

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Investigation into (1) whether Entergy Nuclear Vermont )  
Yankee, LLC, and Entergy Nuclear Operations, Inc., )  
(collectively, “Entergy VY”), should be required to cease )  
operations at the Vermont Yankee Nuclear Power Station, )  
or take other ameliorative actions, pending completion of )  
repairs to stop releases of radionuclides, radioactive )  
materials, and, potentially, other non-radioactive materials )  
into the environment; (2) whether good cause exists to )  
modify or revoke the 30 V.S.A. § 231 Certificate of Public )  
Good issued to Entergy VY; and (3) whether any penalties )  
should be imposed on Entergy VY for any identified )  
violations of Vermont statutes or Board orders related to )  
the releases )

Docket No. 7600

MOTION TO MODIFY THE PREHEARING CONFERENCE MEMORANDUM  
AND TO ENLARGE THE TIME FOR ENTERGY VY TO RESPOND TO  
PENDING DISCOVERY REQUESTS

Under Rules 6(b) and 16.2 of the Vermont Rules of Civil Procedure, as made applicable to proceedings before the Vermont Public Service Board (referenced herein as “The Board”) by its Rule 2.103, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively referenced herein as “Entergy VY”), file this Motion to Modify the Prehearing Conference Memorandum and to Enlarge the Time for Entergy VY to Respond to Pending Discovery Requests.

Good cause exists for the entry of an order enlarging time because Entergy VY has been served with discovery vastly exceeding what was contemplated in the Prehearing Conference Memorandum dated March 18, 2010 (hereinafter “March 18 Order”), not only in terms of volume—over three hundred requests and sub-requests served near the end of the rolling discovery period set forth in the March 18 Order—but also in terms of substance.

In particular, the Board has acknowledged the significant role that matters of jurisdiction, including Federal preemption, will play in this docket, and consequently it limited discovery

during the initial phase of the docket to certain enumerated categories of information and set a schedule for briefing on jurisdictional issues. Notwithstanding the Board's deliberate actions in this regard, a large portion of the discovery served on Entergy VY goes well beyond the carefully circumscribed areas set forth in the March 18 Order.

Moreover, much of the discovery sought concerns matters that, Entergy VY will argue in its brief, are preempted by Federal law. The requesting parties are, in essence, attempting to place upon Entergy VY the considerable burden of answering several hundred questions and producing a substantial volume of documents concerning issues that, if Entergy VY prevails on the jurisdictional question, will not be relevant to this docket.

Under these circumstances, it would be unduly burdensome to require Entergy VY to answer all of the voluminous discovery propounded on it in the timeframe originally contemplated by the Board. Indeed, the burden placed on Entergy VY in this instance is magnified because the Vermont Yankee Nuclear Power Station ("VY Station") commenced an outage this past weekend that, based on prior experience, is expected to last approximately one month. Numerous persons who are to be involved in responding to discovery requests have outage jobs requiring their primary attention to ensure a safe and timely outage.

Thus, while Entergy VY has timely responded to two sets of discovery requests that were served on it by the Conservation Law Foundation ("CLF"), Entergy VY requests that it be provided an enlargement of time to respond to all of the remaining discovery until after the scheduled outage has been completed. Further, Entergy VY requests that the Board revise the March 18 Order to permit Entergy VY to defer responding to certain discovery—discovery outside the scope of the March 18 Order and discovery concerning arguably preempted topics—

unless it has been determined that the Board has jurisdiction here and the docket has moved into a phase in which the remaining discovery is relevant.

## **DISCUSSION**

### **I. Background**

On January 7, 2010, Entergy VY confirmed that a groundwater-monitoring well at the VY Station contained tritium. Entergy VY immediately notified the NRC, various state agencies and other stakeholders and began working 24 hours a day, seven days a week, to identify and stop the leakage. *See* Docket No. 7600, Sworn Affidavit of Timothy G. Mitchell dated March 31, 2010, pp. 3-4 (hereinafter “Mitchell Affidavit”). The NRC has been monitoring the leaks and Entergy VY’s response thereto since January 7, 2010. *See* Docket No. 7600, Sworn Affidavit of Jeffery A. Hardy dated March 31, 2010, Ex. EN-JH-1, ¶¶ 8, 11. Since the day the leaks were discovered, Entergy has fully cooperated with the NRC and other regulatory agencies monitoring the leaks, including allowing open on-site access to officials from the various agencies, participating in daily conference calls with regulatory stakeholders and meeting regularly on-site with state and federal officials. *See* Docket No. 7600, Sworn Affidavit of Timothy C. Trask dated March 31, 2010, p. 10. As supported by the Mitchell Affidavit, Entergy VY has high confidence that it has identified and stopped the leakage and is taking appropriate remediation measures.

