STATE OF VERMONT

PUBLIC SERVICE BOARD

Investigation into General Order No. 45 Notice) filed by Vermont Yankee Nuclear Power) Corporation re: proposed sale of Vermont) Yankee Nuclear Power Station to Entergy) Nuclear Vermont Yankee, LLC, and related) transactions)	Docket No. 6545
Petition of Entergy Nuclear Vermont Yankee,) LLC and Entergy Nuclear Operations, Inc. for a) certificate of public good to construct a dry fuel) storage facility at the Vermont Yankee Nuclear) Power Station, in Vernon, Vermont)	Docket No. 7082

REPLY MEMORANDUM OF LAW IN SUPPORT OF ENTERGY VY'S MOTION PURSUANT TO VERMONT RULE OF CIVIL PROCEDURE 60(b) FOR RELIEF FROM THE JUNE 13, 2002 ORDER IN DOCKET NO. 6545 AND THE APRIL 26, 2006 ORDER AND CERTIFICATE OF PUBLIC GOOD IN DOCKET NO. 7082

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy VY") respectfully submit this reply memorandum of law in further support of their motion, under Vermont Rule of Civil Procedure 60(b) and Public Service Board Rule 2.221, for relief from the Board's Order of June 13, 2002, issued in Docket No. 6545, and its Order of April 26, 2006, and Certificate of Public Good ("CPG") issued in Docket No. 7082.

I. INTRODUCTION

Entergy VY's Rule 60(b) motion requests narrow relief: modification of a few discrete provisions in the 2002 Order and 2006 Order and CPG to avoid injustice that will result if the Board denies Entergy VY's Amended Petition in Docket No. 7862 for a CPG for continued operation of the Vermont Yankee Nuclear Power Station ("VY Station"), or otherwise penalizes Entergy VY, on account of its current operation of the VY Station under circumstances that the Board considers to be unauthorized under Vermont law. This request does not otherwise affect Entergy VY's rights or obligations under these Orders and CPG, but seeks only to conform the Orders and CPG to the understanding of Entergy VY and the Department of Public Service ("DPS") (at least as of March 7, 2012[1]) that the Orders and CPG did not trump 3 V.S.A. § 814(b).

Intervenors and DPS (in a change of position) argue that Entergy's Rule 60(b) motion should be denied because Entergy VY supposedly knew all along that the Orders and CPG would override Section 814(b), and thus that Entergy VY had to *obtain*, not just timely apply for (and wait for a Board decision on), a CPG to continue to operate after expiration of the previously issued CPG. But the Board's interpretation of the Orders and CPG was unforeseeable. Neither the Orders nor the CPG mentioned Section 814(b), and Entergy VY had no reason at the time to think that an action taken by the Board would supersede a duly enacted State statute (Section 814(b)) that embodies a well-known rule of administrative law, the timely-

[1] DPS previously acknowledged that the relevant Orders and CPG would be subject to Section 814(b), but now argues that Entergy VY should have foreseen that the Orders and CPG would trump Section 814(b). *Compare* Docket No. 7440, Letter of John Beling, Dep't of Pub. Serv., to Susan M. Hudson, Vt. Pub. Serv. Bd., at 6 (Mar. 7, 2012) (copy attached hereto), *with* Response of the Dep't of Pub. Serv. to Entergy's Mot., at 7-8 (June 15, 2012).

renewal rule. In any event, Entergy VY could not foresee the circumstance that made it likely that Entergy VY would need to invoke Section 814(b): the Board's inability, because of the limitations placed on it by legislation now found by the District Court to be preempted, to rule before March 21, 2012, on a CPG petition that Entergy VY had filed some four years earlier.

Entergy VY acknowledges that it is not yet certain that the Board will apply its view (Docket No. 7440, Order of 3/19/2012 at 27) that Entergy VY is currently operating without authority under state law to deny the current petition or otherwise to penalize Entergy VY; the Board has noted that Entergy VY *is* authorized to operate by the District Court's injunction. However, Entergy VY has pressed forward with this Rule 60(b) motion because the Board's lengthy discussion of the VY Station's ability to operate under state law suggests that the Board's resolution of the issue might well have an adverse effect on Entergy VY. Additionally, the Board specifically commented that Entergy VY had not sought relief from the Orders and CPG that the Board deemed to trump Section 814(b) (*id.* at 18, 21); the instant motion seeks such relief.

