

STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Entergy Nuclear Vermont Yankee, LLC, and)	
Entergy Nuclear Operations, Inc., for amendment of)	
their Certificates of Public Good and other approvals)	
required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A.)	Docket No. 7440
§§ 231 (a), 248 & 254, for authority to continue after)	
March 21, 2012, operation of the Vermont Yankee)	
Nuclear Power Station, including the storage of)	
spent-nuclear fuel)	

**ENTERGY NUCLEAR VERMONT YANKEE, LLC, AND ENTERGY NUCLEAR
OPERATIONS, INC.'S RESPONSE TO THE QUESTION POSED IN THE BOARD'S
MEMORANDUM DATED JULY 13, 2012**

On July 13, 2012, the Vermont Public Service Board (“Board”) issued a memorandum soliciting comments concerning whether Docket No. 7440 should be closed now that Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy VY”) have, at the Board’s direction, filed an Amended Petition (which commenced Docket No. 7862) seeking approvals that are substantially similar to those that Entergy VY had originally requested in the Petition that initiated Docket No. 7440.

Entergy VY respectfully submits that Docket No. 7440 should remain open until the Board issues its final decision on the Amended Petition in Docket No. 7862. Closing this docket now would create unnecessary judicial and administrative inefficiencies by forcing Entergy VY immediately to appeal the Board’s Order of March 19, 2012 in Docket No. 7440, instead of permitting the parties to pursue any appeals at the conclusion of the proceedings in Docket No. 7862. The Board should therefore hold Docket No. 7440 open until the issuance of a final ruling

on the Amended Petition in Docket No. 7862, so that all of the appeals in the two related matters (if any are taken) may be heard by the Vermont Supreme Court together in a single proceeding.¹

BACKGROUND

Entergy VY's effort to obtain a new or amended Certificate of Public Good ("CPG") and other necessary approvals for the Vermont Yankee Nuclear Power Station ("VY Station") has been ongoing since March 2008, when Entergy VY filed the Petition in Docket No. 7440. That Petition sought an amendment of the CPG issued in Docket No. 6545, which concerned the 2002 sale of the VY Station to Entergy VY, to allow continued operation of the VY Station after March 21, 2012. The Petition also sought approval for storage of spent nuclear fuel ("SNF") derived from such operation, as well as approval by the General Assembly of the VY Station's operation after March 21, 2012.

The Board's efforts to decide the March 2008 Petition were hindered by legislative enactments purporting to insert the General Assembly into the CPG review process and related delays. In April 2011, Entergy VY filed suit in the United States District Court for the District of Vermont ("District Court"), challenging those enactments. On January 19, 2012, the District Court entered a Decision and Order enjoining enforcement of certain of Vermont's nuclear regulatory requirements on the ground that they are preempted by federal law. The ruling freed the Board to rule on a Petition for continued operation of the VY Station, with the caveat that any decision must be based solely on the evidence concerning those areas of policy that Vermont and the Board have authority to regulate. Vermont has appealed the District Court's ruling to the United States Court of Appeals for the Second Circuit; proceedings in the appeal are ongoing.

¹ In the alternative, Entergy VY respectfully requests that the Board reconsider its May 4 determination, vacate the March 19 Order in Docket No. 7440 and enter that order in Docket No. 7862, so as to prevent that Order becoming final.

On January 31, 2012, Entergy VY filed a motion seeking a final decision on the original Petition. On March 13, 2012, Entergy VY filed a motion requesting a declaration that Vermont law permits continued operation of the VY Station during Entergy VY's pursuit of a new or amended CPG and other necessary approvals. By order dated March 19, 2012 (the "March 19 Order"), the Board denied the latter motion, holding that the nature of the declaration that Entergy VY had requested would require modification of orders and CPGs entered in Docket Nos. 6545 and 7082; the Board did recognize that the District Court's injunction prevented the State from halting operation of the VY Station or preventing storage of SNF derived therefrom. On March 29, 2012, the Board issued an Order denying Entergy VY's request for a final decision on the Petition (the "March 29 Order"). The Board reasoned that, in light of changes in the legal and factual landscapes, the best course would be for Entergy VY to file an amended petition and for the Board to open a new docket with a fresh record. Entergy VY complied with this directive, filing an Amended Petition on April 16, 2012; this filing initiated a new docket, No. 7862.