From January 25, 2010, until April 14, 2010, the NRC conducted an inspection of Entergy VY’s performance with respect to the tritium leaks. Letter of Darrell J. Roberts, NRC Director of Reactor Safety, addressed to Michael Colomb, Site Vice President, dated April 16, 2010, p. 1. The NRC has independently confirmed that the public’s health and safety and the off-site environment have not been adversely affected. *Id.* at 2.

On January 25, 2010, the Conservation Law Foundation (“CLF”) requested that the Board issue an order to Entergy VY to show cause why the Board should not immediately shut the VY Station down pending the completion of leak repairs. March 18 Order, p. 3. On February 3, 2010, Entergy VY filed an opposition to CLF’s show-cause request, arguing, *inter alia*, that Federal law preempted the Board from investigating the leaks and ordering the shutdown of the plant. On February 25, 2010, the Board opened this docket to investigate, among other matters, whether Entergy VY “should be required to cease operations at the [VY Station], or take other ameliorative actions, pending completion of repairs to stop releases of radionuclides, radioactive materials, and, potentially, other non-radioactive materials into the environment.” Docket No. 7600, Order of February 25, 2010, p. 8 (hereinafter “February 25 Order”).

In establishing the docket, the Board expressly noted the possibility that it might be preempted by Federal law from taking any action in response to the leaks, observing that “it is clearly established that the Board would be preempted from attempting to regulate Vermont Yankee based on radiological safety.” *Id.* p. 6. While the Board noted that it “retains significant authority in other areas of traditional state regulation,” *id.*, it also stated that such authority does not exist where it “conflicts directly with the NRC’s exercise of its federal jurisdiction [or] frustrates the purposes of the federal regulation,” *id.* p. 7.

Thus, while the Board opined that there was a “colorable claim that [it] is not fully preempted from exercising its state regulatory authority to take action in response to the leaks,” it nonetheless concluded that the question of its authority to order ameliorative action “requires more extensive *legal* briefing by the parties.” *Id.* p. 8 (emphasis added); *see also id.* pp. 8-9 (“Among the issues to be explored in this investigation will be the extent to which federal

preemption limits our authority to take action in response to the leaks.”). Under the current schedule, such legal briefing concerning the Board’s authority is due on May 18, 2010.

At the prehearing conference held on March 10, 2010 (hereinafter “the March 10 prehearing conference”), the Board repeatedly explained that, in light of the preemption issue and concerns around the Board’s jurisdiction, discovery in the matter would proceed in phases, with a first phase limited to facts pertinent to the Board’s jurisdiction over the instant tritium leakage. As members of the Board explained:

How about we start with Entergy. It files testimony or an affidavit within one to two weeks describing what is happening regarding the leak, including status of the efforts to find and fix the leak. What is in the discharge – what is in – what elements are in the discharges, and in what amounts, other than tritium and water, I guess. But anything else that’s in there. What are the amounts. Both of the volume of the discharge in total as well as the individual components. Where are the leaks or the discharges. And then what impacts, if any, on the environment – on the issues I listed earlier – the environment, land use, economic and reliability of the issues. And then once you filed that, parties can do discovery on that.

\* \* \*

I think the initial testimony that we are asking for the quick turnaround on, is to lay out the facts that we need to decide our jurisdictional question.

\* \* \*

Well the issue is what kind of damage is being done, and do we have jurisdiction over it. That’s the issue.

March 10, 2010 Transcript, pp. 34-35, 38-39.

Confirming the statements made at the March 10 prehearing conference, the March 18 Order states that this docket would proceed in stages, with the initial stage of the docket limited to “whether we can take action and what action we should take in response to the on-going

releases of certain contaminants.” March 18 Order, p. 2. In that regard, the Board ordered Entergy VY to submit testimony on the following specific issues:

- What has happened and is happening now with respect to the releases?
- Where are the discharges located (to the extent that Entergy VY knows)?
- What is being released (including any contaminants), in what amounts, and where?
- What steps is Entergy VY taking to find and fix the leaks?
- What are the impacts of the release from an environmental, land use, public health, reliability, and economic standpoint, including any potential increase in the cost of decommissioning?

*Id.* p. 3.

