiss, the details of the Entergy bid, and the opportunity to respond to that proposal. In fact, AmerGen did so by submitting its comments supported by Mr. Lewis' affidavit.⁴⁶ In that filing, AmerGen presents its substantive arguments and through an attempt to increase its bid, seeks to raise issues of material facts. Thus, we conclude that AmerGen has had adequate notice and opportunity to respond.⁴⁷

The Vermont Supreme Court has also made clear that:

42. *Bennett Estate v. Travelers Insurance Co.*, 138 Vt. 189 (1980)(Motion to dismiss is converted into one for summary judgement by consideration of matter beyond the pleadings).

43. *Granger v. Town of Woodford*, 167 Vt. 610, 611, (1998) (mem.); *Bacon v. Lascelles*, 165 Vt. 214, 218, (1996); *Hoeker v. Department of Social and Rehabilitation Service and Sally Lindberg*, 2000WL 1644525 (VT)(2000).

44. *Hodgdon v. Mt. Mansfield Co.*, 159 Vt. 150, 158-159 (1992).

45. *Peters v. Mindell*, 159 Vt. 424, 426 (1992).

46. AmerGen's Motion re: Merits of Entergy Filing and Proposal for Further Actions in this Docket, January 22, 2001 ("AmerGen 1/22") at 2. AmerGen had also filed a motion to strike, dismiss or exclude part of Entergy's January 12, 2001, filing on January 16, 2001. At the 1/29/01 status conference, the Board indicated that it would not consider Option B in reaching its decision on the Entergy filing. Tr. 1/29/01 at 86 (Chairman Dworkin).

47. AmerGen was fully aware of the Board's intent to rule on the motions to dismiss and for summary judgment and could have submitted additional information. However, if AmerGen or any other party view the notice of the Board's consideration of summary judgment inadequate, that party may submit additional responses within one week of this Order. See *In re Thompson*, 166 Vt. 471, 478 (1997).

where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact.⁴⁸

Thus, in the present proceeding, NECNP, VPIRG, CAN, and Entergy need only point to the absence of sufficient evidence that the Amended Petition will promote the general good, at which point the Petitioners have the burden of demonstrating that there is a genuine issue of material fact. Significantly, the Petitioners must demonstrate the existence of a genuine issue for trial; "allegations alone cannot create triable issues of fact."⁴⁹ An issue is material only if it might affect the outcome.⁵⁰

The legal issue the Board must decide in this proceeding is whether the Amended Petition requesting approval of the sale of Vermont Yankee to AmerGen promotes the general good of the state. As we have previously ruled, a necessary (although not sufficient) component of the showing that Petitioners must meet is that the sales price fairly reflects the market value of the facility.

The *genuine* issue of material fact relevant to this legal determination is whether the sales price and other value set forth in the Amended Petition fairly reflect the market value of Vermont Yankee and are thereby sufficient to meet this test.⁵¹ NECNP, VPIRG and CAN argue, among other things, that if the financial value of the transaction is the justification for the sale, then "the undisputed evidence should lead the Board to conclude that rejection of the pending contract would better achieve this goal."⁵² As support for their assertion, they maintain that the Entergy bid "appears at least as valuable as AmerGen's."⁵³ Entergy asserts that it is "[p]roviding a fair

48. *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 15 (1995) (citations omitted).

49. *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981).

50. *Northern Security Insurance Company, Inc. v. Rossitto*, 762 A.2d 861 (2000) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986).

51. Since this fact is vital to approval of the second proposal, we do not need to consider whether AmerGen could make showings as to whether other aspects of its proposal met the legal standard. To prevail on a motion for summary judgment, a party need only present "one legally sufficient defense that would bar plaintiff's claim." *Gore, supra*, at 266. See tr. 1/29/01 at 64-65.

52. NECNP & VPIRG's Motion for Summary Judgment and Reply to Vermont Yankee Objection to Release of Board Order, January 29, 2001, at 6.

