STATE OF VERMONT
PUBLIC SERVICE BOARD

Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC, and related transactions	)	June 15, 2012 Docket No. 6545
Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a certificate of public good to construct a dry fuel storage facility at the Vermont Yankee Nuclear Power Station, in Vernon, Vermont	)	Docket No. 7082

NEC'S OPPOSITION TO ENTERGY'S RULE 60(b) MOTION

NOW COMES the New England Coalition, Inc. (NEC), by and through counsel, Jared M. Margolis, and hereby opposes Entergy's Rule 60(b) motion. In support thereof, NEC provides the following memorandum.

MEMORANDUM

1. Entergy's Motion is not timely

Entergy has moved for reconsideration pursuant to V.R.C.P. 60(b)(6), which is a catch-all provision based on "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) requires such motions to be filed "within a reasonable time." Entergy has failed to file for relief from judgment within a reasonable time as that phrase is used in Rule 60(b)(6) and cases interpreting the rule. *See, e.g., Brown v. Tatro*, 136 Vt. 409, 411 (Vt. 1978) (confirming V.R.C.P. 60(b) motions for relief from final judgment, on any ground, must be made within a reasonable time). Entergy's motion comes ten years after the Board's order in Docket 6545, six years after the Board's order in Docket

7082, and several years after the legislative enactments that form the basis of its 60(b) motion. This delay is unreasonable, and Entergy's Motion must therefore be rejected as untimely.

Entergy has further failed to present evidence of "extraordinary circumstances" justifying the significant delay in bringing its Rule 60(b) motion. Entergy merely argues that the actions of the legislature were "unforeseen," but never even attempts to claim that this rises to the level of "extraordinary circumstances" justifying its delay in bringing the motion.[1] *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993) (to justify relief under Rule 60(b)(6), "a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay") (citations omitted); *Alpine Land & Reservoir, Co*., 984 F.2d 1047, 1049 (9th Cir. 1993) (relief is available under Rule 60(b)(6) "only where extraordinary circumstances prevented a litigant from seeking earlier, more timely relief"). Accordingly, it would be an abuse of discretion for the Board to allow Entergy to now reopen the Judgment for its own convenience. *See Riehle v. Tudhope*, 171 Vt. 626, 629-630 (Vt. 2000) (employing abuse of discretion standard when reviewing trial court's Rule 60(b)(6) ruling).

[1] NEC also notes that these matters were not unforeseeable, nor should they have come as a surprise to Entergy. Entergy in fact supported the legislative enactments it now claims were unforeseen, rendering its arguments absurd. *See* WRC's Reply. Similarly, the Board's analysis of the applicability of Section 814(b) is based on the express language contained in those Orders and CPGs and the "plain language of the statute." Order RE Entergy VY Motion for Declaratory Ruling at 17. Just because Entergy never took the time to consider whether Section 814(b) applied to the entirety of the Board's Orders and CPGs, and failed to bring these concerns prior to now, does not mean that the Board's decision was unforeseeable, and certainly does not provide "extraordinary circumstances" justifying Entergy's delay in seeking reconsideration.

In addition, Entergy has filed its motion under the wrong subsection of Rule 60(b), in an attempt to avoid the 1-year absolute bar against filing under Rule 60(b)(1). *Id.* Entergy's motion is predicated on its claim that:

> it was unforeseen at the time that the Orders and CPG described above were issued that (1) the Board would interpret the Orders and CPG described above to preclude application of Section 814(b) for purposes of Entergy VY's petition for operation of the VY Station after March 21, 2012; and (2) that the Vermont General Assembly would enact statutes (namely, Act 74 and Act 160) allowing the legislature to insert itself into the CPG process…."

Entergy at 4. In other words, Entergy argues that it was surprised by the Legislature's enactment of Acts 74 and 160, and the Board's interpretation of the Orders and CPG in Dockets 6545 and 7082 with regards to the application of Section 814(b). Since Entergy is claiming that the enactment of Acts 74 and 160 were not foreseen, and they were therefore surprised by the legislature's actions, Rule 60(b)(1) is the appropriate rule for its motion (i.e. "mistake, inadvertence, surprise, or excusable neglect").

It is well settled that relief under V.R.C.P. 60(b)(6) is available only when a ground justifying relief is not encompassed within any of the first five classes of the rule. *Alexander v. Dupuis*, 140 Vt. 122, 124 (Vt. 1981) (citing *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977)). Because Entergy is asserting grounds for relief that would have been available under Rule 60(b)(1), it is not permitted to proceed under the "catch all" provision of Rule 60(b)(6). Since Entergy did not file its motion within the 1-year required under Rule 60(b)(1), the motion must be rejected.

