STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8880

Joint Petition of NorthStar Decommissioning Holdings, LLC	**)**
NorthStar Nuclear Decommissioning Company, LLC, NorthStar	**)**
Group Serviced, Inc., LVI Parent Corporation, NorthStar Group	**)**
Holdings, LLC, Entergy Nuclear Vermont Investment Company	**)**
LLC and Entergy Nuclear Operation, Inc., and any other	**)**
necessary affiliated entities to transfer ownership of Entergy	**)**
Nuclear Vermont Yankee, LLC, and for certain ancillary	**)**
approvals, pursuant to 30 V.S.A. secs. 107, 231, and 232	**)**

NEW ENGLAND COALITION MEMORANDUM IN OPPOSITION TO NORTHSTAR'S MOTION FOR SPECIAL PROTOCOL TO GOVERN ACCESS TO CERTAIN DOCUMENTS

Summary

NorthStar has proposed a special protocol that would govern disclosure and use of two documents. These two documents contain detailed evidence that specifically addresses one of the central issues in this proceeding – whether the Board should relieve Entergy Nuclear Operations, ENVIC and the parent Entergy Corporation of their obligations to fund and guarantee decommissioning and restoration costs and replace those obligations in reliance on NorthStar's financial plan. These two documents, according to NorthStar, contain the nuts and bolts of that plan.

Under the proposed protocol, intervenors such as the New England Coalition will be barred from participating in discovery, the trial, and briefing the Board about the documents, and thus about this central issue in the case. Intervenors will be barred because they will not be allowed to obtain a copy of the two documents, will not be allowed to take notes about the documents, will not be allowed to take the deposition of any expert sponsored by the Department of Public Service,

the Agency of Natural Resources or the Office of the Attorney General who has reviewed the documents, will not be able to effectively cross-examine any witnesses about the documents (because counsel would be prohibited from copying or taking any notes about the documents) and will not be able to present their own expert testimony about the documents (because their experts will not be allowed to copy or take notes about the documents).

The motion is supported by an affidavit from Mr. State. The motion and affidavit do not address many of the critical factors required by Board precedent to support a protective order. The motion and affidavit also rely on a document to support the motion which NorthStar has not yet provided to any of the parties or the Board.

The New England Coalition objects. The motion, if granted, will deny intervenors the rights secured to them by the Vermont Administrative Procedure Act and the Board's rules. It will do so without any showing that these draconian measures are necessary.

The New England Coalition also objects to the proposed terms which authorize state agencies to return to NorthStar these critical documents upon conclusion of the proceedings. These documents fall within the Vermont Public Records Act. Those documents may be exempt from public disclosure at this time, but they must be preserved so that the public can have access to them when disclosure would no longer jeopardize NorthStar's legitimate business interests.

The Facts

a. Exclusion of Intervenors from participation

NorthStar has moved for approval of a special protocol governing two documents. One of the documents is *20 pages long* and contains information about *900 sub-tasks and the cost allocation for each task*. The other document is a *16-page long "Deal Model"* that contains *cost*

allocations for each task and the funding sources for each task. See Highly Confidential Document Protocol, filed May 12, 2017, p. 1.

NorthStar's motion asks that the Board rule that discovery of these documents be limited to compelling intervenors' expert witnesses and counsel to travel to Montpelier to view the two documents. The experts and counsel would be prohibited from copying or taking notes about the documents. Highly Confidential Document Protocol, filed May 12, 2017, ¶ 14.

If counsel wishes to prepare cross-examination of witnesses on this subject, he or she will have to memorize the 900 sub-tasks and the cost allocated to each task, as well as the funding sources for each of the 900 sub-tasks, and then conduct cross-examination based on that memorization. Obviously, this is impossible.

Likewise, if intervenors' experts attempt to prepare testimony about these plans, they will have to commit all of the details to memory -- again, an impossible task. See the attached affidavits of Ray Shadis and Arnold Gundersen[1].

Intervenors also will not be allowed to take the deposition of any expert sponsored by the Department of Public Service, the Agency of Natural Resources or the Office of the Attorney General about the documents. Paragraph 11 of the proposed protocol states "No party shall use the Highly Confidential documents to depose any party other than NorthStar. All State Agency Parties also reserve the right to depose other expert witnesses who have executed the relevant protocols."

[1] Theoretically, an expert could spend several days in the room with the two documents, preparing his or her prefiled testimony directly from the two documents. This would cause extraordinary delay and expense. This also appears to be barred by the proposed protocol, because the draft prefiled testimony being prepared by continual resort to the two documents would constitute only a draft, for later review by counsel. This draft would have the same effect as, and necessarily include, notes about the two documents, and would be prohibited.

NorthStar has submitted an affidavit from Mr. State in support of the motion. The State Affidavit, in paragraph 9, relies on another document, containing 90 line items, that he says should provide sufficient information for those parties without access to the two documents – but that document has not yet been produced in discovery or provided to the Board. The motion and Affidavit, in effect, ask the Board and the parties to accept Mr. State's opinion that the as-yet undisclosed document should suffice.