The Board then ordered discovery “on the testimony,” followed by briefing limited to the issue of the scope of the Board’s jurisdiction:

March 31, 2010	Entergy VY files affidavits in the form of testimony explaining releases
March 31 – April 20	Discovery requests upon Entergy VY (rolling with 10-calendar-day responses)
May 5	Parties file testimony
May 5 – May 20	Discovery requests upon Parties’ Testimony (rolling with 10-calendar-day responses)
May 18	Parties file briefs concerning scope of Board’s jurisdiction

*Id.* at 4.<sup>1</sup>

Although Entergy VY takes the position that the investigation itself is preempted by the NRC’s exclusive Federal jurisdiction, Entergy VY has cooperated with the terms of the investigation. As an initial matter, Entergy VY has provided detailed testimony in the form of

<sup>1</sup> The March 18 Order further stated that the parties have yet to provide any legal or factual basis upon which the Board can act, noting that the Board “has been presented only with generalized information and unspecific concerns.” March 18 Order, p. 2. Presumably, discovery was intended to allow parties to develop a record to support or substantiate their as-yet undisclosed claims. The discovery received by Entergy VY thus far, however, almost exclusively appears to be exploring factual issues that are plainly within the exclusive jurisdiction of the NRC.

sworn affidavits addressing the topics specified in the March 18 Order. Moreover, Entergy VY has provided responses to two sets of discovery requests served on it by CLF, one set that was served on March 31, 2010, and a second set that was served on April 12, 2010.

On April 20, 2010, the last day of the “rolling” discovery period called for by the March 18 Order, three additional parties—the Department of Public Service (“DPS”), the New England Coalition (“NEC”) and the Vermont Agency of Natural Resources (“ANR”)—served written discovery requests on Entergy VY. In addition, the Windham Regional Commission (“WRC”) served discovery requests on Entergy VY late in the discovery period. Altogether the discovery requests have included over 440 individual questions or requests, including 333 during the last days of the discovery period from WRC, NEC, ANR and DPS.

Beginning on April 24, 2010, the VY Station began a refueling outage that is expected to last approximately one month, during which time Entergy VY will not only refuel the station but will also perform necessary maintenance and repairs on VY Station’s systems. As set forth in the accompanying affidavit of Glen Lozier:

Among the tasks in the original outage schedule that VY Station employees are scheduled to perform include refueling, preventive maintenance on several electrical buses and batteries, replacement of several service water valves and pipes, condenser tube sleeving, replacement of several control rod drives and some reactor internals, main steam relief valve replacement, torus cleaning, preventive maintenance on turbine controls, some AOG pipe replacement, feed pump motor replacement, condensate pump replacement, and primary containment testing. There are also numerous routine tests and preventive maintenance that can only be done when the plant is shutdown. The outage schedule contains nearly 6,000 activities.

Docket No. 7600, Affidavit of Glen Lozier, dated April 30, 2010, ¶ 5 (hereinafter “Lozier Affidavit”). During this one-month period, many of the VY Station employees critical to responding to the hundreds of discovery requests received during the last days of the discovery

period will be working around-the-clock on the outage's critical maintenance and repair projects.

*Id.* ¶ 11. Indeed, the VY Station will be calling on the services of numerous Entergy VY employees from outside Vermont as well as over 800 non-Entergy VY technicians and experts.

*Id.* ¶ 7.

## **II. Argument**

Under V.R.C.P. 6 and 16.2, as applied to Board proceedings under its Rule 2.103, the Board may amend or extend a scheduling order upon a showing of good cause. *See, e.g., Pet. of Lyndonville Elec. Dept.*, Docket No. 7067, Order of 5/12/06, p. 2 (granting a motion for enlargement because, among other reasons, adherence to the schedule would result in wasted time and resources). Under the circumstances of this docket as shown below and through the Lozier Affidavit, good cause exists to extend the schedule to respond to pending discovery requests, file testimony and brief the legal issues associated with the first stage of this docket.

First, Entergy VY has received several hundred distinct requests from multiple parties, including requests for a voluminous production of documents, to which it would be impossible to respond with any reasonable efforts in the time allotted, particularly given the need of Entergy VY employees to safely and efficiently manage the scheduled outage that began last weekend. Second, the requests go well beyond the limited discovery that the Board permitted in this initial phase of the docket. And third, it is unreasonable to require Entergy VY to respond *now* to hundreds of requests concerning radiological safety issues and plant operation when the Board has requested briefing on the extent of the Board's authority to address these and other issues, and thus a determination on this jurisdictional question may moot the requested discovery.

**A. Entergy VY's Time to Respond to All Discovery Should be Enlarged in Light of the Scheduled Outage**

As an initial matter, the Board should enlarge the time for Entergy VY to respond to the discovery requests in light of the critical repair and maintenance work being performed at the VY Station during the one-month planned outage that began on April 24, 2010. During the outage, the staff on-site at the VY Station will double in size, working in around-the-clock shifts, seven days a week, to perform tasks such as maintenance, refueling and the work necessary to remediate the tritium leakage. Lozier Affidavit, ¶¶ 3-6. During this time, Entergy VY's technical employees will be devoting nearly all of their time and energy to performing work necessary to ensure that the VY Station operates safely and efficiently when it is returned to service. *Id.* ¶ 7. These include the same employees whose knowledge is essential to responding to the hundreds of remaining discovery requests. *Id.* ¶ 11.

