

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Docket No. 7600

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

**WRC REPLY TO THE ENTERGY VY MOTION
TO MODIFY THE PREHEARING CONFERENCE MEMORANDIUM AND
TO ENLARGE THE TIME FOR ENTERGY VY TO RESPOND TO PENDING
DISCOVERY REQUESTS**

Entergy VY filed the above referenced motion with the Board and Parties on April 30, 2010. In an order dated May 3, 2010, the Board established Monday, May 10 as the deadline for Parties to comment on that motion.

Windham Regional Commission (WRC) agrees in principle with the request to enlarge the time for Entergy VY to respond to discovery requests, and we support the sequencing of the schedule as established by the Board on March 18, 2010.

Specifically, we agree that Entergy VY should be permitted to complete the current refueling outage, and to then turn its attention to providing responses to all the submitted informational requests. We believe complete

and accurate answers are better than fast answers¹. However, we reject any proposal that would grant extra time for Entergy VY to argue the questions raised by WRC are not relevant to the order of the Board, or to argue jurisdiction and preemption as they relate to these informational requests. Any such proposal should have been rendered shortly after the questions were evaluated by Entergy VY on April 16, 2010, and not late on April 30, 2010, when the answers to the questions were due or past due.

We urge the Board to order that Entergy VY answer all the questions raised by WRC and other parties, and to prohibit Entergy VY from deferring their answers based on still unsubstantiated claims of preemption or jurisdiction, or delaying response until after a jurisdictional briefing they intend to file on May 18, 2010².

We also urge the Board to reconsider the timing of the schedule because a delay in the reply period for discovery against Entergy VY will force a briefing of scope before the filing of testimony and discovery is complete. We believe the sequencing of the schedule as originally defined is appropriate, and the timing should be adjusted to maintain that sequencing.

The Role of WRC

WRC represents 27 towns in Southeastern Vermont and neither supports nor opposes the continued operation of the Vermont Yankee nuclear station. We recognize many important issues in this docket and in docket 7440, chief among them are overall reliability, prompt and complete decommissioning, and critical economic impacts of plant operation and eventual closure. WRC is committed to assisting the public in understanding all the issues, and in providing the public with access to accurate information. The 2006 Windham Regional Plan includes the following policy, which serves as the driving force in our engagement on VY issues:

“4.6(4)(d): Effectively and adequately address all issues related to facility operation and reliability, recognizing that in some instances they are inextricably intertwined with public health and safety.”

¹ At this time it appears the leak(s) which generated this docket have been stopped, and that *continuing* harm from the specific identified tritium leak may have been averted. However, the response to this leak should be used to understand multiple underlying issues that developed here and could become manifest should there be another leak. As such, the critical urgency initially called for is no longer necessary, but undue delay in ascertaining the causes, effects, and underlying issues would be harmful to the region and state, should another leak occur.

² Entergy VY states on page 18 of their April 30, 2010 memorandum that it intends to brief on May 18, 2010 that the Board is “without authority to order any action by Entergy VY with respect to the leakage.”

The Regional Plan includes a Vision Statement on page one which encourages public involvement and the education of our constituents as follows:

“For the Communities...Decision making that encourages public involvement at every stage, and affirms the legal right and obligation of elected and appointed officials to act. An educated and informed citizenry ready to make effective decisions.”

WRC takes these responsibilities very seriously. We have devoted substantial time and resources to representing the regional interest in this case, and in supporting informed public discourse. We were encouraged in early January when Entergy VY responded to the tritium leak and the charges of misrepresentation of “underground pipes” by committing to open and transparent communication, and to providing the public with complete and accurate information. Unfortunately the Motion filed by Entergy VY on April 30, 2010 is contrary to this position.

History of WRC Informational Request in Docket 7440

WRC filed its only informational request electronically on the afternoon of Friday, April 16, 2010. The WRC Executive Director was at the Vermont Statehouse on that date, and included a note with the electronic filing that paper copies would be sent on Monday, April 19, 2010. Paper copies were sent on Monday by prepaid first class mail, as promised. The timing of this filing was dictated by the need for review and approval of the questions at the WRC Energy Committee meeting on April 8, 2010, and at a meeting of the WRC Executive Board on April 13, 2010. Three additional days were scheduled to allow for minor changes and internal consensus approvals. The timing of our informational requests was not targeted to the end of the discovery period, but rather was dictated by internal workload and preexisting meeting schedules.

WRC chose to send our requests electronically on April 16, 2010 rather than the following week because past experience told us to expect other Parties would file questions on or about April 20, 2010, and we wanted to provide Entergy VY with adequate time to deal with our requests on the mandated rolling 10 calendar response schedule. We are confident that Entergy derived the intended advantage.

Subsequent to the filing of our discovery we reviewed the Morgan, Lewis, & Bockius “Report of Investigation” into the charges of misrepresentation of the buried pipe issue provided by Entergy VY³. We make note here that Entergy

³ This report was filed in docket 7440 on or about April 22, 2010.

VY's typical internal process of discovery triage is detailed on page 48, and begins with an immediate review of any informational requests, often within minutes of receipt. WRC believes Downs, Rachlin & Martin, acting on behalf of Entergy VY, received our request and began the process of triage on April 16, 2010.