The State affidavit, in paragraph 9, also refers to what he says is a "4-page" version of the Deal Model. That "4-page version" is attached. The first of the four pages is the cover page. The remaining three pages contain cryptic conceptual statements and broad estimates; they contain no data or information that would substitute for actual disclosure.

The State Affidavit does not address:

a) the extent the information is known by employees and independent contractors;

b) measures taken to guard secrecy;

c) the amount of effort or money used to develop the information;

d) the ease or difficulty of others in acquiring or duplicating the information;

e) justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

f) explanation of whether partial disclosure, or disclosure of redacted versions, can adequately protect the allegedly confidential information.

b. Return of critical documents to NorthStar at conclusion of proceedings

Paragraph 13 authorizes NorthStar, at the conclusion of the proceeding, to request the Department, the Agency of Natural Resources and the Office of the Attorney General to return these critical documents to NorthStar, and compels these state agencies to comply. See emails

from James Dumont to Joint Petitioners, and reply by Joslyn Wilschek, attached, explaining that this paragraph subjects the two documents to the standard procedures governing return of documents in the Department's proposed Protective Agreement and Order. These standard procedures allow NorthStar to compel return of the documents. The Protective Agreement submitted to the Board for approval states, in paragraph 11:

> The disclosing Party may make a written request to the Department or other Party for the return of allegedly confidential information or CEII. Such request shall be made within sixty (60) days after final decision, order, or judgment in this docket, unless appeal from such decision, order, or judgment is taken, in which case the request shall be made within sixty (60) days after the conclusion of the appeal and any remand or further appeal therefrom. Within sixty (60) days of such a request, the Department or other Party shall: (a) return the Allegedly Confidential Information or CEII to the disclosing Party's counsel, except for those portions of the Allegedly Confidential Information or CEII which have been made public; (b) cause its employees and consultants to destroy any notes taken concerning, or any documents or information in any form incorporating, Allegedly Confidential Information or CEII which has not been made public; and (c) advise the disclosing Party in writing that the requirements of this paragraph have been met. Notwithstanding the foregoing, nothing in this paragraph shall require the Department or a public agency to destroy notes, documents, or information in violation of statute.

Memorandum of Law

a. Exclusion of Intervenors from participation

This Board has established the process by which a party can place documents under a protective order. In *In re Investigation into General Order 45 Notice*, Docket No. 6545, Protective Order, November 9, 2001, the Board concluded:

> IV. Conclusion
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> For the reasons stated above, we will order implementation of the Protective Agreement, but with the following significant modifications:
>
> . the Petitioners must file a document-specific (or information-specific) averment, as detailed below, of the basis for keeping confidential any document (or information) that they wish to be kept under seal; and

. today's protective order shall govern only the protection of documents and information provided in discovery.

If a party wishes to keep confidential any material that is proffered for inclusion in the evidentiary record, that party must present a properly supported motion for protection of that material.

Therefore, IT IS HEREBY ORDERED that Allegedly Confidential Information provided by the Petitioners pursuant to the Protective Agreement shall be treated in this proceeding as follows:

1. For each document or information response that a Petitioner wishes to treat as Allegedly Confidential Information, the Petitioner must submit a detailed, document-specific (or information-specific) averment of the basis for such treatment, which addresses the following, to the extent that the Petitioner relies upon that factor as the basis for an assertion of confidentiality:

a. Identification of the specific document or information for which confidential treatment is sought;

b. Explanation of the degree to which the document or information contains a trade secret or other commercially sensitive information, or is privileged;

c. For documents and information alleged to contain trade secrets or other commercially sensitive information,

i. the extent the information is known outside the company,

ii. the extent the information is known by employees and independent contractors,

iii. measures taken to guard secrecy,

iv. the value of the information to the company and competitors,

v. the amount of effort or money used to develop the information,

vi. the ease or difficulty of others in acquiring or duplicating the information, and

vii. an explanation of how disclosure of the information could result in cognizable harm sufficient to warrant a protective order;

d. Justification of the period during which the submitting party asserts that material should not be available for public disclosure;

e. Explanation of whether partial disclosure, or disclosure of redacted versions, can adequately protect the allegedly confidential information; and

f. Any other information that the party seeking confidential treatment believes may be useful in assessing whether the document or information should remain confidential.

These requirements were recently repeated in *Investigation of Petition of Vermont Gas Systems, Inc., for a Change of Rates*, Docket No. 8710, Protective Order, May 26, 2016.

In the present matter, the affidavit supporting the motion fails to address six of the factors. The State Affidavit does not address: a) the extent the information is known by employees and independent contractors; b) measures taken to guard secrecy; c) the amount of effort or money used to develop the information; d) the ease or difficulty of others in acquiring or duplicating the information; e) justification of the period during which the submitting party asserts that material should not be available for public disclosure; and f) explanation of whether partial disclosure, or disclosure of redacted versions, can adequately protect the allegedly confidential information.

These failures are compounded by NorthStar's reliance, in support of its motion, on a document which has not been produced.