Given the several hundred requests received from the remaining parties on the last day of the discovery period and the critical work being done by the employees of the VY Station during the outage, it would place an undue burden on Entergy VY to require it to respond to the discovery requests during the short time-frame allotted in the Board's March 18 Order. Entergy VY believes that it was not the Board's expectation that Entergy VY would be presented with the volume of questions and document requests it has received, nearly all at the end of the discovery period, and thus believes that it was not the Board's intent to place Entergy VY under the existing burden it is now facing. As such, Entergy VY requests that the Board enlarge the time to respond to the remaining discovery requests until after the current outage.<sup>2</sup>

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<sup>2</sup> Entergy VY communicated its intention to seek scheduling relief to the parties. CLF supports a limited extension and a commensurate adjustment to the rest of the schedule; WRC supported a reasonable extension of time; the DPS supported a three-week extension; and NEC and the Vermont Natural Resources Council supported a limited extension, with a corresponding adjustment to the schedule. No party agreed to extend the schedule beyond the refueling outage.

**B. The Requesting Parties Have Disregarded the Limits on Discovery Set by the Prehearing Conference Memorandum.**

As described above, the Board's March 18 Order set forth the scope of the first stage of the docket. Entergy VY was required to submit testimony concerning the releases of contaminants at the VY Station, steps being taken to find and fix such releases and the effects of those releases, as may be relevant to the jurisdiction of the Board. March 18 Order, pp. 3-4. That testimony was provided by Entergy VY. The March 18 Order then provided the requesting parties an opportunity to take discovery concerning Entergy VY's testimony on the precisely-defined set of topics.

Unfortunately, the parties requesting discovery from Entergy VY have, in substantial measure, ignored the March 18 Order's limits on discovery for this phase of the case. Read as a whole and in many particular instances, the requests go well beyond the particular categories of information concerning the leakage that were requested by the Board and instead seek broad and burdensome discovery concerning other aspects of the leakage, radiological safety issues and the VY Station's operations.

Examples of discovery requests going beyond that authorized for this phase of the docket are found throughout the requests served on Entergy VY. For instance, ANR's discovery requests included the following:

Q.ANR:EN.1-29: Please identify the location of any and all spills containing cesium-137 that may have occurred in the past 40 years. Produce any and all documents on which you rely for your response.

This request—representative of six requests in the ANR discovery requests concerning cesium and numerous other requests concerning radioactive substances other than tritium or radioactive substances generally—has nothing to do with the March 18 Order's focus on the particular

leakage that is the subject of this docket. The request is even more burdensome given that it asks for information concerning unspecified cesium spills over a *40-year period*.

Other parties have also misapplied the discovery provided for in the March 18 Order to launch a fishing expedition into other, unspecified leaks. WRC, for instance, submitted the following request:

Q.WRC:EN.1-13: Have there been leaks of radionuclides from either buried or underground pipes at other Entergy plants? Please describe any leaks that have occurred, the cause of each (if known), and how each was remediated including the costs. The purpose of this question is to assist the parties and the public to understand the recent ENVY leak relative to industry experience.

While WRC attempts, in the final sentence of the request, to justify the request by reference to the tritium leakage, nothing in the March 18 Order opens the floodgates to any discovery concerning “industry experience” with leaks, nor is it apparent why such discovery would be relevant to the issues presented in this initial phase of the docket. Moreover, the WRC request is burdensome as it contains no date limitations.

Other discovery requests served on Entergy VY ask for responses that concern aspects of the VY Station’s construction and operation well beyond the tritium leak and Entergy VY’s response to the tritium leakage. For example, NEC propounded the following requests:

Q.NEC:EN.1-6: Please provide all documents regarding the siting, drilling, and sampling of groundwater test wells at the Vermont Yankee site since 2002.

\* \* \*

Q.NEC:EN.1-15: Please provide the number and location of all drains existing in pipe tunnels at the VY station.

- a. Please indicate whether or not these drains are clogged, and how Entergy has determined this information.

b. Please explain how Entergy has addressed, or plans to address, the potential for these drains to be or become clogged.

c. Does Entergy have plans to investigate and address potential clogging or the existence of construction debris in other pipe tunnels? If so, please provide those plans and all relevant documentation.