53. *Id.*

market offer with options that have substantial additional value above the guaranteed purchase price."⁵⁴ Entergy states that its bid meets or exceeds AmerGen's bid, as reflected in the Amended Petition.⁵⁵

In response, AmerGen's filing and affidavit assert that AmerGen has offered equivalent or greater value, which appears to allege a genuine issue of material fact. However, as the Vermont Supreme Court and national practice tell us, a mere allegation does not create a genuine issue.⁵⁶ Consideration of AmerGen's affidavit shows that its assertion is not supportable. First, AmerGen's affidavit and assertions do not rest upon a comparison of the Entergy bid to the Amended Petition. Instead, AmerGen attempts to increase the value of the Amended Proposal through an additional, third, description of its offer price and then compares *this* value to Entergy's offer. Since we have not authorized AmerGen to amend its offer yet again, these comparisons are of no value and do not create a genuine issue in regard to the pending Amended Agreement. Second, AmerGen's comparison also relies upon an increase in value for its offer arising from completing the sale by April 1, 2001. As we explained above, AmerGen does not, however, have the agreement of the other contractual parties to the Amended Petition in making such an offer. To the contrary, Vermont Yankee Corporation has indicated that there are numerous and insuperable difficulties with AmerGen's proposed early closing. And, in fact, uncontroverted statements from Vermont Yankee Corporation's counsel at prior status conferences make clear that the April 1, 2001, closing date is unattainable so that any increase in value that may occur from the early closing has no weight.⁵⁷

54. Letter of J. Yelverton to S. Hudson, January 12, 2001, at 2.

55. Specifically, Entergy claims to match the Amended Petition's terms and conditions regarding (i) purchase power agreement buyout, (ii) credit insurance, (iii) decommissioning, (iv) outage payment, (v) financial integrity, (vi) Board approval of license renewal, (vii) sharing excess of delayed decommissioning funds, (viii) Board review of decommissioning, (ix) decommissioning fund top-off, (x) purchase power agreement low market adjuster, (xi) spent fuel costs from spent fuel trust fund, (xii) spent fuel settlement incentive, (xiii) intercreditor agreement summary, (xiv) regulatory approvals, and (xv) additional approvals. Prefiled testimony of Dan Keuter at Exhibit EN-2, Attachment A. In addition to the purchase price, Entergy's bid eliminates the purchase price deflator until the end of calendar year 2001. Entergy also has doubled the employee payment and offered employment to all employees. *Id.*

56. *Gore, supra* at 266.

57. *See* footnote 37, above.

On the key comparison of the Amended Petition to the market value of Vermont Yankee, as reflected in Entergy's bid, AmerGen has presented no evidence that would create any issue of material fact.⁵⁸ That comparison demonstrates that AmerGen's offer is substantially lower than the market value of Vermont Yankee and that we must, accordingly, grant summary judgment. The Amended Petition contains a "Cash Purchase Price of \$23,800,000"⁵⁹ It also contains negotiated terms and conditions on many other aspects. Entergy submitted a bid in response in which Entergy agrees to match or exceed every term in the Amended Petition. Of most relevance to the present motion, Entergy has offered to purchase Vermont Yankee for more than twice the purchase price in the Amended Petition: \$50 million.⁶⁰ Thus, the Amended Petition clearly does not reflect the market value of Vermont Yankee.

One key factor supports this conclusion. Although we deny AmerGen's attempt to unilaterally alter the sales contract and increase the value of its bid, the fact that AmerGen felt compelled to increase its offer to compete with Entergy's bid shows that the former falls short of reflecting the market value and thereby meeting the legal standard.

Thus, we find that AmerGen and the other Petitioners have not presented a genuine issue of material fact and that, based upon the facts presented, we cannot, as a matter of law, approve the Amended Petition. Therefore, we find that we would grant the Motions for Summary Judgment if we had not already determined that we should dismiss the Amended Petition.