If the Board were to clarify that operation of the VY Station under protection of the federal court injunction cannot be held against Entergy VY in the Docket No. 7862 proceedings or otherwise used to penalize Entergy VY, Entergy VY would withdraw its Rule 60(b) motion. Otherwise, this Board should grant the motion.[2]

II. ARGUMENT

Contrary to claims from DPS and intervenors that Entergy VY's request would require wholesale reconsideration of the Board's decisions in Docket Nos. 6545 and 7082, Entergy VY

[2] As Entergy VY also noted in its opening memorandum of law, Entergy VY does not object to the Board considering this Rule 60(b) motion in connection with its final decision in Docket No. 7862 so long as Entergy VY's rights are not prejudiced by such treatment.

merely seeks to modify a few discrete provisions (in earlier issued Orders and a CPG) that the Board deemed trumped by Section 814(b). Both DPS and Entergy VY, the parties to the MOUs in these dockets, agreed that Section 814(b) applied. *See* Docket No. 7440, Letter of John Beling, Dep't of Pub. Serv., to Susan M. Hudson, Vt. Pub. Serv. Bd., at 6 (Mar. 7, 2012) (copy attached hereto). As explained in Entergy VY's opening memorandum in support of its motion for Rule 60(b) relief, extraordinary circumstances justify the Board exercising its discretion to grant the minor modifications requested.[3]

The Vermont Supreme Court has recognized that Rule 60(b) "is to be liberally construed and applied." *Pierce v. Vaughan*, 2012 VT 5, ¶ 9, _ Vt. _, _ A.3d _ (quoting *Cliche v. Cliche*, 143 Vt. 301, 306, 466 A.2d 314, 316 (1983)). Entergy VY promptly moved for Rule 60(b) relief after the Board's March 19, 2012 ruling. Injustice would result if the operation of the VY Station pursuant to a federal court injunction could be used as a reason to deny the VY Station a CPG for continued operation or otherwise invoked to penalize Enter gy VY. None of the arguments raised by the parties opposing Entergy VY's motion should dissuade the Board from exercising its discretion to modify the relevant provisions.

A. Rule 60(b) Permits The Narrow Relief Requested Here

As a threshold matter, Entergy VY made its motion within a reasonable time. The "reasonable time" criterion is evaluated by taking into consideration "all the factors and

---

[3] Contrary to the argument of the Vermont Public Interest Research Group (Mot. To Intervene, at 4-5 (June 13, 2012)), Rule 60(b) relief is not limited to vacatur; modification of a judgment is permitted. *See Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 149 Vt. 365, 370, 543 A.2d 1320, 1324 (1988) (holding that "the trial court did not err in modifying the judgment order to allow only simple interest on the judgment award" on a Rule 60(b) motion); *In re Chittenden Solid Waste Dist.*, 2007 VT 28, ¶¶ 32-33, 182 Vt. 38, 53, 928 A.2d 1183, 1193 (2007) (directing a court to allow relief on "the narrow question of the increase in value" of property on two different dates) (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 18 (1984) ("Rule 60(b) empowers a federal court, upon motion of a party, to withdraw or *amend* a final order . . . .") (emphasis added)).

circumstances of the particular case." *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 149 Vt. 365, 369, 543 A.2d 1320, 1323 (1988). Although the relevant Orders and CPG were issued between six and ten years ago, Entergy VY did not know that Section 814(b) would not apply to an application to renew or amend its CPG until the Board denied its motion for a declaratory ruling on March 19, 2012. And the Board's order specifically noted that Entergy VY had not sought relief from the previously issued Orders and CPG, Docket No. 7440, 3/19/2012 Order at 18, thus implying that Entergy VY should still seek such relief if a procedural vehicle to do so were still available; Rule 60(b) provides such a vehicle.