On April 27, 2010 Downs, Rachlin & Martin filed a letter stating that they would not be able to provide timely answers to any of the pending discovery requests due to the volume of questions and the time pressures of the ongoing refueling outage, and that additionally they intended to file a motion to defer based on jurisdiction and preemption. WRC responded the same day by stating that we did not object to "a reasonable extension," but noted that our questions had been filed on April 16, 2010, and 11 days had already elapsed. In that letter we stated the following:

The WRC is represented pro se and does not have the expertise to argue the limited jurisdiction that Entergy VY asserts, nor do we have the expertise to offer legal arguments regarding alleged preemption. However, we believe the public interest is served when needed information is forthcoming and not withheld unreasonably, and that is especially so when deception or misrepresentation are alleged as they have been in this case. Entergy VY, other parties, and the public deserve a full airing of all the issues brought forward in this Docket.

On April 29, 2010 WRC received a telephone message from John Marshall of Downs, Rachlin & Martin stating that Rules of Civil Procedure do not recognize an electronic filing. While we accept the Rules of Civil Procedure, we must make it clear that Entergy VY received our questions on April 16, 2010, and we believe they had ample opportunity to immediately review those questions and begin the process of triage and reply, as is their standard protocol. It is disingenuous for Entergy VY to claim all the discovery questions arrived at roughly the same time, or that they could not respond to our questions until the paper copy was served. We had hoped Entergy would recognize the overriding public interest in transparency and open communication, and not lean on legal technicalities to avoid answering reasonable questions. We are disappointed.

On April 30, 2010 Entergy VY filed a motion to defer answering all pending questions by ANR, DPS, WRC, and NEC, identifying several of those questions as potentially preempted, irrelevant, or of debatable jurisdiction⁴.

⁴ WRC finds it especially troubling that three of the four parties to be denied discovery are government entities representing the state or municipalities.

Although Entergy VY appears to believe that at least some of the pending questions meet all the standards set by the Board, to date they appear to have made no effort whatsoever to deliver the requested information.

Instructions from the Board

On January 27, 2010 the Board held a status conference for docket #7440, the CPG extension case, and expressed grave concerns about inaccurate statements made to the Board, and to other state agencies and investigators regarding the existence of underground pipes⁵. The Chair read a statement into the record that included the following:

14 Obviously one area of concern is the
 15 particular statements made under oath before
 16 the Board, but it appears that the issue is
 17 broader and that Entergy may have provided
 18 false information for an extended period of
 19 time not only to us under oath here in the
 20 hearing room, but also to the Department, to
 21 the state's contractors conducting the
 22 comprehensive vertical audit, to the Public
 23 Oversight Panel, to the Legislature, and to
 24 the public. These statements would seem to
 25 date at least as far back as the preliminary

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1 discussions on the scope of the comprehensive
 2 vertical audit since they were relied upon by
 3 Nuclear Safety Associates and the Public
 4 Oversight Panel in defining the scope of the
 5 work for the audit, and if some press reports
 6 are accurate, Entergy's denials continued
 7 through the fall of last year.

8 To compound the problem it appears that
 9 Entergy did nothing to correct the record. It
 10 should go without saying, but perhaps Entergy
 11 needs to hear it anyway, such conduct is

⁵ Entergy has expressed concern about the volume and substance of questions raised in docket 7600, and complained that some drift away from the testimony they have filed. It should be understood that Parties are responding, in part, to Entergy VY's own failure to completely and accurately answer questions about pipes in Docket 7440. Parties rely on the integrity of testimony and answers to discovery. To the extent that past misrepresentations cause Parties to be suspicious of the information Entergy has provided in this docket, it is reasonable for them to ask more probing and far reaching questions here. That suspicion is of Entergy VY's own making.

12 absolutely unacceptable. Our decision in this
 13 proceeding, the case as presented by the other
 14 parties, and the Legislature's own parallel
 15 determination all depend on Entergy providing
 16 timely, accurate, and complete information.

On February 25, 2010, Docket #7600 was opened by the Board in response to the ongoing leak of radioactive material. The title of this docket includes three specific areas of interest including: should the plant be shut down or should other actions be taken to reduce the impact of the leak(s), should the current operating certificate be modified (Docket 6545), and should penalties be assessed.

The Board has made clear that preemption is established with regard to radiological safety, but holds that significant authority exists in other areas:

With respect to federal preemption, it is clearly established that the Board would be preempted from attempting to regulate Vermont Yankee based on radiological safety. However, it is also well established that the Board retains significant authority in other areas of traditional state regulation. This retained state authority includes some regulation related to the land-use and economic issues (including reliability issues) associated with nuclear material, other than matters of radiological safety.⁶

It appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs. Increased site contamination could also delay the completion of the decommissioning process, which in turn could affect the future economic use of the site. These concerns do not fall within the preempted sphere of radiological health.⁷

Even if we were ultimately to conclude that we were preempted from closing down the plant, however, there may be other non-preempted actions we could take to ameliorate economic and land use impacts of the leaks.⁸

On March 10, 2010 the Board convened a Prehearing Conference to consider the scope and schedule for this docket. The Chair initially identified the scope and read the three elements in the title of the docket as follows:

⁶ Order of the Board, February 25, 2010, page 6

⁷ Order of the Board, February 25, 2010, page 8

⁸ Order of the Board, February 25, 2010, page 8

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1 CHAIRMAN VOLZ: Good afternoon. We are
2 here this afternoon in Docket Number 7600,
3 which is the investigation into one, whether
4 Entergy Nuclear Vermont Yankee and Entergy
5 Nuclear Operations should be required to cease
6 operations at the Vermont Yankee Nuclear Power
7 Station or take other ameliorative actions
8 pending completion of repairs to stop releases
9 of radionuclides, radioactive materials, and
10 potentially other non radioactive materials
11 into the environment; two, for good cause to
12 exist or revoke the 30 V.S.A. section 231
13 Certificate of Public Good issued to Entergy
14 Vermont Yankee; and three, whether any penalty
15 should be imposed on Entergy Vermont Yankee
16 for any identified violations of Vermont
17 statutes or Board orders related to the
18 releases.