However, even if the Board accepts that it was the Board's Order RE Entergy VY Motion for Declaratory Ruling that triggered the need for Entergy's 60(b) motion, that Order was issued on March 19, 2012 – almost 70 days prior to Entergy filing its motion.

Entergy provides no explanation as to why it waited nearly 70 after the Board's order regarding the applicability of Section 814(b) to file its 60(b) motion. Whereas this is an issue that needs to be addressed in a timely manner – since it impacts matters that are at issue in an ongoing proceeding before the Board (i.e. Docket 7862) – waiting more than 60 days is unreasonable. Given that Entergy provides no reasonable excuse for the delay in filing, the Board should find that Entergy's Motion was not filed within a reasonable time of the occurrences forming the basis for its claims.

The Board should therefore find that Entergy's motion is untimely, either as a Rule 60(b)(6) motion not filed within a reasonable time, or as a Rule 60(b)(1) motion filed after the one-year absolute deadline. The Motion should therefore be denied.

2. <u>Entergy has made no showing of harm to support reconsideration of the prior Board Orders and CPGs.</u>

Entergy maintains that the modifications it seeks to the Docket Nos. 6545 and 7082 Orders and CPGs are necessary to "prevent hardship and injustice," and that Entergy will "suffer substantial hardship… if enforcement of these orders and CPG to deny Entergy VY of the benefits of Section 814(b) results in the assessment of penalties or compromises or negatively affects Entergy VY's ability to obtain a new or amended CPG in Docket No. 7862." Entergy at 5-6. Entergy's argument is without merit or support. Entergy fails to provide an affidavit supporting its claim of substantial hardship, and never even attempts to explain the exact nature of the supposed hardship it might face (i.e. it has not shown what penalties might be assessed, or how those penalties would cause hardship to the company). The generic claim of "hardship," without any explanation or support, should be rejected.

Furthermore, the motion does not appear to be ripe. Entergy claims that reconsideration is necessary to prevent the assessment of penalties, but no such penalties have been contemplated by the Board. The Department has not moved for penalties, and the Board has taken no further action following its Order on Entergy's Declaratory Judgment Motion. For the Board to reconsider conditions in prior Orders and CPGs in order to prevent the assessment of penalties that are not forthcoming is an unnecessary waste of time. To the extent that Entergy seeks reconsideration of these Orders and CPGs to avoid any negative affect on its ability to obtain a new or amended CPG in Docket 7862, that issue should be considered within Docket 7862, and not as a Rule 60(b) motion filed in other dockets.[2]

Moreover, Entergy's argument is predicated on an illogical assessment of hardship. Entergy is claiming that the hardship they might face stems from the Board's potential enforcement of certain conditions in its Orders and CPGs, which the Board has determined are not subject to Section 814(b). The Board, however, has already determined that these conditions were prerequisites for the approval of Entergy's ability to purchase the plant and store spent nuclear fuel in dry casks on-site. *See* Docket Nos. 6545 and 7082 Orders and CPGs. These were final decisions that were not challenged by Entergy to the Supreme Court, and relitigation of them is precluded.[3] The Board has further determined that Section 814(b) does not apply to the specific conditions Entergy seeks to modify, since they are not licenses under the statute. *See* Order RE Entergy VY

[2] Entergy appears to acknowledge this by stating that "Entergy VY does not object to the Board considering the request only in connection with Docket No. 7862…." Entergy at 2.
[3] *See* VPIRG's Motion to Intervene citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed 2d 492, n.9 ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.").

Motion for Declaratory Ruling. Entergy likewise did not challenge that decision to the Supreme Court or ask the Board for reconsideration. Rule 60(b) "is not intended to function as a substitute for a timely appeal." *Richwagen v. Richwagen*, 153 Vt. 1, 3, 568 A.2d 419, 420 (1989) (quoting *Tetreault v. Tetreault*, 148 Vt. 448, 451, 535 A.2d 779, 781 (1987)). The notion that Entergy should now be relieved of the responsibility of adhering to conditions in prior Orders and CPGs – Orders and CPGs that allowed Entergy to profit from plant operation and dry cask SNF storage – simply because Entergy is not getting the benefit of a statute that the Board has shown not to apply the way Entergy wants, and where Entergy did not take the necessary timely appeals, provides no basis for a claim of hardship, and must be rejected.