Even after March 19, 2012, the Board had pending DPS's motion requesting "a declaratory ruling that all aspects of the CPGs issued in Dockets 6545, 6812 and 7082, including the substantial obligations associated with those CPGs, remain in effect pending a final decision by this Board," a motion that the Board decided only on April 12, 2012. Docket No. 7440, Order of 4/12/2012 at 2 (citation and internal quotation marks omitted). Entergy VY filed its motion 45 days after issuance of that ruling. Moreover, Entergy VY specifically requested a briefing schedule on the Rule 60(b) motion; while the Board did not specifically include in the docket schedule any deadlines for a Rule 60(b) motion or other motions, it did include a period of time before the due date for Entergy VY's pre-filed testimony and did not specifically rule that a Rule 60(b) motion would not be heard. Docket No. 7862, Order of 5/4/2012 at 3. Under these circumstances, the May 25, 2012 filing of Entergy VY's motion was made within a reasonable time.[4] *See Greenmoss Builders*, 149 Vt. at 369, 543 A.2d at 1323 (finding permissible a Rule

[4] The New England Coalition ("NEC"), while arguing that Entergy VY waited too long after the Board's March 19 ruling to file its motion, inconsistently argues that Entergy VY must wait longer because its claim for relief is unripe. *Compare* NEC Opp. to Entergy's Rule 60(b) Mot., at 4 (June 15, 2012) *with id.* at 5; *see also* Conservation Law Foundation's Response to Entergy's 60(b) Mot., at 5 (June 14, 2012) (contending both that the motion is untimely and that

60(b) motion brought several years after judgment and completion of appellate process); *see also Riehle v. Tudhope*, 171 Vt. 626, 627, 765 A.2d 885, 887 (2000) ("Rule 60(b)(6) is intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a *substantial period of time*.") (emphasis added).[5]

Entergy VY had no reason to challenge or seek modification of the Orders and CPG at the time they were entered because there was no reason to believe that they would later be held to override Section 814(b). *See Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982) ("Until the dismissal, appellants had understandably relied on repeated assurances by the Secretary that the federal settlement would not bar their state claims. Therefore, we hold that appellants' motion was filed within a reasonable time for the purposes of Rule 60(b)(6)."). For this same reason, Entergy VY is not seeking to use its Rule 60(b) motion as a substitute for an appeal, as several parties erroneously contend. *See* NEC Opp. at 6; Mem. of Vt. Natural Res. Council and the Conn. River Watershed Council in Opp. to Entergy's Mot., at 4 (June 15, 2012); Conservation Law Foundation's Response to Entergy's 60(b) Mot., at 2 (June 14, 2012). Because the Board's interpretation of the Orders and CPG to supersede Section 814(b) was

---

it is unripe). As explained below, Entergy VY's claim is ripe because it currently operates in a state the Board perceives as unauthorized under state law, which itself causes hardship because of the looming risk that the Board will use that supposedly unauthorized operation to deny a new or amended CPG or otherwise to penalize Entergy VY.

[5] Even if the unforeseen circumstances could be characterized as a "surprise," as NEC contends, NEC Opp. at 3, "the federal courts have used 60(b)(6) to avoid extreme hardship in cases 'which might literally be thought to be within the one-year limit of clauses (1)-(3),' and the catchall provision is designed specifically 'to give the court the flexibility to see that the rule serves the ends of justice.'" *Chittenden Trust Co. v. Holm*, No. 2005-298, 2006 WL 5838952, at *2 (Vt. Oct. 1, 2006) (citing Reporter's Notes, V.R.C.P. 60; *Cliche*, 143 Vt. at 306, 466 A.2d at 317 ("[R]elief from judgment under V.R.C.P. 60(b)(6) is, by its very nature, invoked to prevent hardship or injustice and thus is to be liberally construed and applied.")). To the extent the circumstances here could qualify as surprise, the "surprise" did not occur until after the one-year period in Rule 60(b)(1) had passed. In such a situation, relief under Rule 60(b)(6) is appropriate.

unforeseeable, Entergy VY could not have appealed that interpretation at the time, and Entergy VY's current request for relief does not result from any tactical decision not to appeal.