\* \* \*

Q.NEC:EN.1-39: Please provide any documents, including all correspondence, meeting minutes, notes, reports, etc. filed or shared or exchanged with the US Nuclear Regulatory Commission regarding tritium leak(s) and/or aging management and material condition of buried or underground piping, and/or AOG and/or condensate tank since August 1, 2009.

Likewise, ANR and other parties submitted the following onerous and overly broad requests that, while they may touch in some particulars on the specific tritium leakage and Entergy VY's response to it, call for vast quantities of information unrelated to the specific leakage:

Q.ANR:EN.1-15: What do you mean by "we will benchmark the industry to determine best practices;"

- a. How will you determine the benchmark?
- b. How many plants will be utilized to determine the benchmark?
- c. Identify the names of the nuclear power plants that will be evaluated in determining benchmark
- d. Identify the similar and distinguishing characteristics of the plants to which you will refer in determining benchmark
- e. Identify any and all plants discarded and explain why, in determining the benchmark
- f. For what period of time will the benchmark be determined?

g. For what practices are you determining best practices

h. Identify any and all practices that are going to be evaluated and benchmarked.

Q.ANR:EN.1-45: Please produce any and all documents that Entergy VT has in its possession having to do with the human health effects of tritium. Please provide any and all documents on which you rely for your response.

Q.ANR:EN.1-46: Please produce any and all documents that Entergy VT has in its possession having to do with the environmental effects of tritium. Please provide any and all documents on which you rely for your response.

Q.ANR:EN.1-47:

- a. How is tritium handled within the facility?
- b. How is tritium disposed within your facility?
- c. Produce all documents on which you rely for this response including all permits governing the discharge of tritium and guidance documents.

Q.NEC:EN.1-15: Please provide the number and location of all drains existing in pipe tunnels at the VY station.

- a. Please indicate whether or not these drains are clogged, and how Entergy has determined this information.
- b. Please explain how Entergy has addressed, or plans to address, the potential for these drains to be or become clogged.
- c. Does Entergy have plans to investigate and address potential clogging or the existence of construction debris in other pipe tunnels? If so, please provide those plans and all relevant documentation.

With respect to these and similar requests, Entergy VY agrees that some aspects of the questions are within the scope of the March 18 Order as pertaining to the leakage in question, and Entergy

VY will be prepared to respond to those aspects (to the extent the requests are not otherwise objectionable), but the requests as phrased go far beyond the scope of the authorized discovery.

The DPS served five requests, but they broadly concern Entergy VY's past, present and future plans to implement a set of industry-recommended practices concerning general groundwater protection. The DPS requests included:

Q.DPS:EN.1-1: The Nuclear Power Industry has agreed to implement the Nuclear Energy Institute (NEI) "Industry Ground Water Protection Initiative - Final Guidance Document" NEI 07-07 [Final] dated August 2007 (GPI). Please produce the initial plan and schedule on how Entergy would meet the objectives of the GPI at the Vermont Yankee Nuclear Power Station ("VY").

Q.DPS:EN.1-2: Please specify in detail the progress Entergy made in implementing the GPI at VY up until the discovery of elevated tritium in a ground water sampling well in January 2010.

Although such plans do relate in part to the tritium leakage and Entergy VY's efforts to remediate that leak, the subject matter of these requests from the DPS concerns far more than just the specific tritium leakage incident, which is the specific subject matter for discovery set forth in the March 18 Order.

Many other requests go beyond the bounds of the discovery concerning facts pertaining to the leakage and the response to the leakage by asking Entergy VY to second-guess decisions made not only with respect to the tritium leakage, but even decisions made years ago. For example, the DPS submitted the following request:

Q.DPS:EN.1-3: Under the GPI, if additional test wells other than the three placed into service in 2007 were to be installed prior to January 2010 at VY, please explain in detail why their installation was postponed.

Q.DPS:EN.1-4: What other parts of the GPI plan for VY were not implemented on schedule prior to January 2010? Please explain in detail why implementation was not accomplished.

Likewise, NEC requested:

Q.NEC:EN.1-23. Admit that one means of slowing or stopping the flow of fluid or tritium from the identified leak points would have been to shut down and depressurize the entire system?

- a. Why wasn't this done? Please provide all relevant documentation supporting your answer.

Q.NEC:EN.1-24: Admit that, all other things remaining equal (including the amount of time it took to find the source of the leak), if the plant had been shut down as soon as the tritium leaks were detected, less tritium would have been emitted into the soil and groundwater at VY.