II. AmerGen's Third Proposal

On December 28, 2001, the Board instructed parties to submit comments as to the merits of Entergy's January 12, 2001, filing, by January 19, 2001.⁶¹ On January 22, 2001, AmerGen filed its comments and an affidavit of Charles P. Lewis in support of those comments.⁶² In its comments AmerGen indicated that it was increasing the value of its offer, by eliminating the price

58. *Northern Security Insurance Company, Inc. v. Rossitto*, 762 A.2d 861 (2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986).

59. Amended Petition at § 3.3(a)(ii).

60. Letter of J. Yelverton to S. Hudson, January 12, 2001, at 1. Both the Amended Petition and Entergy bid assume a June 30, 2001, closing.

61. Order of 12/28/01 at 4.

62. AmerGen's Motion re: Merits of Entergy Filing and Proposal for Further Actions in this Docket, January 22, 2001 ("AmerGen 1/22") at 2. Affidavit of Charles Lewis, 1/22/01.

deflator, a provision that decreases the purchase price by \$90,000 per day until closing, and agreeing to close by April 1, 2001.

AmerGen, in its Third Proposal, seeks to materially revise the terms and conditions of the Amended Petition before us. These changes represent an "amendment" within the meaning of Board Rule 2.204(G). Under that rule, petitioners may freely amend filings, but the Board may dismiss the amendments if the Board finds that it will unreasonably delay the proceeding or unreasonably affect the rights of other parties. In addition, this rule allows the Board to condition its acceptance of an amended proposal "as justice may require."⁶³ Here we deny AmerGen's request to amend the second proposal for the following reasons: first, the Amended Petition is a joint agreement of AmerGen and Vermont Yankee Corporation (and its owners) as to the terms and conditions of the sale of the Station. AmerGen's third proposal represents unilateral alterations of this agreement, which AmerGen cannot do without the full agreement of the other parties to the contract (i.e., the other Petitioners and the Department), as reflected by the Amended Petition before us.⁶⁴ Thus, AmerGen has no legal authority to further amend the transaction on its own.⁶⁵ AmerGen's newest proposal represents yet another significant and material alteration to the Amended Petition that parties have been preparing to review. Second, at this stage of the proceeding, moving the target (*i.e.*, the proposal under review) again is simply unfair, and could require us to allow others to respond again, with significant procedural and substantive unfairness within the schedule Amergen suggests. Indeed, because this Docket is intended for review of a specific proposal rather than to serve as a vehicle for repeated bids — as some kind of surrogate for a properly conducted auction — it is not reasonable to allow AmerGen to repeatedly and unilaterally amend its proposals. Finally, AmerGen's third proposal is linked to a condition — a closing by April 1, 2001 — that has already been recognized by the

63. See Order of 12/15/00 at 7-11.

64. "We agreed with your ruling earlier today that [AmerGen's newest proposal], which I should point out Vermont Yankee has obviously not signed, Vermont Yankee has not negotiated and we think contains significant omissions in terms of valuation, we think that that [sic]-- that proposal is indeed, as you have ruled, an amendment which we would oppose. . . ." Tr. 1/29/01 at 20 (Marshall).

65. "One party to a contract may violate it ---- break it, so to speak; but does it not require *all* to lawfully revise it?" First Inaugural Address of Abraham Lincoln, March 4, 1861.

sellers as unachievable.⁶⁶ We, therefore, will not permit this amendment to the Amended Petition.