Nor did Entergy VY waive its statutory rights under Section 814(b), as DPS implies, *see* Response of the Dep't of Pub. Serv. to Entergy's Mot., at 7 (June 15, 2012), again inconsistently with DPS's position as of March 7, 2012. None of the provisions in the previous CPGs and Board orders cited by the various parties speaks in any way to what will happen if the Board does not issue a decision by the relevant date; Section 814(b) does speak to that issue. Such a distinction is significant because, if Entergy VY's CPG application had been denied prior to March 21, 2012, Entergy VY would have had appellate rights. Because the parties in the prior dockets (No. 6545 and No. 7082) did not contest that Section 814(b) applied, and this issue was not the subject of any evidentiary dispute, no hearing is necessary to make these modifications.

Finally, the motion is ripe. Entergy VY is already laboring under the hardship caused by the uncertainty of how the Board will treat operation as authorized by the federal court injunction. *See Town of Rye, N.Y. v. Skinner*, 907 F.2d 23, 24 (2d Cir. 1990) (*per curiam*) (finding hardship created by uncertainty). Entergy VY should not be required to wait to seek relief for the Board to deny a CPG or otherwise to penalize Entergy VY; were Entergy VY to wait for such events, the intervenors would surely argue that Entergy VY had waited too long.

B. Rule 60(b) Relief Is Further Warranted Because It Was Unforeseeable That The Board Could Not and Would Not Rule on Entergy VY's Petition in a Timely Manner

As demonstrated in Entergy VY's opening memorandum, the Board's inability to rule before March 21, 2012, on Entergy VY's pending petition, which was filed some four years earlier on March 3, 2008, was also unforeseeable and warrants the narrow relief requested here. Specifically, the motion seeks to account for the inability of the Board to rule on Entergy VY's pending application due to the legislature's enactment of now-invalidated statutes and the

legislature's lengthy delay in exercising its authority under those statutes, which prevented this Board from deciding Entergy VY's petition in Docket No. 7440 before March 21, 2012. When the Board issued the CPG and Order in Docket No. 6545 in 2002, the General Assembly's unlawful assertion of CPG authority was not even on the horizon: General Assembly approval became necessary only after the Attorney General opined in 2004 that a statutory exemption for construction of a spent fuel facility was owner-specific, not site-specific, which in turn set in motion the enactment of Act 74.

This unforeseen development was reinforced by the unlawful legislative approval requirement in Act 160, and these conditions directly inhibited Entergy VY's ability to obtain a timely ruling from the Board, despite filing a petition four years in advance of March 21, 2012. The General Assembly, after conducting numerous studies on continued operation, did not even hold a vote in both houses on allowing the Board to issue a decision and, indeed, never authorized the Board to rule on its petition. Such action was unforeseeable not only because of the extraordinary delay, but because the General Assembly's actions have now been found by the District Court to be preempted.[6] This extraordinary course of events, which rendered the Board unable to rule on a CPG petition filed four years before March 21, 2012, justifies the narrow relief Entergy VY requests here.

CONCLUSION

The Board should grant the narrow relief requested in Entergy VY's Rule 60(b) motion. Namely, the Board should (1) modify Condition 8 of its Order of June 13, 2002, issued in Docket No. 6545, to permit Entergy VY to operate the VY Station while the Amended Petition in

[6] In addition, Board practice with respect to time-limited CPGs dictated that any new conditions would replace those found in the existing Orders and CPG. *See* Entergy VY Mem. In Support Of Mot. For 60(b) Relief, at 11-12 (May 25, 2012).

Docket No. 7862 is pending and once a new CPG is granted; (2) modify Condition 4 in its Order of April 26, 2006, and Condition 3 in the CPG issued on April 26, 2006, in Docket No. 7082 to permit storage of SNF at the VY Station even if the amount of SNF exceeds the amount derived from operation as of March 21, 2012; (3) modify Condition 7 in its Order of April 26, 2006, and Condition 6 in the CPG issued on April 26, 2006, in Docket No. 7082 to permit Entergy VY to obtain a CPG when its Amended Petition is decided and to operate in the interim period; (4) once the foregoing modifications are made, declare that Section 814(b) applies to allow Entergy VY to operate the VY Station (including storage of SNF derived from such operation) while its Amended Petition in Docket No. 7862 is pending; and (5) grant such other and further relief as the Board deems appropriate.