All told, the above-cited requests, as well as those additional requests noted in the attached Schedule A, are not within the scope of discovery in this phase of the docket, which the Board has limited to factual details concerning the current leakage, the steps actually taken to ameliorate the leakage and the effects of the leakage. Rather, some parties are using the present investigation to engage in a fishing expedition for information about the past and present operation of the VY Station and to speculate as to why various safety, construction and operations measures have not been taken.

It may be, in some phase of the docket, that the discovery listed in Schedule A will become relevant. It is not relevant, however, in the current phase of the investigation. Entergy VY thus seeks an order enlarging the time it has to respond to the requests listed in Schedule A until the docket has proceeded to a phase where such discovery has become relevant.

**C. Certain Discovery Requests Are Premature in Light of the Briefing on the Extent of the Board's Jurisdiction**

As described above, the Board itself has observed that issues of Federal preemption will play a central role in defining the scope of this docket and consequently has directed the parties to submit briefing on the issue of the Board's authority with respect to the tritium leak. Entergy VY intends to argue in that briefing that Federal law preempts requiring Entergy VY to respond to many of the discovery requests submitted by the other parties to this

docket and that Federal law preempts the Board from ordering any ameliorative or other action in response to the leakage. Entergy VY believes that it would be inequitable to require the company to respond to burdensome discovery *now*, before the jurisdiction of the Board in this docket has been finally settled.

Importantly, this is precisely the approach—designed to avoid unnecessarily wasting the resources of the parties and the Board—that was repeatedly articulated by the Board members at the March 10 prehearing conference. For example, members of the Board explained:

The preemption claim obviously is something that we have to be aware of. We don't want to be spending the resources of everybody here, depending on how that determination comes out, we don't want to be spinning our wheels like the little robot in the python in Vernon.

\* \* \*

[B]efore we spend a lot of time and effort by all the parties, in — potentially in areas that may go into things that we don't have jurisdiction over, probably it would be better to try to just get this jurisdiction thing squared away first.

\* \* \*

But I was — mostly wanted to focus on the facts we needed in order to decide the jurisdictional question before we get to the other more major issues in this docket.

March 10 Transcript, pp. 30, 45, 50. While the Board did permit some basic factual inquiries prior to jurisdictional briefing, these statements make clear the Board's concurrent concern that the parties not waste resources with extensive discovery into potentially preempted areas.

Given this concern with avoiding extensive, potentially mooted discovery prior to a final determination of the Board's authority, it is also important to foreshadow that Entergy VY will argue in its May 18 brief that the Board's current position as to the reach of the NRC's exclusive jurisdiction—that it potentially does not preempt the Board from addressing issues of plant

operation of radiological safety, if there is some economic, land use or other ostensibly non-preempted rationale for the Board action—is too narrow and that any action by the Board in response to the leakage at the center of this investigation is preempted by Federal law. That is because, as a string of decisions by the Supreme Court and courts of appeal have stated, state regulation of the construction and operation of nuclear facilities is preempted *even if* such regulation is intended to address economic or non-radiological-safety issues.

The Supreme Court, for example, has explained that “state regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation, ‘*even if enacted out of non-safety concerns*, would nevertheless infringe upon the NRC’s exclusive authority.’” *English v. General Electric Co.*, 496 U.S. 72, 84 (1990) (quoting *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212 (1983)) (emphasis added). While the Supreme Court held in *PG&E* that Federal law does not preempt the ability of a state, in regulating utilities, to prohibit altogether the construction of a nuclear plant by a utility based on economic concerns, the Court expressly distinguished that scenario from a state attempting to employ the same economic concerns to regulate the construction or operation of a plant once approved:

we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of non-safety concerns*, would nevertheless directly conflict with NRC’s exclusive authority over plant construction and operation.

461 U.S. at 212 (emphasis added). Thus, the Court has established that state regulations promulgated out of non-safety concerns are preempted whenever such regulations “have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels.” *English*, 496 U.S. at 85.

Following the Supreme Court’s rationale, the lower Federal courts have held that state laws and regulations passed and promulgated even for non-radiological-safety reasons, such as economic concerns, are preempted by exclusive Federal jurisdiction over the safety and operation of nuclear plants. *See, e.g., United States v. Manning*, 434 F.Supp.2d 988, 995 (E.D. Wash. 2006) (striking down state law concerning the release of “mixed” radiological and non-radiological waste, holding that “even if a state law were not motivated by radiological safety concerns, it would still be preempted if it so related to radiological safety as to effectively infringe upon the field preempted by the AEA”) (affirmed, *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008)).

Under these decisions, it is not determinative that there may be “economic” or other non-safety issues arising from the leak that could be taken into account by the state in deciding whether to permit the construction of a proposed utility plant. The VY Station is obviously not a proposed utility plant. Because the leakage is related to the operation and radiological safety of an existing plant, it necessarily falls within the preempted sphere. As Entergy VY intends to brief on May 18, the Board is therefore without authority to order any action by Entergy VY with respect to the leakage.