III. Entergy's Draft Performance Bond

On January 29, 2001, Entergy filed a draft "Proposal Bond" ("Bond") with the Board, valued at \$26.4 million. This Bond is intended to be used, if the Board dismisses the current petition, to secure the offer that Entergy has made as to what it would bid if Vermont Yankee Corporation were to have a multi-party auction and request for proposals in the future. Entergy has indicated that the purpose of its intervention and its role in this Docket has been to provide a bid superior to that contained in the Amended Petition and to assure the Board and participants, through this Bond, that the bid has backing.⁶⁷

The Bond currently runs to Vermont Yankee Nuclear Power Corporation. The Department, at the January 29, 2001, status conference, originally indicated that the Bond should run to the Public Service Board and its successors or in a manner that would clearly provide for any payment for the benefit of all Vermont Yankee Corporation ratepayers.⁶⁸ Entergy indicated that it would accept such an obligation as part of an appropriate order from this Board and the Department indicated agreement with that concept.⁶⁹

The Board requested any party that had comments on, or concerns about, the draft Bond to promptly contact Entergy with those comments and attempt to resolve them. We assume that parties have done so. As of today's date, the only comments filed upon the Bond have been those of AmerGen filed on February 2, 2001.⁷⁰

AmerGen argues that Entergy's performance alone is not what should be secured by a bond, but rather, the potential loss of the AmerGen offer that is "now available for prompt

66. See note 64 and accompanying text above.

67. Tr. 1/29/01 at 55 (Brown).

68. Tr. 1/29/01 at 82 (Commons). "[I]t should be clear to all that if there were a payment under the bond or that the obligations under the bond are impressed with the public trust such . . . that the proceeds, although if they might be paid to Vermont Yankee Corporation, would essentially for the benefit . . . of the ratepayers." *Id.*

69. *Id.* at 83.

70. The Board received comments from AmerGen on January 26, 2001.

closing." In particular, AmerGen argues that the Bond offers no protection to Vermont for the following reasons:

- (1) there is no Entergy L.L.C. registered to do business in Vermont;⁷¹
- (2) while the Bond purports to assure that Entergy will enter into a proposal, the only proposal before the Board is a "redlined draft of an asset purchase agreement;"⁷² and
- (3) the obligee of the Bond is not the Board, as suggested by the Department.⁷³

We do not find these concerns valid. First, we find the fact that Entergy is not registered in Vermont to be irrelevant. It is registered in other states, and by having filed here, it has consented to subject matter jurisdiction in Vermont. Second, for purposes of considering Entergy's proposal, the draft asset purchase agreement adequately specifies the relevant commitments here. Third, we agree with the Department's point that the Bond should be for the benefit of all Vermont Yankee Corporation ratepayers, and that this substantive goal can be achieved by order as well as through a modification of the rest of the Bond.⁷⁴

AmerGen also raises various contingencies and limitations in the Bond that should be eliminated if the Bond is to secure Vermont from not proceeding with the AmerGen transaction.⁷⁵ AmerGen first argues that if Entergy should withdraw its proposal prior to January 1, 2002, and have to pay Vermont Yankee Corporation damages, then those damages should be set, at least, at the value of the cash purchase price, as represented by AmerGen's Third Proposal, *i.e.*, \$40 million. In addition, AmerGen argues that this amount should be further increased to reflect the full value of the AmerGen offer, including the amount that Vermont Yankee must pay into the decommissioning fund at some later date.

We reject this argument for two reasons. First, the cash purchase price that AmerGen has validly offered is not the \$40 million it now identifies, but is instead the \$23 million in the Amended Petition. The Entergy Bond adequately covers this amount. Second, we find it reasonable to require a Performance Bond in an amount equal to the purchase price of Vermont

71. Letter of AmerGen to Susan Hudson, February 1, 2001, at 1.

72. *Id.*

73. *Id.*

74. *See tr.* 1/29/01 at 82.

75. AmerGen raises five specific objections which it labels as contingencies and limitations. *See id.* at 2-3.

Yankee rather than the full net present value of the transaction. If Entergy defaulted on its obligation, the Bond would compensate Vermont Yankee Corporation for the lost purchase price. Considering the fact that Vermont Yankee Corporation would retain ownership of the facility and could either continue to derive benefit from that ownership or elect to sell the facility at a fair market price, we do not find it necessary to increase the value of the Performance Bond to reflect the full, asserted, net present value of AmerGen's Amended Petition.