St. Johnsbury, Vermont. July 2, 2012.

Respectfully submitted,

ENTERGY NUCLEAR VERMONT YANKEE, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC.

By their attorneys

DOWNS RACHLIN MARTIN PLLC
John H. Marshall
Nancy S. Malmquist
Lisa A. Fearon

Of Counsel:

Kathleen M. Sullivan
Robert Juman
Sanford I. Weisburst
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010

and

Robert B. Hemley
Matthew B. Byrne
GRAVEL & SHEA
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369

ATTACHMENT

VERMONT

State of Vermont
Department of Public Service
112 State Street
Montpelier, VT 05620-2601
TEL: 802-828-2811

FAX: 802-828-2342
TTY VT: 800-734-8390
email:vtdps@state.vt.us
http://publicservice.vermont.gov/

March 7, 2012

Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620-2701

Re: Docket 7440 – Response to Board Memorandum re: Procedural Issues

Dear Mrs. Hudson:

I am writing in response to the question raised by the Board in its memorandum dated February 22, 2012.

> **1. What is the scope of review for Entergy's petition? Entergy originally petitioned under 30 V.S.A. § 231, 248, and 254 as well as 10 V.S.A. § 6501-6504. The District Court's Declaratory Judgment states that Act 160 is preempted, including the provisions of Sections 248(e)(2) and 254. However, the Permanent Injunction relates only to barring the state from enforcing Act 160 to compel Vermont Yankee to shut down due to failure to receive legislative approval.**

The petition is subject to review under all non-preempted portions of Vermont law, including Title 10, Chapter 157 (other than 10 V.S.A. §6522(c)(4), preempted by the District Court's opinion now on appeal) and 30 V.S.A. §§ 102 & 231 as to continued operations.

The Board has broad authority under Section 231 to consider a number of factors relating to Entergy and the Vermont Yankee facility. The Board has noted that:

> [The section 231] criteria are guidelines only, and the Board may deviate from them as the circumstances require. Indeed, the Board's authority under section 231 is broad. Because 30 V.S.A. § 203 permits the Board to exercise its jurisdiction "so far as may be necessary to enable [it] to perform [its] duties and exercise the powers conferred upon [it] by law," in issuing a CPG, the Board may tailor conditions appropriate to the planned activities of the petitioner.

See Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont, certain affiliates thereof, and FairPoint Communications, Inc. for approval of an asset transfer, acquisition of control by merger and associated transactions, Docket 7270, Order dated 12/21/07 at 23. The activities of the Petitioners here, continued operation of an electric generation facility, will inform the criteria the Board will consider in its CPG review, and may include several criteria listed under 30 V.S.A. § 248(b), such as economic benefit to the State.

The Vermont Supreme Court has described the Board's authority under 30 V.S.A. §§ 102 & 231 as follows:

> [T]he PSB has authority under 30 V.S.A. § 102 and § 231 to amend or revoke a CPG for good cause. See 30 V.S.A. § 102(c) ("For good cause, after an opportunity for hearing, the board may amend or revoke any certificate awarded under the provisions of this section."); id. § 231 (same). Good cause to amend or revoke ENVY and ENO's CPGs might be found if the companies materially alter the circumstances they presented to the PSB as grounds for it to find that the sale and associated power purchase agreement promote the general good of Vermont.

In re Proposed Sale of Vermont Yankee Nuclear Power Station, 2003 VT 53, ¶ 11 (2003).

(a) Under the language of Title 10, Chapter 157 (as modified by the District Court Order), does the Board have authority to grant Entergy VY's petition under that Chapter?

The Board has authority to consider Entergy VY's petition for certificates of public good to operate and for spent fuel storage. Further explanation is provided in response to Question 4.