Notably, courts have held that this preemption extends not only to substantive dictates concerning plant operation but also to investigations of plant construction and operation, even when premised on non-radiological-health-and-safety concerns. For instance, in *County of Suffolk v. Long Island Lighting Company*, the Second Circuit affirmed the dismissal of a complaint by the County of Suffolk seeking an order allowing it to inspect an under-construction nuclear plant “essential to safety, *reliability, and economy of operation*” and an injunction against the operation of the plant. 728 F.2d 52, 56 (2d Cir. 1984) (emphasis added). Despite the

fact that the county's complaint relied heavily on the economic effects of and reliability concerns pertaining to the plant's construction and operation, the Second Circuit explained that:

To grant either of these actions would plainly intrude on areas of exclusive NRC jurisdiction. Pursuant to 42 U.S.C. § 2021(c)(1), the NRC retains responsibility to regulate "the construction and operation of any production or utilization facility." This necessarily includes the authority to inspect nuclear power plants. The NRC can, if it chooses, delegate this authority to the states, 42 U.S.C. § 2021(i), but it has not done so here.<sup>3</sup> Instead, through May, 1982 the NRC has undertaken a rigorous, systematic program consisting of 146 regular and three special on-site inspections of Shoreham. Since September 30, 1979 the NRC has assigned permanent inspectors to Shoreham for purposes of making daily inspections. Under the standard of preemption enunciated by the Supreme Court in *Pacific Gas*, a court ordered inspection, whether it be for safety or non-safety reasons, would obviously invade the NRC's exclusive regulatory province. Similarly, an injunction that even temporarily shuts down the Shoreham facility would infringe on the NRC's authority over construction and operation.

*Id.* at 59-60.

Here too the NRC has conducted an inspection of the company's response to groundwater contamination. Indeed, the instant situation provides a good example of why the NRC's authority over plant safety and operation should preempt concurrent state authority, as (for the reasons given above) requiring Entergy VY personnel to respond to burdensome discovery requests in this state investigation during an outage has the potential to detrimentally impact the ability of those personnel to perform their vital outage tasks, tasks that are connected with the safety and operational matters regulated by the NRC.

In light of this case law, there is, at a minimum, a substantial question as to the extent of the Board's jurisdiction both to take action in response to the leakage and to require discovery concerning the leakage, even if motivated by non-radiological-safety concerns such as concerns

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<sup>3</sup> Vermont is not a so-called "Agreement State," meaning no authority has been delegated to it by the NRC.

regarding the economic impact (if any) of the leakage. Given this uncertainty, Entergy VY believes that it should not be required at present to respond to the discovery requests outlined in the attached Schedule B, as those requests relate to issues having a direct and substantial relationship to radiological safety and/or the operation of the VY Station, issues that are under the NRC's exclusive jurisdiction. Once the question of the Board's authority has been resolved, then, as the Board previously suggested was the approach to be taken in this docket, Entergy VY will respond as necessary to these questions.

As seen in Schedule B to this Motion, the vast bulk of the discovery propounded by the requesting parties goes to issues that, Entergy VY intends to argue, are preempted by Federal law because they concern radiological safety or operational issues. For example, the following requests, examples of those set forth in Schedule B, relate directly to the preempted issue of radiological safety:

Q.ANR:EN.1-16: Has VY ever evaluated the risk of radionuclide leakage for applicable structures, systems, and components?

- a. Identify any and all inspections and evaluations undertaken, for what structures, systems, and components, and for what period of time.
- b. If there have been evaluations for the risk of radionuclide leakage for applicable structures, systems, and components, identify any and all risks previously noted or reported and identify and explain any and all remediation or corrective or preventative actions taken to prevent such leakage.

Q.ANR:EN.1-27: In CLF- EN-I-2, CLF asked you to admit that there have been leaks of radioactive material and radionuclides at the VT Yankee Nuclear Power Facility in Vernon, VT. Specifically, have there been any releases of cesium -137 at the VT Yankee Nuclear Power Facility? Produce any and all documents on which you rely for your response.

Q.ANR:EN.1-45: Please produce any and all documents that Entergy VT has in its possession having to do with the human health effects of tritium. Please provide any and all documents on which you rely for your response.

Q.ANR:EN.1-46: Please produce any and all documents that Entergy VT has in its possession having to do with the environmental effects of tritium. Please provide any and all documents on which you rely for your response.