Shortly thereafter the following exchange occurred between the Chair and Sarah Hoffman of DPS (underline added):

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2 CHAIRMAN VOLZ: All right. Thank you.
3 I think from our perspective, when we opened
4 the order, one of the issues in this case
5 could be, when we opened this docket, one of
6 the issues in the case could be whether or not
7 a show cause order should issue. We didn't
8 rule on that in the other case. Instead of
9 ruling on it in the other case, we opened this
10 investigation, and that is one of the things
11 that we could consider.
12 We can also consider what level of
13 jurisdiction we have over the matters that
14 might be the subject of this docket. What we
15 do think that it also might -- one of the
16 issues that might be part of this case would
17 be what's being released into the environment
18 right now, in what quantities, what are the
19 impacts of those things that are being
20 released, in particular the environmental
21 impacts, the land use impacts and the economic
22 and reliability impacts. So those are

23 subjects -- things that we could look at, and
24 also what is the status of efforts by Entergy
25 to fix the leak.

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1 So I guess we need to construct a
2 schedule for going forward to address those
3 issues. And I wondered if anybody had any
4 ideas about a schedule.

5 MS. HOFMANN: The only other thing I
6 would add before I handed it over to Ms.
7 Levine, is that we see the second piece, the
8 investigation into the possible revocation of
9 the Certificate of Public Good or the
10 modification, to be a much broader scope than
11 the other two issues which is the leak and its
12 ramifications and the penalties, so we see
13 that second piece as really having a much more
14 in-depth schedule than perhaps the other ones.

15 CHAIRMAN VOLZ: I didn't mean to suggest
16 that the items that I identified were the
17 entire scope of what could be addressed by
18 this docket. It was just some of the things
19 that came to our mind at the outset.

Later in the hearing an exchange took place between Chairman Volz and attorney Marshall, who was speaking for Entergy VY, in which the Chair identified the need for an investigation prior to arguments regarding jurisdiction:

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12 CHAIRMAN VOLZ: Well one of the things
13 that occurs to us if you jump straight into
14 the jurisdiction, it seems like in order to
15 decide the jurisdiction question, you might
16 need a factual basis.

17 MR. MARSHALL: That is a fair
18 observation. And I would point out that there
19 is extensive factual information that the
20 company has made public that is on the
21 Department of Health's Web site⁹.

⁹ Importantly, WRC believes that the information Entergy points to is not part of the record in this docket.

On March 18, 2010 the Board issued a Prehearing Conference Memorandum in which the Board listed the three issues in the title of the docket and then said¹⁰:

The initial stage of this investigation will focus on the first issue above – whether we can take action and what action we should take in response to the ongoing releases of certain contaminants.

The statement included footnote #2 which said¹¹:

Obviously, to the extent that appropriate relief for the unpermitted discharges is modification or revocation of the CPG, the initial stage of this investigation will encompass the second issue. We do not intend to undertake a broader examination of issues related to the CPG in the first stage of this proceeding.

The March 18 Prehearing Conference Memorandum then established a schedule that required Entergy VY to submit, within two weeks, sworn affidavits in the form of testimony on a variety of topics related to the leak, and then stated:

Following Entergy VY's filing, other parties may engage in discovery on the testimony and file responsive testimony.¹²

The Board did not place any limit on the nature of the discovery, other than it should be on “the testimony.” The Board then issued a schedule for this docket that sequenced activities as follows:

- Entergy VY files affidavits in the form of testimony explaining releases
- Discovery requests upon Entergy VY
- Parties file testimony
- Discovery requests upon Parties' testimony
- Parties file briefs concerning scope of Board's jurisdiction¹³.

It is abundantly clear the Board recognized a need for discovery upon the testimony filed by Entergy VY and for parties to then file testimony and receive discovery on their testimony, before the issues of jurisdiction or

¹⁰ Prehearing Conference Memorandum, March 18, 2010, page 2

¹¹ Prehearing Conference Memorandum, March 18, 2010, page 2

¹² Prehearing Conference Memorandum, March 18, 2010, page 3

¹³ WRC is represented pro se. We do not anticipate separately briefing jurisdiction or preemption. We have raised some questions and concerns about jurisdiction and preemption in this reply, and hope that Parties with representation will address them where appropriate.

preemption can be adequately argued. The Board has recognized a great deal of space in which claims of preemption do not apply, including costs and timing of decommissioning. It is also apparent that the Board understands issues of modification to docket 6545 might rightly belong in the first stage of this investigation. Further, it is clear this docket will likely be far deeper than just the first topic in the title.

It troubles us that Entergy VY has stated their intent to brief on May 18, 2010 that “...*the Board is therefore without authority to order any action by Entergy VY with respect to the leakage.*”¹⁴ We are concerned that any such briefing filed prior to the completion of Party testimony and discovery responses could undermine this docket, and might very well preclude a complete understanding of actions that lead to the leak, actions that increased or decreased the level of contamination, all issues related to the leak itself, the impacts upon the decommissioning cost and timing caused by the contamination of the ground, and the corporate structures and incentives that allowed this leak to flow for a period of time and which might affect how future leaks are addressed.