2. To what degree can the Board rely upon the existing record? In its comments, the New England Coalition observes that Entergy VY had taken the position before the District Court that the record in Docket 7440 was tainted and that it was necessary to start over in a new docket. Is this Entergy VY's position? If so, is it not essential that the Board start over to ensure that the record does not remain subject to challenge?

The Department notes that this question is directed at Entergy but substantively responds to this issue in its Memorandum in Opposition to Entergy's Motion Seeking Issuance of a Final Decision and Order Granting CPG, previously filed and incorporated herein by reference.

3. If the Board uses the existing record as a starting point, to what extent is it necessary to allow parties the opportunity to update the record?

The parties should be permitted to update and address the record with respect to all criteria applicable to Entergy VY's petition.

(a) Are the economic analyses still valid or is it necessary to update them?

It is necessary to update these analyses because they are now out of date.

(b) What changes to the record are necessary based upon Entergy VY's testimony that it subsequently acknowledged to be less than fully accurate?
Do parties need an opportunity to respond to any changes that Entergy VY seeks to make to the record?

The record must be updated to reflect all circumstances that have changed since evidence was last submitted in this matter, including regarding the failure to disclose underground piping. All parties need an opportunity to respond to changes or additions to the record, whether through a process of updating the current record or conducting new evidentiary proceedings.

(c) Are further updates necessary to reflect intervening events (such as Entergy VY's challenge to Vermont law or the Nuclear Regulatory Commission's grant of a license extension)?

Yes; the parties should be permitted to address all intervening events relevant to the criteria the Board will consider in issuing a decision on Entergy VY's petition. *See further* Opposition to Entergy's Motion Seeking Issuance of a Final Decision and Order Granting CPG

(d) Under 10 V.S.A. § 6522, "Any certificate of public good issued by the board shall limit the cumulative total amount of spent fuel stored at Vermont Yankee to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, the end of the current operating license." It appears that this provision, which was incorporated in the Docket 7082 CPG, has not been preempted by the District Court. Does the record contain evidence on how Entergy VY will comply with this requirement?

The cited provision is not affected by the District Court's narrow and specific order regarding Act 74. In response to the Board's specific question, the Department is not aware of any such evidence; to the extent that Entergy seeks to continue operations and therefore requires approval of storage of additional spent fuel the record would have to reflect evidence on this subject. See Responses 4(b) – 4(d). The cited provision is reflected in 10 V.S.A. § 6522(c)(2), which is a portion of a subsection, Section 6522(c), that set limiting conditions for the issuance of a certificate of public good for the establishment of a spent nuclear fuel facility. The cited limiting condition placed an end date on Entergy VY's CPG related to its storage facility, just as it had an end date on its CPG related to facility operations. The effect of the provision was to require Entergy VY to seek approval for continued storage at the facility for operations beyond March 21, 2012; that petition for approval (for both storage and operations) is pending before the Board. Given the District Court's narrow injunction striking legislative approval over continued spent nuclear fuel storage, the Board's process may and should continue.

4. To what extent can Entergy VY operate past March 21, 2012?

The State must follow the terms of the District Court injunction, which with respect to continued operation provides:

> 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.

Entergy v. Shumlin, Docket No. 1:11-cv-99, slip op. at 100-101 (D.Vt. Jan. 19, 2012)("1/19/12 District Court Order"). While the State has appealed the district court's decision, as set forth below, the permanent injunction issued by the federal district court does not in the meantime permit the State to prevent Entergy from operating for lack of a CPG for operation or spent nuclear fuel storage. Instead, Entergy could continue to operate under its current CPG pursuant to 3 V.S.A. § 814(b) pending resolution of its CPG petition. Under that section, all aspects of a license remain in force and effect pending a timely and sufficient petition for a new or renewed license; once the Board rules on the pending petition, or there is a reversal on appeal, 3 V.S.A. § 814(b) would no longer apply . Entergy VY has not established whether it will comply with its present CPGs during pendency of this review. *See further* Response to 4(d).