Q.NEC:EN.1-7: Were borings (soils brought to the surface during drilling) from any test wells in the GZ series subjected to radiological measurement and/or analysis?

- a. If not, why not?
- b. If so, please provide the results of the testing and all relevant working documents (for example, correspondence, logs, notes, work orders, plans, condition reports, quality assurance reports, protocols, manuals, templates, meeting agendas and minutes, instrument printouts, etc).

Q.NEC:EN.1-8: Were workers engaged in AOG vicinity excavations in response to the tritium leak at any time obliged to wear radiation protective gear, such as gloves, booties, suits, head-covering, and or respirators or filter-masks?

- a. If so, why and which ones? If not, why not?
- b. Does Entergy VY agree that risk from radiation dose is cumulative and therefore it is desirable to minimize exposures where practicable?
- c. Does Entergy agree that exposure to background radiation may have negative health consequences?
- d. Does Entergy agree that exposure to any amount of radiation over and above background radiation may have negative health consequences?

Q.NEC:EN.1-33: Admit that the presence of tritium in fish present in the Connecticut River may increase over time due to bioaccumulation.

Q.NEC:EN.1-34: In Answer 8 on page 4, Mr. Hardy states at lines 18-19 that a low energy beta particle cannot penetrate the

[human] skin. How does this apply to radiation dose or exposure from ingestion of tritiated water or inhalation of tritium gas?

- a. Does Mr. Hardy have any information regarding what a beta particle from tritium can and cannot penetrate once tritium is inhaled or ingested? Please provide this information, and the basis for Mr. Hardy's testimony.

Q.WRC:EN.1-13: Have there been leaks of radionuclides from either buried or underground pipes at other Entergy plants? Please describe any leaks that have occurred, the cause of each (if known), and how each was remediated including the costs. The purpose of this question is to assist the parties and the public to understand the recent ENVY leak relative to industry experience.

Similarly, the following requests, again merely examples of those set forth in Schedule B, relate directly to the preempted issue of plant operation:

Q.NEC:EN.1-15: Please provide the number and location of all drains existing in pipe tunnels at the VY station.

- a. Please indicate whether or not these drains are clogged, and how Entergy has determined this information.
- b. Please explain how Entergy has addressed, or plans to address, the potential for these drains to be or become clogged.
- c. Does Entergy have plans to investigate and address potential clogging or the existence of construction debris in other pipe tunnels? If so, please provide those plans and all relevant documentation.

Q.ANR:EN.1-9: The Nuclear Power Industry has agreed to implement the Nuclear Energy Institute (NEI) "Industry Ground Water Protection Initiative - Final Guidance Document" NEI 07-07 [Final] dated August 2007 (GPI). Please produce the initial plan and schedule on how Entergy would meet the objectives of the GPI at the Vermont Yankee Nuclear Power Station ("VY").

Q.ANR:EN.1-15: What do you mean by "we will benchmark the industry to determine best practices;"

- a. How will you determine the benchmark?

- b. How many plants will be utilized to determine the benchmark?
- c. Identify the names of the nuclear power plants that will be evaluated in determining benchmark
- d. Identify the similar and distinguishing characteristics of the plants to which you will refer in determining benchmark
- e. Identify any and all plants discarded and explain why, in determining the benchmark
- f. For what period of time will the benchmark be determined?
- g. For what practices are you determining best practices
- h. Identify any and all practices that are going to be evaluated and benchmarked.

Q.ANR:EN.1-18: Identify any and all factors that will be considered in deciding whether and in what circumstances to replace or relocate below-grade pipe to above ground.

Q.ANR:EN.1-19: Explain any and all factors that would result in a decision to leave below-grade pipe below ground.

Again, as the Board recognized at the March 10 prehearing conference, forcing Entergy VY to respond to such discovery requests before the Board has had the opportunity to rule on the scope of its jurisdiction, which ruling could render some or all of such requests moot, is both unnecessary and would place an undue burden on Entergy VY. Responding to such discovery prior to the jurisdictional determination is particularly unnecessary given that Entergy VY has fully cooperated with the NRC and other regulatory agencies in responding to, stopping and now remediating the leakage, eliminating any need for speed in the conduct of this docket that may once have been deemed necessary.

CONCLUSION

For the reasons stated herein, Entergy VY respectfully requests that the Board issue an order enlarging the time for Entergy VY to respond to the remaining discovery requests and for parties to prefile responsive testimony until after the present outage has been completed and enlarging Entergy VY's time to respond to the discovery requests set forth in the attached Schedules A and B until after the jurisdiction of the Board has been finally determined and the docket has entered an appropriate phase.

St. Johnsbury, Vermont. April 30, 2010.

Respectfully submitted,

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