While it may be that some of the discovery questions filed upon Entergy VY by some of the parties are outside the proposed initial scope of review, they appear to fall within the overall scope of this docket, and there may well be a nexus to topics that have been identified by the Board as subject to review now, that will not become apparent until the questions are answered and briefs are filed. The very questions of jurisdiction and preemption may well rest on information gathered through the process of prefiled testimony and unfettered discovery. Further, to the extent that any discovery question naturally follows the actual testimony of Entergy VY witnesses, it should be accepted as within the direction of the Board provided in the March 18, 2010 Prehearing Conference Memorandum (“*Following Entergy VY’s filing, other parties may engage in discovery on the testimony and file responsive testimony.*”)¹⁵.

It is also apparent that findings of earlier misrepresentation in statements and testimony about underground pipes could have substantial affect upon questions of both jurisdiction and preemption, and are central to this docket and an understanding of the leak. Therefore, questions that seek to determine the source and nature of that misrepresentation would seem to fall within the scope of this docket, and should be addressed through discovery prior to any arguments of jurisdiction or preemption¹⁶. We also argue that

¹⁴ Entergy VY Motion to Modify, dated April 30, 2010, page 18

¹⁵ Prehearing Conference Memorandum, March 18, 2010, page 3

¹⁶ There is no other place to raise these questions before jurisdiction and preemption are briefed. It is our understanding that docket 7440 is currently closed.

any misrepresentations and evasive answers by Entergy VY in docket 6545 would have frustrated Parties in this docket, and the depth and breadth of questions filed here would be a direct result of Entergy VY's past action.

Reasonableness of Questions asked by WRC

WRC has argued that our discovery questions were delivered to Entergy VY electronically on April 16, 2010, and we mailed an identical written copy of those questions on April 19, 2010. It is our understanding that Entergy VY began the process of triage and response to our discovery on the afternoon of April 16, 2010 and had ample opportunity to raise questions of scope and jurisdiction within 10 days of April 16 or April 19, but did not do so until April 30, 2010. We have asked the Board to require Entergy VY to answer all questions raised in our discovery based partially on the lack of timeliness of their Motion to Modify with regard to our questions. Notwithstanding that request, we offer here arguments as to the reasonableness of our questions.

WRC carefully constructed a limited set of discovery questions to better inform the public, and to assist in the development of this docket. Entergy VY has divided those questions into a number of categories and listed them on two "schedules," with Schedule "A" defined as those questions they believe are beyond the scope of this docket¹⁷, and schedule "B" defined as those questions they believe are preempted¹⁸. Entergy VY has allocated 15 of the 16 questions submitted by WRC to either schedule A or B, and has left only a single question that they apparently think is not preempted and is within the scope of the order of the Board¹⁹. Of the 91 questions asked by ANR, only 10 appear acceptable to Entergy VY²⁰, of the 5 questions asked by DPS not one is acceptable, and of the 42 questions posed by NEC, only one question is not on either schedule A or B and thus appears to pass Entergy VY's standard²¹. To our eye there is no rhyme or reason to the objections.

Of the 16 questions submitted by WRC, numbers 1 through 12 were directly tied to testimony provided by Entergy VY, and meet the standard set by the Board that "*Following Entergy VY's filing, other parties may engage in*

¹⁷ Entergy VY Motion to Modify, dated April 30, 2010, page 15

¹⁸ Entergy VY Motion to Modify, dated April 30, 2010, page 20

¹⁹ Entergy apparently considered WRC question #16 to be not preempted and within the scope of the order. This is WRC question #16: "Please identify the roles played by Entergy Nuclear Vermont Yankee, Entergy Nuclear Operations, Entergy Services Inc., Entergy Corporation, and all other Entergy subsidiaries in the evaluation and response to this leak. Please identify how income from the sale of electricity was allocated through the period of the leak, and how expenses related to the leak were allocated among the various Entergy subsidiaries."

²⁰ ANR questions 1,2,3,4,17,26,56,57,87,88 are not on schedule A or schedule B

²¹ NEC question 32 is not on schedule A or schedule B

*discovery on the testimony*²²...” WRC does not believe any further justification for these 12 questions is needed, however, for illustration purposes we will discuss several of these questions.

WRC Question #7

In writing our discovery, where a question arose in relation to testimony, we associated that question with specific testimony. We inadvertently failed to specify a point in testimony for question #7 but believe the question self-evidently relates to the two leaking pipes at issue. We note for the record these pipes and leaks were described in testimony by Entergy VY witnesses Timothy Mitchell and Timothy Trask. The citations of specific prefiled testimony are included in many other questions in the WRC Discovery. In the unlikely event that Entergy VY is unsure which pipes we are asking about, or where these pipes are discussed in their own testimony, we call attention to WRC questions #3, #5, and #6. Entergy VY has identified WRC question #7 as WRC:EN.1-7, and has included it on “Schedule B” as a question they consider preempted. Question #7 was submitted as follows:

- 7) Please identify the cause of the leaks in each pipe, and identify what steps have been taken to immediately identify and prevent such leaks in other pipes.
 - i) Have the leaking pipes been forensically inspected?
 - ii) Will a detailed report of the cause of pipe failure be available to the public?
 - iii) If Entergy does plan to provide a public report on the cause of pipe failure, how, when, and to whom will it be distributed?
 - iv) Please describe the intended inspection process.