AmerGen next argues that because it is the signing (rather than the closing and payment of money) that is the significant transactional event under Vermont law, the Surety should not be excused by reason of Vermont Yankee Corporation entering into a binding agreement for the sale of the assets, as provided for under paragraph 1(b) of the draft Proposal Bond. We do not agree that Entergy should be required to maintain its Performance Bond after such time as Vermont Yankee Corporation enters into a legally binding agreement to sell Vermont Yankee to a bidder other than Entergy. However, paragraph 1(b) must be amended to require Entergy to continue the bond in effect after the signing of a binding agreement for the sale of assets if Entergy is the purchaser of Vermont Yankee. Section 1(b) shall be restated as follows:

- (b) after the Proposal Date, the Obligee enters into a binding agreement for the sale of the assets described in the Proposal with any prospective buyer, other than the Principal; or

AmerGen also states that the proposed "Material Adverse Effect" contingency, paragraph 1(c) of the draft Bond, is an "escape mechanism" that, in the case of, *e.g.*, an operational problem, would allow Entergy to walk away from the transaction, leaving Vermont Yankee Corporation no recourse. Section 9.1(h) of the Asset Purchase Agreement provides the same escape for AmerGen.⁷⁶ We see no difference between these provisions in the Amended Petition before us, and the provisions described in the draft Bond. Thus, we do not require any further changes to the Bond.

Finally, AmerGen urges the Board to eliminate paragraph 2 of the draft Proposal Bond. AmerGen argues that, rather than protecting ratepayers from a default by Entergy, the Proposal Bond should protect ratepayers from the loss of the AmerGen offer. AmerGen's argument,

76. Exh. VY-1.

however, rests on the assumption that, absent Entergy's bid, Vermont ratepayers would derive the benefits of the AmerGen offer. As we find in this Order, AmerGen's Amended Petition does not reflect the fair market value of Vermont Yankee. Therefore, as the AmerGen offer cannot be approved, the loss of the AmerGen offer does not deprive Vermont ratepayers of any benefit that they would otherwise receive. Moreover, as with AmerGen's argument above, at one, this argument fails to recognize that, in the case of default, the Petitioners and other owners of Vermont Yankee would continue to own and derive value from the nuclear station.

For these reasons we, reject AmerGen's arguments that Entergy's draft Proposal Bond fails to offer adequate protection to Vermonters.

Entergy shall file an actual Performance Bond in substantially the form of its most recent draft (with Section 1(b) restated as above) within five business days of today's Order. We hereby order that, if payment under the bond or that the obligations under the bond result, then proceeds should inure to the benefit of all retail customers of the Petitioners. If there continue to be unresolved issues associated with the Performance Bond, then parties seeking to raise those issues shall file comments with the Board within five business days of Entergy's filing of that Bond. Absent further order of this Board, the request to approve the sale of Vermont Yankee will be dismissed ten business days after the deadline for filing comments on the Performance Bond.

IV. Motions for Independent Counsel

Both WEC and CLF have asked that the Board appoint independent counsel in these proceedings.⁷⁷ Both parties have made this request due to their perception that the Department is unable to fulfill its role as representative of the public interest in this Docket. Because we dismiss the current petition, we need not reach this issue here. However, we note, as we have in the past, that the Department's having taken a position in a Docket does not *per se* invalidate its ability to represent the public interest.⁷⁸ As an advocate, the Department is expected to take and defend positions on issues before the Board.

77. WEC Motions and Comments, 1/17/01 at 7-8; CLF Comments in Support of Motion to Dismiss and Regarding Future Actions, 1/19/01 at 6.