The Board held a prehearing conference in the new docket on May 2, 2012. On May 4, the Board entered a Prehearing Conference Memorandum, which established a schedule in that proceeding. The Memorandum also rejected Entergy VY's request that the Board enter in Docket No. 7862 the March 19 Order and the March 29 Order. Prehearing Conf. Mem., entered 5/4/2012, at 5. The Board went on to advise Entergy VY that the Board would also be "issuing a memorandum to parties in Docket 7440 soliciting comments on further steps in that docket, including the possibility that the docket would be closed." *Id.*

On May 25, Entergy VY filed a motion, pursuant to Vt. R. of Civ. P. 60(b), seeking relief from the Board's June 13, 2002 Order in Docket No. 6545 and its April 26, 2006 Order and Certificate of Public Good in Docket No. 7082, as the Board had suggested was the appropriate

course of action in its March 19 Order. These requests seek to prevent hardship and injustice resulting from the occurrence of events that were unforeseeable at the time of entry of the orders in question. The other interested parties filed response memoranda, and on July 2 Entergy VY filed its Reply Memorandum in support of its Rule 60(b) motion. The Rule 60(b) motion remains pending.²

On July 13, the Board issued a memorandum in this docket, which stated that “there appear to be no outstanding issues in this docket,” and suggested that it is “not clear that there is a reason to keep this docket open.” The Board did, however, offer the parties an opportunity to comment on the potential closing of the docket. It specified that “the commenting party should clearly identify the reasons for the request and how that relates to the issue raised by Entergy VY’s petition that led to this proceeding and why Docket No. 7862 is not an adequate mechanism for addressing such issues.” Entergy VY does so below.

ARGUMENT

Entergy VY respectfully submits that Docket No. 7440 should not be closed at this time. Doing so would force Entergy VY to seek immediate judicial review of an essentially interlocutory order (the March 19 Order) in order to preserve its appellate rights, notwithstanding the fact that the Board has not reached a final decision on the merits of Entergy VY’s request for a new or amended CPG. To effectively require Entergy VY (or any other party) to take an immediate appeal of an interlocutory order would impose unnecessary burdens on the parties, the Board, and the Vermont Supreme Court, without any counterbalancing benefit. Such a procedure would contravene the policies that support the final judgment requirement and the

² As noted in Entergy VY’s memoranda in support of its Rule 60(b) motion, Entergy VY does not object to the Board considering the 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.

Vermont Rules of Appellate Procedure, and should be avoided. The better course of action is to hold this docket open until the Board has entered a final decision on the Amended Petition in Docket No. 7862. At that time, every party wishing to seek judicial review of any perceived error in either docket will be able to do so at once, permitting the Supreme Court to consolidate the case into a single streamlined proceeding that will benefit from the light shed by the updated record that the parties are in the process of developing in the new docket.

The March 19 Order in Docket No. 7440 is currently interlocutory, but would become appealable upon entry of a final order closing Docket No. 7440. *See* Vt. R. App. P. 3(a) (“An appeal from a judgment preserves for review any claim of error in the record ...”); *State v. Fisher*, 150 Vt. 655, 655-56 (1988) (a non-final decision is typically reviewable on appeal and therefore not at the time the decision is filed).³ Entry of a final and appealable order would begin the running of Entergy VY’s time to seek judicial review, which is limited to 30 days (with the possibility of an extension of no more than 30 additional days). Vt. R. App. P. 4(a), (d). To avoid the lapse of the filing period and thus to preserve its right to appellate review, Entergy VY would thus be required to file an appeal almost immediately upon entry of an appealable final order.

An order “closing” this docket would constitute such an appealable final order, in that it would have the effect of dismissing the Petition. *See, e.g., Beaupre v. Green Mt. Power Corp.*, 172 Vt. 583, 586 (2001) (the Public Service Board’s “order closing the docket” constituted its “final judgment in the matter”); *Investigation into the provisions of PSB Rule 3.700—pole attachments in re: procedures necessary to attach a pole; make-ready and related issues; and*

³ The 10-day window for seeking discretionary review of an interlocutory order has lapsed. *See* Vt. R. App. P. 5(b), 5.1(a). Entergy VY was not required to seek such review in order to preserve its appellate rights. *State v. Kingsbury*, 143 Vt. 20, 23 (1983) (“An interlocutory appeal is not mandatory ...”).

rates, Vt. P.S.B. Docket No. 5743, Order of Feb. 12, 2003, at 1 (treating “dismissal” and closure of a docket as interchangeable). Even though such a closure or dismissal would be without prejudice to the Amended Petition in Docket No. 7862, it would constitute a final and appealable order in Docket No. 7440. Vermont follows the federal rule with regard to the finality of a judgment for purposes of an appeal, see *Hospitality Inns v. South Burlington R.I.*, 149 Vt. 653, 656 (1988) (“In applying the final judgment requirement, we have been guided by the federal requirement and its exceptions.”), and federal law is clear that “a dismissal without prejudice that does not give leave to amend and closes the case is a final, appealable order,” *Wynder v. McMahon*, 360 F.3d 73, 76 (2d Cir. 2004). This is so because such a dismissal ends the proceeding and thus satisfies the requirement “that the decree or judgment disposed of all matters that should or could properly be settled at the time and in the proceeding then before the court.” *State v. CNA Ins. Cos.*, 172 Vt. 318, 322 (2001) (quoting *In re Estate of Webster*, 117 Vt. 550, 552 (1953)).