WRC Question #8

We submitted question #8 which sought photographs of the structures that were involved in the leak, and that were described within the testimony provided by Entergy VY. Surprisingly, Entergy VY has placed this question in their Schedule B, which they identify as preempted. Question #8 was developed after WRC attended a “stakeholders meeting” at the VY plant on March 25, 2010. At that meeting we were given a chance to look into the excavation pit where the leak occurred, but were not able to see any of the structures involved. We asked to see photographs of those structures, but were told that while photographs do exist, they would not be made available. It is our understanding that the Board toured the site on April 29, 2010, and although the excavation pit may have been enlarged, it is still not possible to see most of the structures involved. To date the only photographs placed into

²² Prehearing Conference Memorandum, March 18, 2010, page 3

the record by Entergy VY show the view from the top of the excavation pit, and do not show any of the structures discussed in detail in the written testimony provided by Entergy VY²³.

We do not understand the argument that a request for photographs of structures already described in testimony is preempted, and we believe that the release of detailed photographs will help all Parties and the public to understand what happened. We call special attention to a discussion at the March 10 Prehearing Conference between Kenneth Picton of CVPS and Chairman Volz:

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24 MR. PICTON: Just as an alternative to
25 consider, I would presume that Entergy is

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1 taking pictures of the area and the
2 remediation that's being done. And it might
3 be an alternative to have somebody at Entergy
4 provide a number of pictures with an
5 explanation of what they are. Just so we can
6 see the scope of it without necessarily having
7 to have a site visit.

8 CHAIRMAN VOLZ: Yeah. That's a good
9 suggestion. And they might want to put that
10 in their testimony that we might ask them to
11 file. Might go a long way to solving this
12 problem.

WRC Question #11

WRC included question #11 to seek information about the effect of the leak on decommissioning costs. Entergy VY has identified this question as WRC:EN.1-11, and curiously has included it on their Schedule A and Schedule B, defining it as both preempted and beyond the scope of the Board order. It appears that Entergy VY is simply identifying questions they would rather not answer. Question #11 is as follows:

11) When asked if the tritium leakage will affect the cost of decommissioning, Mr. Mitchell stated the following: "We do not believe there should be any material effect since we are taking remediation measures now. However, the results of the current remediation effort will be reviewed in the preparation of the next decommissioning cost study as will the adequacy of the current funding estimate for

²³ Entergy exhibit EN-TT-5, March 31, 2010

groundwater and soil remediation.” (PWT of Timothy Mitchell dated March 31, 2010, page 12, line 4).

- i) Please identify exactly what expenses or what types of leak related remediation expenses will be borne by the decommissioning fund.
- ii) If your answer is dependent on a period of license extension beyond March 21, 2012, or if your answer assumes the use of SAFSTOR, please state the effect that license termination on March 21, 2012, and the inability to use SAFSTOR, would have on decommissioning costs related to this leak.
- iii) Please identify when the next decommissioning cost study will be prepared.

WRC is especially disturbed by Entergy VY’s unwillingness to answer this question because an understanding of the effect of the leak on decommissioning costs and timing is essential to determine if a harm has occurred. The Board appeared ready to recognize a harm in the Prehearing Conference Memorandum dated March 18, 2010, but lacked sufficient specifics, stating:

At the outset, the Board wants to make clear that it takes the potential consequences of any unpermitted releases of material, radioactive or non-radioactive, into the environment very seriously, especially when such releases may have adverse effect upon the public’s environmental, land use, economic, and health interests. However, at this time, the Board has been presented only with generalized information and unspecific concerns. No party has presented any factual information through testimony or affidavits showing the particular harms that may be occurring, or what relief the Board could and should order to redress any such harm.²⁴

WRC now draws attention to CLF discovery question # 17, submitted to Entergy VY on April 12, 2010, and the answer provided by Entergy VY identified as CLF:EN.1-17²⁵. This question also sought to determine the effect of the leak on decommissioning costs and timing, and the answer provided by Entergy VY certainly suggests that the company is planning on a long period of SAFSTOR to allow for decay of the leaked radionuclides. It is our position that any radioactive material that remains in the soil after the current license is scheduled to expire in less than two years could have an effect upon the timing and cost of decommissioning, and that itself is a harm. It is essential for the Board, the Parties, and the public to understand what that harm will be. Entergy VY objected to CLF:EN.1-17, stating “The request is vague and ambiguous and calls for speculation” but did not object on grounds

²⁴ Prehearing Conference Memorandum, March 18, 2010, page 2

²⁵ The Entergy response to CLF was filed after WRC issued our discovery.

that it was preempted, beyond the scope of this discovery session, or outside of the Board's jurisdiction. CLF discovery question #17 and the Entergy VY response is as follows (underline added):

Q.CLF:EN.1-17: Admit that the soil and water at the site containing radionuclide and radioactive material will be removed either before or as part of decommissioning.

a. If denied, explain why such materials will not be removed.

A.CLF:EN.1-17: OBJECTION. The request is vague and ambiguous and calls for speculation. Without waiving any objection, Entergy VY responds:

ADMITTED that Entergy VY is currently in the process of removing soil and water at the site that contains radionuclides. Further ADMITTED that Entergy VY will comply with the NRC's regulations for termination of the VY Station's license, including the radiological criteria for license termination found in 10 C.F.R. Part 20. The amount of soil or water that would need to be removed at decommissioning, if any, to meet the regulatory requirements will depend on, among other things, the timing of the termination of the license. This is because the radionuclides continue to decay to non-radioactive elements over time. By way of example, over a 62-year period of time approximately 97 percent of an initial quantity of tritium will have decayed to non-radioactive helium. At the time of license termination, any residual radionuclides from the recent tritium release event may have decayed sufficiently to be within the applicable license-termination criteria without further actions. Otherwise, DENIED.

a. See A.CLF:EN.1-17.