78. Tr. 1/29/01 at 88 (Chairman Dworkin).

V. Other Issues

Board Letter to Parties

On January 25, 2001, at the request of the Board, the Clerk of the Board issued a memorandum to the parties in this docket containing questions and a list of issues that the Board wanted to consider at its January 29, 2001, status conference. That memorandum contained an error, at page 2, as to the value of figures contained in AmerGen's filing of January 22, 2001. The memorandum indicated that AmerGen would increase its offer **by** \$40 million, rather than increasing its offer **to** \$40 million. AmerGen, by letter of January 26, 2001, indicated this mistake to the Board. We appreciate this notice and hereby make that clarification.

Department Position on Entergy's Intervention

Our Order of December 15, 2000, characterized the Department as opposing Entergy's request for intervention in these proceedings. On December 28, 2000, Counsel for the Department wrote the Board requesting a modification of that characterization. The Department maintained that, rather than opposing the intervention, the Department actually sought imposition of a bond as a condition of Entergy's intervention. This condition, the Department says, was withdrawn at the December 8, 2000, status conference.

In its filing of December 4, 2000, the Department indicated that it "does not oppose Entergy's motion, but believes it should be granted only if conditioned to protect Vermont consumers from possible prejudice."⁷⁹ It recommended that "Entergy's motion to intervene be granted, conditioned upon provision of a bond or other security in an amount of at least \$10 million."⁸⁰ At the December 8, 2000, status conference, the DPS stated that it did not intend the \$10 million bond to be an absolute barrier, and that, instead, the Board should either require the bond or require Entergy to file its bid by December 15, 2000, *i.e.*, within four business days.⁸¹

The Department is correct. As described above, it supported a very strictly conditioned intervention.

79. Department filing of 12/4/00 at 3.

80. *Id* at 5.

81. Tr. 12/8/00 at 19-22 (Commons).

Release of October Draft Order

On October 26, 2000, this Board issued its *Order re Motion for Delay in Issuance of Order*, allowing petitioners to amend their original petition and noting that the Board had been prepared to rule upon the original petition.⁸² Since then, several Parties have requested that the Board issue the October draft of the order addressing the original petition.⁸³ The principal argument in support of this is that the draft would provide guidance on issues that they litigated in the summer of 2000 and which they might litigate again in some future proceeding. These parties assert that this information would be of significant value to those who participated in these proceedings and to bidders and others if Vermont Yankee were to be sold at auction. Other parties have opposed the issuance of the Order, arguing that such an Order would constitute an illegal advisory opinion, that it would cause unnecessary procedural difficulties, and that the substance of the October draft simply contains findings developed on the basis of a record that is no longer relevant to these proceedings.

We conclude, in light of our decision to dismiss these proceedings, that the detailed information contained in the draft decision is no longer pertinent to issues that participants in this Docket may face in the future if there is another petition for approval of the sale of the Vermont Yankee Station. First, the purpose of guiding the parties in negotiations last fall has clearly come and gone. Second, the proponents of releasing a draft decision cite no circumstances when a judge or judicial panel releases an opinion on what had been presented, but was no longer in front of them.

We note that the "Conclusion" section of our draft decision, which was made public, outlines the major factors we considered in determining whether the original proposal promoted the general good of the state and clarifies the close link between establishing market value for Vermont Yankee and determining sufficient economic benefit to the State of Vermont.⁸⁴ To the

82. We note that the document referred to here is not an "unpublished decision," *i.e.*, a signed decision whose effect is legally binding. Here, we are referring to a draft of what a decision might have been, based upon the record established earlier in these proceedings. Tr. 1/29/01 (Chairman Dworkin).

83. Order of 10/26/00. In our Order of 11/17/00, we included an attachment containing the "Conclusion" section of the order we were prepared to issue in October 2000.

84. We have also recognized this elsewhere, e.g., Order of 12/15/00. "During these proceedings, the Board has stated that the fair market value of the plant is a critical aspect of the question before us." *Id.* at 2.

extent parties need guidance, the "Conclusion" section should provide sufficient information. For these reasons, we decline to issue last October's pre-decisional draft.