(a) Does Entergy VY plan to operate past March 21, 2012, if the Board has not yet issued a CPG? If so, what does Entergy VY plan to do with spent fuel generated as a result of such operation?

This question is directed at Entergy.

(b) Is such operation barred by 10 V.S.A. § 6522(c)(5), which provides: "Compliance with the provisions of this subchapter shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before the owners of the generation facility may operate the generation facility beyond that date, they must first obtain a certificate of public good from the public service board under Title 30."?

Section 6522(c)(5) of Title 10, which was passed into law prior to Act 160, has not been ruled preempted by the District Court. Entergy has now sought to clarify or correct the District Court order, even though the District Court specifically found only a "single sentence" of

Section 6522 preempted. Nevertheless, the Board has not ruled on Entergy's petition for a CPG for continued operation, and could not do so due to the lack of legislative approval required by Act 160. Act 160 has been preempted by the District Court's order. The injunctive relief cited above precludes the State "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 . . ."), unless the order is reversed or modified on appeal. 1/19/12 District Court Order at 100. The Department believes the injunction in effect does not permit the State to take action to compel cessation of operations while the CPG application is pending, on the ground that the Board has not ruled on Entergy's pending petition for a new or renewed CPG. In the Department's view, and does not believe Section 6522(c)(5) provides an independent basis outside the scope of the injunction for forced cessation of operations on March 21, 2012.

Does this enactment take precedence over the general provisions of 3 V.S.A. § 814?

Absent other factors, the more specific terms of 10 V.S.A. § 6522(c)(5) would govern over the more general provisions of 3 V.S.A. § 814. *See Town of Brattleboro v. Garfield*, 2006 VT 56, ¶ 10. As explained above, in light of the Court's ruling and injunction, the Department does not believe that § 6522 provides a basis for requiring Vermont Yankee to cease operations while its petitions for new CPGs are pending; moreover Section 814 continues the force and effect of all aspects of a license pending timely and sufficient petition for a new or renewed license.

(c) The District Court Order observed that "The Board's order also expressly limited the total fuel that could be stored to amounts derived from operation through 2012, the end of the current operating license." What effect, if any, does this have on Entergy's operation beyond March 21, 2012?

Because the Board could not rule on Entergy's petition to store spent nuclear fuel past March 21, 2012 without legislative approval under section 6522(c)(4) of Title 10, the injunctive relief cited above precludes the State from "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. . . " 1/19/12 District Court Order at 100. Nevertheless, Entergy requires a certificate of public good for continued operations and storage, and the Board should set a schedule for consideration of whether to grant the petition.

(d) How does the provision in 3 V.S.A. § 814 stating that an existing license does not expire while a timely and sufficient application for renewal is pending relate to these explicit commitments and orders? Specifically, do the Docket 6545 MOU and the Board's Orders (not the CPGs themselves) in Dockets 6545 and 6082 constitute "licenses" within the

meaning of Section 814? In particular, the Board's June 13, 2002, Order in Docket 6545 states "Absent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012." In addition, the Docket 6545 MOU also contains Entergy's agreement that "Any such Board order approving the sale shall be so conditioned, and any Board order issuing a CPG to ENVY and ENO shall provide that operation of VYNPS beyond March 21, 2012 shall be allowed only if application for renewal of authority under the CPG to operate the VYNPS is made and granted." (Emphasis added).

The provisions of 3 V.S.A. § 814 apply to "licenses," which are defined as "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." Under this definition, it is a CPG that would qualify as a "license." While the Board has the powers of a court of record pursuant to 30 V.S.A. § 9 and Board Orders are independently enforceable, language in the Board's orders repeating the language in a CPG would not serve to alter this status.

The Docket 6545 MOU predated Act 160, which prevented the Board from ruling on Entergy's petition for a CPG. While the State has appealed the district court's order, at present the injunctive relief cited above precludes the State "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 . . ."). 1/19/12 District Court Order at 100.