WRC Questions #13 and #14

WRC included two questions that sought information to assist the public in understanding the nature of the misrepresentation of underground pipes by Entergy VY. This topic is apparently slated for docket 7440, but is also relevant here. For example, if it is determined that Entergy VY was aware that this plant and other plants have underground steam pipes that can leak tritium, and Entergy VY understood the legislature's interest in inspecting pipes was specifically driven by past leaks that caused substantial expense loads on decommissioning funds, and Entergy VY intentionally misdirected the NSA inspection process to avoid having those pipes inspected, then the Board would have cause to consider the leak as a potentially preventable

event. Such a finding could certainly affect the continued operation of the plant, potential modifications to the existing Certificate of Public Good (docket 6545), and penalties for the leak. Likewise, such a conclusion could increase the argument for jurisdiction, and as far as the leak having caused some additional harm, it could alter the preemption argument. WRC is not now alleging that Entergy VY knew of past leaks, knew of the legislature's intent, and then intentionally mislead NSA. Rather, this is an area of considerable uncertainty that should be at least peripherally explored prior to arguments for jurisdiction and preemption.

We note there is some evidence that supports Entergy VY's claim that they did not think steam pipes were especially leak prone, and that they did not steer NSA to avoid an inspection of their underground pipes. Specifically, the Report of Investigation by Morgan, Lewis & Bockius²⁶, which was an internal investigation by a law firm hired directly by Entergy, found in Entergy's favor on many of these issues, and offers substantial documentation of supporting interviews²⁷.

However, there is ample evidence that there were prior leaks of tritium within the industry that would likely have been known to Entergy VY, and there had been several leaks of steam lines at Entergy VY²⁸ that gave indication of the potential for tritium releases into the environment. It is also clear from the Report of Investigation that Entergy VY was aware of the addition of language calling for inspection of "an underground piping system that carries radionuclides" into the bill that would become Act 189 while the legislature was still considering the bill²⁹, and it is likely the Entergy VY legislative lobbying team would have attempted to learn why that language was inserted and possibly lobby for its removal.

Entergy VY singles out WRC question #13, in their Motion to Modify identifying it as WRC:EN.1-13, and characterizing it as "a fishing expedition

²⁶ The Report of Investigation by Morgan, Lewis & Bockius was apparently filed for docket 7440 by DPS on or about April 22.

²⁷ It is unclear from the report which Entergy affiliate hired this law firm. The text references "Entergy" as the hiring company and states "Entergy directed the investigator to focus on ENVY actions or inactions and whether ENVY personnel engaged in any intentional misconduct."

²⁸ As an example, page 15 of the "Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Nuclear Facility" filed in docket 7440 by DPS on April 30, 2010 said: "The SR Assessment Team reviewed the past three years of CRs on the AOG system to determine if piping inspections had been performed as required and to determine the results of the inspections. Three pipe leaks on steam trap drain lines were found during the period from 2004 to 2006 and two additional leaks in 2010. None of these leaks were discovered by routine inspections. This is primarily due to the fact that they were in areas that are not accessible."

²⁹ Report of Investigation by Morgan, Lewis & Bockius, page 15

into other, unspecified leaks.³⁰ That is simply not true. Our interest here is to determine if Entergy VY had prior awareness of tritium leaks at other plants, and was aware of the potential economic consequences of a tritium leak to the decommissioning fund. We understand that Entergy VY does not want to review potentially dozens of problems at other nuclear plants, and we would be satisfied if Entergy VY answered this question by stipulating that there have been prior leaks of radionuclides from pipes at other Entergy plants, and that those leaks have added substantially to the cost of decommissioning.

While question #13 is relevant to an understanding of the misrepresentation, it is also relevant to an understanding of the potential costs of tritium leaks, how Entergy VY balanced risks and benefits while responding to this specific leak, and how that balancing might unduly burden the decommissioning fund. In our review of WRC questions # 15 and #16 we will discuss the relevance of “decision making” as it pertains to the distribution of risks and benefits among the various Entergy affiliates and subsidiary companies including Entergy Nuclear Operations Inc. and Entergy Nuclear Vermont Yankee LLC, and how that distribution of risk and benefit can be favorably modified in docket 6545. WRC questions #13 and #14 are as follows:

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.

14) Please consider the official actions of ENVY executives, including but not limited to; Jay Thayer, David McElwee, John Dreyfuss, David Manai, Mike Netell, and Michael Colomb, as they were developing the response to Act 189 and assisting the Public Oversight Panel and Nuclear Safety Associates in defining the scope of the inspection. The intent of this question is to assist the parties in determining the appropriateness of requests for cost reimbursement, as has been briefed;

i) Did any Entergy Executives attend legislative hearings at which the scope of Act 189 was discussed? If yes, please list the dates of those hearings and which executives were in attendance.

ii) Were any Entergy executives who were communicating with Nuclear Safety Associates and the Public Oversight Panel aware of prior leaks of tritium or other radionuclides from buried or underground pipes at other Entergy plants?

³⁰ Entergy VY Motion to Modify, dated April 30, 2010, page 11

- iii) Were any Entergy executives who were communicating with Nuclear Safety Associates and the Public Oversight Panel aware of leaks of tritium or other radionuclides from underground or buried pipes at plants not owned by Entergy?
- iv) Were any Entergy executives who were communicating with Nuclear Safety Associates and the Public Oversight Panel aware of any prior leaks, anomalies, or damage to pipes at the Vermont Yankee facility?