Motion for Protective Order

On January 18, 2001, the Department filed a Motion for Protective Order with the Board requesting that a response to certain of NECNP and VPIRG's discovery requests not be required.⁸⁵ The Department reasoned that, since it no longer intends to seek approval of the Amended Petition, it should not be required to respond to discovery requests.

At the status conference the Board granted the motion for protective order for a period of ten days.⁸⁶ On February 8, 2001, we stayed the discovery process until the date of our ruling on the pending motions for dismissal and/or summary judgment.⁸⁷

In light of today's decision to close this docket, no further responses to discovery are required.

VI. Further Actions

CLF has asked the Board to open a new docket concerning the "future disposition of the [Station] in light of current market conditions."⁸⁸ In that future docket, CLF would have the Board consider numerous issues, including early shutdown, replacement power costs, decommissioning costs and, in the case of a future sale, terms and conditions for an auction process.⁸⁹ At the status conference, CLF acknowledged that, rather than requiring Vermont Yankee Corporation to have an auction, that it is CLF's position that these things should be considered *if* there is a decision, by Vermont Yankee Corporation or some other party, that there should be a sale of the facility.⁹⁰

85. Motion for Protective Order, 1/18/01.

86. Tr. 1/29/01 at 88 (Chairman Dworkin).

87. Order of 2/8/01.

88. Conservation Law Foundation's Comments (1) in support of motion to dismiss and (2) regarding future actions dated January 19, 2001, at 3.

89. *Id.* at 4-5.

90. Tr. 1/29/01 at 13 (Sinclair).

While taking no firm stance on further actions, the Department's opinion differs from CLF's. The Department essentially argues that with the dismissal of this Docket, Vermont Yankee Corporation has a broad range of options, and that Vermont Yankee Corporation ought to actively consider those options.⁹¹ According to the Department, Vermont Yankee Corporation needs to "assess the marketplace and consider whether to go to an auction, whether to . . . take Entergy up on their offer of exclusive negotiations or what other steps they should take, and that is an appropriate management role that the Board should not take away from them."⁹²

At this stage, a number of parties seem to favor an action. This view is reflected by Vermont Yankee Corporation, "we think the best procedure is to move as expeditiously as possible to an auction."⁹³ CVPS agrees: "recent developments cause us to conclude that the revised transaction no longer represents the best market value option when compared to the likely (but not guaranteed) outcome of a timely auction."⁹⁴ CLF urges the Board to establish "terms for a competitive bidding process."⁹⁵ AmerGen has also acknowledged the potential for an auction; indeed, it has recommended one if we do not approve the Amended Petition:

At least two other parties are "waiting in the wings" to participate in an auction. If the Board is inclined to "reopen" the bidding on the Station, then the Board ought to allow **all** potential bidders to participate, not just Entergy.⁹⁶

At this point, we do not explicitly order an auction of the Vermont Yankee facility. Rather, as a matter of fiduciary duty to ratepayers and stockholders, Vermont Yankee Corporation's management has the primary initial duty to make the initial judgment as to how to

91. "[W]hile we believe that the docket should be dismissed, we do not believe that the Board should direct the next steps." *Id.* at 30-32 (Commons).

92. *Id.*

93. Tr. 1/29/01 at 18-19 (Marshall).

94. Letter of K. Picton, Esq., to Susan Hudson, January 19, 2001, at 1.

95. Conservation Law Foundation's Comments (1) in support of motion to dismiss and (2) regarding future actions dated January 19, 2001 at 1.