NorthStar's failure to address these critical factors makes it unnecessary to address whether, once these factors are addressed, a sufficient showing has been made to cripple intervenors' opportunities to meaningfully participate in this matter. NorthStar has, so far, utterly failed to demonstrate that the rights guaranteed by the Vermont Administrative Procedure Act and the Vermont Rules of Civil Procedure must be abridged. These include:

► "Opportunity shall be given all parties to respond and present evidence and argument on all issues involved." 3 V.S.A. § 809(c).

► "A party may conduct cross-examinations required for a full and true disclosure of the facts…" 3 V.S.A. § 810(3).

► "Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate." 3 V.S.A.§ 813

► "In all trials the testimony of witnesses shall be taken orally in open court, unless

> otherwise provided by these rules, the Vermont Rules of Evidence or other rules adopted by the Supreme Court." V.R.C.P. 43(a). See Board Rules 2.103 (applying Vermont Rules of Civil Procedure) and 2.201(E) (prohibiting ex parte communications).

Without permission to take notes on the two documents, and to take depositions if appropriate, it will be impossible for intervenors to respond, present evidence, and conduct the cross-examination required for full and true disclosure of the facts, on one of the central issues before the Board -- whether the Board should relieve Entergy Nuclear Operations, ENVIC and the parent Entergy Corporation of their obligations to fund and guarantee decommissioning and restoration costs and replace those obligations in reliance on NorthStar's financial plan. This will become essentially an ex parte proceeding.

If note-taking and depositions are allowed but the protocol otherwise goes into effect, it will dramatically increase intervenors' expenses and will necessitate further delays in the schedule. The time that counsel must expend to prepare cross-examination, and the time the experts must spend preparing their testimony will snowball, because they will not have the documents in front of them when they are drafting their testimony. Unless the notes taken amount to handwritten copying of the entire document, repeated visits to the hard copy will be necessary for counsel to prepare cross-examination, for the experts to prepare their prefiled testimony, and again for the experts to prepare their discovery answers and then prepare for cross-examination at trial.

The New England Coalition opposes the motion in its entirety at this time. The motion fail to meet the standards set forth in Docket Nos. 6545 and 8710. The motion fails to provide good cause to transform intervenors into bystanders.

If the motion is to be granted in any form, the protocol should be modified as follows: 1) note-taking by intervenors' counsel and expert witnesses is permitted; 2) depositions may be conducted by intervenors subject to the same conditions as a state agency; 3) NorthStar will pay the added

costs incurred by intervenors in conducting discovery, in preparing cross-examination, in preparing prefiled testimony, in preparing discovery responses and in preparing for trial; and 4) additional time must be provided to intervenors to prepare their prefiled testimony and responses to discovery, to allow for return visits to review the two documents.

b. Return of critical documents to NorthStar at conclusion of proceedings

Section 317a of the Public Records Act in general bars a state agency from returning to NorthStar any document submitted to the Department, the Agency of Natural Resources, or the Office of the Attorney General, without specific legal authorization. It states "A custodian of public records shall not destroy, give away, sell, discard, or damage any record or records in his or her charge, unless specifically authorized by law or under a record schedule approved by the State Archivist pursuant to 3 V.S.A. § 117(a)(5)."

Board approval of the proposed special protocol for these two documents, however, will amount to Board authorization of return of the documents. The Board will be approving of the language authorizing return of the documents. See the email exchange attached.

The standard protective agreement submitted by the Department appears to authorize return of documents provided under the protective agreement, but with little harm since other parties generally will have access to the documents once they execute the protective agreement.

In this case, however, only the state agencies will have copies. Moreover, the documents are, according to NorthStar, highly relevant to a central issue in the case.

Three, five, or ten or twenty years from now, these documents may be necessary in order for the Department, the Agency, the Office of the Attorney General, the public or a party to understand or question why decommissioning or site restoration is falling short or has fallen short of NorthStar's promises. Only NorthStar will have copies. NorthStar will not be subject to the

Public Records Act. Long after the commercial value of the documents would be threatened by disclosure, the public will be denied access, because no state agency will possess the documents.

Regardless of whether, in other cases, the standard language governing return of documents is appropriate, it is not appropriate in this matter as to these two documents. The Board should approve of the protocol only by adding a statement that approval does not constitute authorization under 1 V.S.A. § 317a for return or destruction of the documents.

CONCLUSION

The Board should deny NorthStar's motion. If the motion is to be granted in any form, the protocol should be modified as follows: 1) note-taking by intervenors' counsel and expert witnesses is permitted; 2) depositions may be conducted by intervenors subject to the same conditions as a state agency; 3) NorthStar will pay the added costs incurred by intervenors in conducting discovery, in preparing cross-examination, in preparing prefiled testimony, in preparing discovery responses and in preparing for trial; and 4) additional time must be provided to intervenors to prepare their prefiled testimony and responses to discovery, to allow for return visits to review the two documents.

The Board also should approve of the protocol only by adding a statement that approval does not constitute authorization under 1 V.S.A. § 317a for return or destruction of the documents.

Counsel for the Conservation Law Foundation has authorized the undersigned to state that C.L.F. joins in this objection.

Dated at Bristol, Vermont this 17th day of May, 2017.

BY: /s/ James A. Dumont_____

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