WRC Questions #15 and #16

WRC served Entergy VY with questions #15 and #16 that sought to determine how decisions were made in the response to this leak, and how the various risks and rewards were allocated³¹. Entergy VY has included question #15 on Schedule A and identified it as beyond the scope of discovery, but has neither objected to nor answered question #16. WRC question #9 is part of the same line of inquiry, but unlike questions #15 and #16, it was specifically associated with the testimony of Jeffery Hardy. Entergy VY has included WRC question #9 on schedule B, indicating they believe it is preempted, but within the scope of discovery.

We appreciate that Entergy VY developed an aggressive response to the leak in January 2010, and appears to have accepted financial responsibility for the bulk of the clean-up thus far, but we are also aware that the company has a pending request for a 20 year license extension and companion Certificate of Public Good, which might have influenced those decisions. There is no assurance that the decommissioning fund will be free of any burden for this leak, or that the fund will not be required to carry the full financial burden of any potential future leak³². Our questions here are related to decommissioning costs and seek to determine what corporate influences exist that may have had an affect on those costs, how those influences may have

³¹ Entergy VY argues on page 17 of their April 30, 2010 Memo to Modify that the Board is preempted in many different areas, and quotes a United States Supreme Court decision which states “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.” WRC is interested in evaluating, not regulating, the decisions of the operators so that matters of corporate structure can be understood. The regulation of the underling ownership structures is not preempted, and is commonly ruled upon by the Board.

³² WRC is pleased that Entergy VY has voluntarily begun a clean-up process, but it is not clear this was required or would be required in the event of a future leak. We are aware of a leak in a drain line from a Chemistry lab in the late 1980’s or early 1990’s. The drain line appears to have been abandoned in place, and the costs of remediation will be borne by the decommissioning fund. The plant was owned by Vermont Yankee Nuclear Power Corporation at the time of that leak. We can find no assurance that Entergy VY will not impose similar future burdens on the decommissioning fund.

affected the response to this leak, and if it would be appropriate to modify the existing CPG to better balance the risks and rewards that underlie the corporate influences.

Our understanding of corporate ownership and responsibility is limited, but it is clear that there are a number of corporate entities engaged in the management of Entergy VY, and in the response to the leak. Likewise, it is clear that individuals from a variety of Entergy affiliates and subsidiaries have participated in the leak response, including Timothy Trask and Timothy Mitchell who list their employer as Entergy Services Inc. To our mind there is more than a casual connection between the various Entergy affiliates, and we wonder what those relationships are, and if financial incentives exist that would encourage individuals or corporate entities to make decisions that might favor the parent company at the expense of Entergy Nuclear Vermont Yankee LLC, which is apparently solely responsible for decommissioning³³.

Our understanding of the current Certificate of Public Good is that the CPG is issued to Entergy Nuclear Operations Inc. (ENO) and Entergy Nuclear Vermont Yankee LLC (ENVY), both subsidiaries of Entergy Corporation. As we understand the relationship, ENVY, which has very few actual employees³⁴, owns the plant and the existing decommissioning fund and nothing more. ENVY contracts with ENO to operate the plant and sell the electricity, and the profits flow to Entergy Corporation, but neither ENO nor parent company Entergy Corporation currently have any financial responsibility to fund decommissioning.

The region and the State of Vermont are harmed if the decommissioning fund is insufficient or when it must cover additional expenses, because that will delay the completion of decommissioning, which directly impacts land use and economic development. Thus, if ENO, serving as the operator of the plant, makes decisions that increase the cost of decommissioning or increase the time required to decommission, those costs will be borne by ENVY alone, while the direct financial benefits of those decisions will flow exclusively to the parent company. Likewise, decisions made regarding preventative inspections and maintenance on non-safety systems, such as piping systems, could be designed to improve the short term profit potential of the parent company, while having a negative affect on reliability.

³³ There is reason to believe that individuals with the Entergy family of companies are granted bonuses based on plant performance, which may have an effect on decision making. We have not asked about these individual incentives in this round of discovery, and nor have we asked Entergy VY to identify the managers of ENVY. Those questions seem relevant to us and may be brought forward at technical hearing. We hope Entergy VY witnesses will be prepared.

³⁴ The employee count at ENVY has been described to us by Entergy VY as “one or two.”

The Supplemental Reliability Assessment (SRA) produced by NSA and filed by DPS in docket 7440 on April 30, 2010, makes note of an aggressive response by Entergy VY to the tritium leak beginning in January 2010, but also identifies several deficiencies in preventative maintenance, inspection, and detection programs. Prior leaks are listed in a redacted part of the report, and then a corrective action plan is summarized in the public release copy. The summary notes the plan meets industry standards but then offers strong criticism of the schedule as follows³⁵:

The corrective action plan to address pipe leaks on AOG drain lines was identified and in progress. The steps of the plan were well thought out and consistent with industry standards. A more aggressive schedule might have prevented the current leak, which is discussed in more detail in Appendix 1. The slow, protracted schedule demonstrates a willingness to assign a low priority to non-safety issues. This extended duration until repair can have adverse consequences, as shown by the costly impact of the leaks discussed in Appendix 1.