As the final judgment, an order closing this docket would start the running of the 30-day clock for obtaining judicial review of any claims of error that Entergy VY may seek to raise in this matter, including those associated with the March 19 Order. Such an order would therefore have the effect of requiring Entergy VY to take an immediate appeal of the March 19 Order to preserve its rights to judicial review.

Imposing such a requirement in this case would be contrary to the purposes of the final judgment rule. The Vermont Supreme Court has aptly summarized the “weighty considerations that support the finality requirement”:

Piecemeal appellate review causes unnecessary delay and expense, and wastes scarce judicial resources. Furthermore, an appellate court labors under great disadvantages in disposing of interlocutory appeals. The litigants may not yet have narrowed the case’s issues sufficiently for appellate review. We are deprived of the benefits

of a final trial court opinion. Interlocutory review requires us to decide legal questions in a vacuum, without benefit of factual findings. Appellate decisionmaking suffers from such abstractness. By [their] very nature then, interlocutory appeals impair this Court's basic functions of correctly interpreting the law and providing justice for all litigants.

In re Pyramid Co., 141 Vt. 294, 300-01 (Vt. 1982) (citing Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 89 (1975)). These concerns are present in this case, and are indeed quite pronounced. An immediate appeal would create expense and delay as all interested parties prepared their appellate briefs and arguments. It would waste judicial resources by forcing the Vermont Supreme Court to consider questions pertaining to (for instance) temporary authorization for operation of the VY Station now, when a grant of Entergy VY's Amended Petition would obviate the need ever to reconsider those questions. And if the Supreme Court were to hear the case now, it would have to do so without the benefit of the new record that is being developed in Docket No. 7862: its consideration of the case would be limited to the same record that the Board has deemed inadequate, inaccurate, and stale. *See* March 29 Order, at 2-4.

An immediate appeal of the March 19 Order would be inefficient for the further reason that the Board's disposition of Entergy VY's pending Rule 60(b) motion may make the matter moot. The Board's March 19 Order ruled that the orders and CPG in Docket Nos. 6545 and 7082 do not permit continued operation of VY Station and storage of SNF derived as a necessary incident of such operation after March 21, 2012, notwithstanding 3 V.S.A. § 814(b). As discussed above, however, Entergy VY's Rule 60(b) motion seeks modification of those orders and CPG so that they would explicitly permit continued operations and SNF storage.⁴ If that

⁴ It may also be prudent to delay decision on the Rule 60(b) motion until the parties have developed a complete, new record in Docket No. 7862, as the newly developed evidence and testimony may bear on the motion's merits.

motion is granted, Entergy VY would be likely to move, in light of the changed provisions, for reconsideration of the March 19 Order or for entry of a new declaratory ruling to the effect that plant operation and SNF storage are permitted until the Board issues a final decision on the Amended Petition. If Entergy VY has already been forced to appeal by the closure of the docket, however, such a motion for reconsideration would have to be preceded by a motion for remand from the Supreme Court to the Board, so that the Board could reassume jurisdiction. This step would only add further inefficiency, without any meaningful benefit to any party or to the Board. Closure of Docket No. 7440 should be delayed until all of the proceedings in these two related dockets (Nos. 6545 and 7082) have come to an end, so that, if an appeal is taken, the Supreme Court may review all of the connected proceedings at once.

If this case had involved the filing of an Amended Petition within the same docket rather than the opening of a new docket, thereby avoiding the issue of docket closure raised by the March 19 Order, there would have been no occasion to consider whether an immediate appeal of that Order would be required to preserve Entergy VY's rights. While Entergy VY might have considered seeking such an appeal upon issuance of the Orders, "[a]n interlocutory appeal is not mandatory," *State v. Kingsbury*, 143 Vt. 20, 23 (1983), and it could have chosen to conserve its resources (and those of the Board and the Supreme Court) by declining to seek permission to appeal. The Board's decision to create a new record should not alter the state of affairs that would have prevailed had the entire petitioning process been confined to a single docket. To do so would impose unnecessary costs and burdens upon the parties, the Board, and the Vermont Supreme Court.

Finally, if the Board decides to close this docket, it should reconsider its decision not to transfer the March 19 Order to Docket No. 7862, so as to prevent that Order from becoming final when this Docket is closed. Doing so would ensure that Docket No. 7862 remains an adequate

forum for addressing all issues raised in Docket No. 7440, by preserving Entergy VY's right to seek appellate review of the March 19 Order upon entry of a final judgment.

CONCLUSION

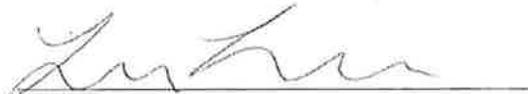
The Board should not close Docket No. 7440 until it closes Docket No. 7862. In the alternative the Board should reconsider its May 4 determination, vacate the March 19 Order in Docket No. 7440 and enter that order in Docket No. 7862.

St. Johnsbury, Vermont. July 25, 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