96. AmerGen made these observations in support of its argument to strike, dismiss or exclude Entergy's "Option B," a confidential alternative bid for the Vermont Yankee Station. AmerGen Motion to strike, dismiss or exclude part of Entergy's January 12, 2001, filing, January 16, 2001, at 7 (emphasis added). Although we dismiss the Amended Petition, we would welcome AmerGen's active participation in future efforts to sell Vermont Yankee.

proceed from here and to take action to effectuate their decision.⁹⁷ This includes the consideration of various options including, but not limited to, retaining ownership, selling the facility or shutting down the plant. If Vermont Yankee Corporation decides to sell the Station, then it will have to consider the possibility of an auction and will ultimately have the responsibility to demonstrate why an auction or some other alternative process is the appropriate step to take.⁹⁸ We note that other states, such as Connecticut, Massachusetts and New York have successfully used formalized multi-bidder processes to achieve maximum value.⁹⁹ Vermont Yankee, in exercising its duties, must make the first assessment of whether these models are the appropriate mechanism or whether some other process may result in fair market value for Vermont Yankee.

VII. Conclusion

For the reasons stated above, we conclude that we should grant Entergy's motion to dismiss (and would grant NECNP, VPIRG, and CAN's motion for summary judgment had we not decided on dismissal). We reject AmerGen's proposal of November (the Amended Petition) and conclude that closing this Docket is the appropriate action to take at this point. In addition to the reasons discussed above, we are firmly convinced that this result will benefit ratepayers and promote the general good of the state. It is undisputed that the Amended Petition is of less value than is otherwise available on the market today. Conducting detailed evidentiary hearings when the outcome is already clear serves no purpose except to increase costs. At the same time, it

97. Vermont law recognizes that a utility and not the Board, is the best-qualified to oversee such management decisions. See *In re Green Mountain Power Corp.*, 162 Vt. 378, 386 (1994); *Latourneau v. Citizens Utilities Co.*, 125 Vt. 38 (1965).

98. The sale of such an asset would trigger Board jurisdiction, and in a subsequent review the Board always has the duty to inquire into the reasonableness of utility management decision-making, in order to safeguard and benefit ratepayers.

99. In particular, this Board has previously noted the value of auctions in setting a reasonable valuation on generating resources:

[a]n auction of currently owned or committed [supply] resources may be the most accurate way to determine a reasonable objective for Vermont's near-term power costs and rates. . . . Recent auctions or sales by other utilities in the region have established market prices for power resources well in excess of book values and, in most circumstances, substantially in excess of pre-sale estimates.

Docket 6140, Order of 12/11/98 at 5–7. By comparison, the earlier record in this proceeding suggests that bilateral negotiations may not be the optimal approach, particularly if one party is able to gain leverage over the other.

delays further efforts to evaluate the best disposition of Vermont Yankee and sell the Station for a fair price (assuming that Vermont Yankee Corporation and its Sponsors conclude that sale is the preferred option). Dismissing the Amended Petition will permit Vermont Yankee to move rapidly to assess its options and attempt to select the best outcome.

VIII. Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. Within five business days of this Order, Entergy Nuclear Corporation ("Entergy") shall file its Performance Bond in the amount of \$26.4 million, payable to Vermont Yankee Nuclear Power Corporation for the benefit of all Vermont retail customers served by power purchased from Vermont Yankee. The Performance Bond shall be in substantially the form as the most recent draft Proposal Bond, as modified in Section III, above.

2. Within ten business days of this Order, any party that seeks to comment upon the Performance Bond filed by Entergy shall file those comments.

3. Unless otherwise ordered by the Board, ten business days following the submission of the Performance Bond required in the previous paragraph, the Petitions filed by Vermont Yankee Nuclear Power Corporation, Green Mountain Power Corporation, Central Vermont Public Service Corporation, Vermont Electric Power Company, and AmerGen Energy Company, L.L.C. are dismissed without prejudice, and this docket shall be closed.

Dated at Montpelier, Vermont, this 14th day of February, 2001.

<u>s/ Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
)	

OFFICE OF THE CLERK

FILED: February 14, 2001

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of production errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.