3. <u>Modification of Condition 8 of the 6545 Order is unwarranted as that condition does not apply to Entergy's operation of the plant</u>

In the Board's Order RE Entergy VY Motion for Declaratory Ruling, it found that Condition 8 of the Docket 6545 Order "is a requirement of the order approving the sale of Vermont Yankee to Entergy VY" under 30 V.S.A. § 109, and pursuant to that statute, the Order, and Condition 8 thereof, was "an approval issued to the *former owners* of Vermont Yankee, *not* to Entergy." Order RE Entergy VY Motion for Declaratory Ruling at 16-17 (emphasis in original). The Board concluded that "[t]his Section 109 approval is an approval for the sellers to sell, and in no way constitutes an approval for the purchasers to operate the plant which is, instead, controlled by the Docket 6545 CPG." *Id*. at 18. Since it is clear from the Board's decision that Condition 8 of the 6545 Order applies to the plants former owners as part of a "discrete transaction – the sale of Vermont Yankee" and not to the continuing operation of the plant by Entergy, there is no basis on which Entergy can have Condition 8 of the 6545 Order amended.

Furthermore, while the Board has determined that Condition 8 of the 6545 Order – even though it applied to the former owners and not to Entergy's operation of the plant – does require that Entergy obtain a new CPG prior to March 21, 2012 for continued operation of the plant, Entergy has failed to show, or even claim, that any potential negative impact this may have on its ability to obtain a new or amended CPG in Docket No. 7862 was somehow inadvertent. Regardless, such a claim would come under Rule 60(b)(1), and is thereby barred as untimely as discussed above (i.e. not filed within 1 year). Entergy's motion should therefore be denied.

4. Modification of the Docket 7802 CPG is unwarranted

It would be imprudent for the Board to alter the condition set forth in the Docket 7082 CPG limiting the amount of SNF that can be stored at the VY station in dry cask storage. NEC concurs with the argument provided by VPIRG in its Motion to intervene[4] that Vermont case law does not allow a Rule 60(b) motion to serve as a motion to modify parts of an order, but rather may only result in the order being vacated if the 60(b) motion is granted. NEC further agrees that the Board can, and should, therefore only grant Entergy's motion if the result is that the Orders granting Entergy the ability to operate the plant and store spent nuclear fuel on-site are vacated and set for a new trial.

Regardless, this Board must not act hastily in reconsidering conditions imposed in prior dockets. The conditions and limitations imposed upon Entergy were presumably included in those prior Orders and CPGs in order to ensure that the operation of the plant and storage of SNF were within the public good and met the requirements of Vermont's laws. A full analysis of the importance of those conditions, as well as the ramifications

[4] NEC supports VPIRG's Motion to Intervene and incorporates the arguments made therein be reference.

of modifying them, must be undertaken if the Board is even going to consider Entergy's request. This is especially important here, given that one of the conditions that Entergy seeks to modify is the limitation on the amount of SNF that it can store on-site pursuant to the Docket 7082 CPG.

In fact, a recent ruling by the D.C. Circuit Court underscores the need for the Board to act cautiously in assessing the request to modify the 7082 CPG. In its June 8, 2012 decision in *New York v NRC*, the D.C. Circuit Court struck down the NRC's Waste Confidence Rule, under which the NRC licensed Entergy Vermont Yankee's dry cask spent fuel storage. *New York v NRC*, USCA Case #11-1045 (D.C. Cir. June 8, 2012). The Court found that the NRC had impermissibly by-passed the need to study site-specific environmental vulnerabilities and impacts of long-term nuclear waste storage by supplanting it with a simple generic declaration that NRC "has confidence" that spent fuel will be safely stored until a permanent repository is needed and in place. The Court found that "[t]he lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary SNF storage and the reasonableness of continuing to license and relicense nuclear reactors." *Id.* at 5.

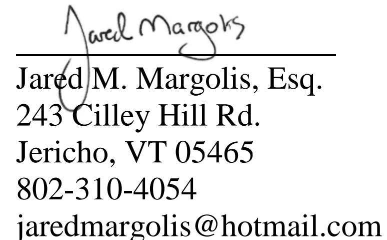
As this Board is well aware, the environmental and economic ramifications of spent nuclear fuel storage are well within the purview of the State pursuant to the dual jurisdiction created by congress regarding nuclear power plants. *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 205, 212 (1983). The D.C. Circuit Court's ruling suggests that the NRC's oversight is not providing the State with any assurances regarding the environmental effects of SNF storage on-site at the VY station. The Board should make no modification of the 7082 CPG (conditioned on

compliance with all NRC regulation) until this matter is settled, and certainly should not eliminate a condition limiting the amount of SNF that can be stored on-site without a full investigation into the non-preempted ramifications of additional fuel storage. Should the Board even entertain Entergy's motion regarding the 7082 CPG, it would require, as VPIRG notes in its Motion to Intervene, that the judgment in Docket 7082 be vacated and set for a new trial, at which Entergy would have the burden of proof under each of the statutory criteria, using currently available evidence, and taking into consideration the recent decision of the D.C. Circuit Court.

5. Conclusion

For the foregoing reasons, Entergy's Motion should be denied.

Dated at Jericho, Vermont this 15th day of June, 2012.



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