Appendix 1 of the SRA provides a detailed evaluation of the January 2010 leak event, and identifies several places where better oversight and maintenance could have identified the leak event sooner. It is unclear what role management decision making had in response to earlier leak events, but the allocation of additional resources to preventative inspection and maintenance could be expected to improve reliability and in this case, reduce soil and groundwater contamination and the associated remediation costs and decommissioning impacts. The SRA offers the following analysis in Appendix 1³⁶:

The event timelines and the major decisions that were made between 1/6/10 and 4/5/10 were reviewed. The response to this event was appropriate, well planned and well executed. However, it should be noted that the SR Assessment Team found five CRs containing prior observations of ground subsidence in the vicinity of the AOG leaks between 7/08 and 4/10. A review of the CRs indicates that they had been closed with a minimal amount of investigation. These CRs could represent missed opportunities to possibly discover the AOG leakage sooner.

It appears that in this case maintenance and repairs of the leaking system received low priority. Then, there was a lag of roughly 50 days between the

³⁵ Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Nuclear Facility, Page 30

³⁶ Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Nuclear Facility, Page 85

time a groundwater sample was obtained, and the availability of the test result showing elevated tritium. It also appears the plant continued to operate for several additional weeks as measured tritium levels climbed. The continued flow of tritiated water certainly had an effect on the cost of remediation, and it is likely that plant operators and the various executives responsible for decision making understood that continued operation would increase remediation costs, and possibly the time and cost to fully decommission³⁷.

WRC is not in the nuclear power generation business, and we are not suggesting that the plant should have been shut down when test results showed increasing tritium from an unknown source. However, we recognize that it could have been shut down, and that such an action might have reduced the contamination entering the ground, and might have reduced the eventual cost of remediation and decommissioning. And while we recognize the direct economic impacts that would accompany an unplanned shutdown, it remains true that decisions made here may have had a direct impact on decommissioning and are certainly relevant to this docket.

We understand the ultimate decision as to whether or not to continue operating a nuclear plant is complex, and that the Public Service Board should not routinely be in the business of making that decision. Indeed, we recognize that in most cases the actual decisions as to continued operation are likely preempted. Yet, we wonder if the corporate structures and employment status of the decision makers influenced these decisions to the potential detriment of reliability and the decommissioning fund, and we wonder if rebalancing the responsibilities of the various corporate entities would be an appropriate remedy to protect the timely decommissioning of the plant at the end of its operating life. Specifically, through questions #15 and #16 we hope to explore if a modification to docket 6545 that would make ENVY, ENO and Entergy Corporation jointly and severally responsible for decommissioning would be an appropriate way to rebalance the risks and rewards to better protect the land use, economic interests of the state, and the return of the site to productive use following prompt decommissioning.

WRC is not prepared to brief a rebalancing of corporate responsibilities at this time, but we believe fact finding on the role each corporation played in the response to this leak is relevant to current discovery, and is not preempted. The Board clearly has the authority to explore the ownership and financial assurances of the companies that operate regulated nuclear power generation stations in Vermont, and to explore how ownership affects the

³⁷ WRC's discussion of Entergy's concerns about our question #11 (above) includes an Entergy answer to CLF in which it appears the cost and timing of decommissioning may have actually been affected by this leak, and an identified harm has occurred.

non-nuclear issues within its jurisdiction, including the costs and timing of decommissioning. WRC questions #15 and #16 are as follows:

15) Prefiled testimony provided on March 31, 2010 included the affidavits of Timothy Trask and Timothy Mitchell (among others), both of whom list their employer as Entergy Services Inc. Please identify all employees of Entergy Services Inc., Entergy Corporation, and other Entergy subsidiaries who have been engaged on-site in the leak investigation and repair project, or who have otherwise had a significant role in the process. Please identify the name of each individual, what his/her employment status is, and what unit or subsidiary s/he works for. Please also identify the role each individual has played in the investigation and repair project. It is not necessary to list those who are normally employed by ENO or ENVY, however employees who are directly employed by Entergy Corporation or another subsidiary should be listed even if they regularly spend the bulk of their time at the Vermont facility. Please recognize this question seeks to determine the role Entergy Corporation and its subsidiaries have played in the process (as distinct from ENVY and ENO), and to assist in understanding potential decision making conflicts and incentives that might have played a role in the response to this leak, or that could potentially play a role in a response to future leaks or anomalies. The question should be answered broadly to address that specified intent.

16) Please identify the roles played by Entergy Nuclear Vermont Yankee, Entergy Nuclear Operations, Entergy Services Inc., Entergy Corporation, and all other Entergy subsidiaries in the evaluation and response to this leak. Please identify how income from the sale of electricity was allocated through the period of the leak, and how expenses related to the leak were allocated among the various Entergy subsidiaries.

Conclusions

Entergy VY has sought to modify the schedule to allow additional time for response to discovery questions they have been served by ANR, DPS, NEC, and WRC. This request for additional time is based on the added pressures of a previously scheduled refueling outage. WRC supports this request.

Entergy VY has sought to disqualify the vast majority of questions raised by ANR, DPS, NEC and WRC as outside the jurisdiction of the Board, not relevant to this phase of the proceeding, or preempted by federal law. WRC opposes the wholesale elimination of these questions, many of which we

believe may yield important information about the leak, and may assist Parties in briefing jurisdiction and preemption. The Board is urged to require Entergy VY to answer each question.

Entergy VY has sought to brief jurisdiction and preemption as part of a scope briefing previously scheduled by the Board on May 18, 2010. WRC opposes the briefing of scope prior to the conclusion of discovery upon Entergy VY, and prior to the filing of testimony by other Parties and the discovery upon that testimony. Complete prefiled testimony and discovery will assist the Parties in briefing the scope issue. The Board is urged to leave the schedule sequence intact, and to change the dates to allow for an extended period of reply in the discovery upon Entergy VY.

Respectfully Submitted

May 5, 2010