Finally, it must be noted that the provisions of 3 V.S.A. § 814 apply to all aspects of the CPG currently in place for the facility which are not subject to the terms of the injunction. While pending appeal or decision of this Board on the petition, the State cannot force Entergy to cease operations based upon the lack of a current CPG for operation or spent fuel storage, Entergy's commitments under the Memorandum of Understanding between Entergy VY and the Department of Public Service dated June 21, 2005 otherwise remain in place under the existing CPG. *Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a certificate of public good to construct a dry fuel storage facility at the Vermont Yankee Nuclear Power Station, in Vernon, Vermont,* Docket 7082, Certificate of Public Good dated 4/26/06 at ¶ 2.

Thank you for the opportunity to provide these responses. Please let me know if you have any questions.

Sincerely,

John Beling

Director for Public Advocacy

cc: Attached Service List

PSB Docket No. 7440 - SERVICE LIST

Parties:

John Beling, Esq. – Aaron Kisicki, Esq.
Vermont Department of Public Service
112 State Street
Montpelier VT 05620-2601

John H. Marshall, Esq. - Nancy S. Malmquist, Esq.
Peter D. Van Oot, Esq. - Robert A. Miller, Esq.
Downs Rachlin Martin, PLLC
90 Prospect Street - P.O. Box 99
St. Johnsbury, VT 05819-0099 **(Entergy)**

Kim F. Bykov Esq.
Senior Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601 **(Entergy)**

Robert B. Hemley, Esq. - Matthew B. Byrne, Esq.
Gravel and Shea, P.C.
76 St. Paul Street – 7th Floor
PO Box 369
Burlington, VT 054012-0369 **(Entergy)**

Judith L. Dillon, Esq.
Vermont Agency of Natural Resources
103 South Main Street
3rd Floor Center Building
Waterbury, Vermont 05671-0301 **(ANR)**

Kenneth C. Picton, Esq.
Dale A. Rocheleau, Esq.
Carolyn Browne Anderson, Esq.
Central Vermont Public Service Corporation
77 Grove Street
Rutland, VT 05701 **(CVPSC)**

James Matteau, Executive Director
Windham Regional Commission
139 Main Street, Suite 505
Brattleboro, VT 05301 **(WRC)**

Robert E. Woolmington, Esq.
Whitten, Woolmington, Campbell & Boepple, P.C.
4900 Main Street – PO Box 2748
Manchester Center, VT 05255-2748
(TransCanada Hydro Northeast)

Robert M. Fisher, Esq.
Fisher & Fisher - 114 Main Street – PO Box 621
Brattleboro, VT 05302-0621
(Town of Brattleboro)

Jared M. Margolis, Esq.
151 Cilley Hill Road
Jericho, VT 05465 **(NEC)**

Clay Turnbull
New England Coalition
PO Box 545 - Brattleboro, VT 05302 **(NEC)**

Peter H. Zamore, Esq. - Benjamin Marks, Esq.
Sheehey Furlong & Behm, PC - 30 Main Street - P.O. Box 66
Burlington, VT 05402 **(GMP)**

Donald J. Rendall, Jr., Esq., General Counsel
Green Mountain Power Corporation
163 Acorn Lane - Colchester, VT 05446 **(GMP)**

Caroline S. Earle, Esq.
Law Office of Caroline S. Earle, PLC
107 State Street – PO Box 1385
Montpelier, VT 05601-1385 **(IBEW)**

Jeffrey C. Wimette
IBEW Local No. 300
3 Gregory Drive - South Burlington, VT 05403-6061
(IBEW Local No. 300)

Sandra Levine, Senior Attorney
Conservation Law Foundation
15 East State Street - Suite 4
Montpelier, VT 05602-3010 **(CLF)**

James A. Dumont, Esq.
Law Offices of James A. Dumont, Esq. PC
15 Main Street – PO Box 229
Bristol, VT 05443 **(VPIRG)**

Sandra Dragon, President
Associated Industries of Vermont
PO Box 630
Montpelier, VT 05601 **(AIV)**

J. Randall Pratt, Manager – Government Relations
Vermont Electric Cooperative, Inc.
42 Wescom Road - Johnson, VT 05656 **(VEC)**

Jon Groveman, Esq.
Vermont Natural Resources Council
9 Bailey Avenue - Montpelier, VT 05602