

STATE OF VERMONT
PUBLIC SERVICE BOARD

Joint Petition of NorthStar Decommissioning)
Holdings, LLC, NorthStar Nuclear)
Decommissioning Company, LLC, NorthStar)
Group Services, Inc., LVI Parent Corp., NorthStar) Docket No. 8880
Group Holdings, LLC, Entergy Nuclear Vermont)
Investment Company, LLC, and Entergy Nuclear)
Operations, 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. §§ 107,)
231, and 232)

**NORTHSTAR PETITIONERS' REPLY TO NEW ENGLAND COALITION'S
OPPOSITION TO NORTHSTAR PETITIONERS' MOTION FOR
SPECIAL PROTOCOL TO GOVERN PARTIES' ACCESS TO HIGHLY
CONFIDENTIAL DOCUMENTS**

Petitioners NorthStar Decommissioning Holdings, LLC, NorthStar Group Holdings, LLC, LVI Parent Corp., NorthStar Group Services, Inc., and NorthStar Nuclear Decommissioning Company, LLC (together, "NorthStar"), respectfully submit this reply to New England Coalition's Opposition To NorthStar Petitioners' Motion For Special Protocol To Govern Parties' Access To Highly Confidential Documents, which New England Coalition ("NEC") filed on May 17, 2017. NEC sets forth two principal arguments: (1) that the level of access provided to NEC by the special protocol is insufficient; and (2) that the special protocol violates Vermont law in (supposedly, according to NEC) calling for the Vermont governmental agencies to return or to destroy (rather than retain) the documents at the conclusion of the proceeding.

Neither argument is persuasive, as explained in more detail below. Please also recall that NorthStar has committed through the regular protective agreement to provide NEC with thousands of documents.

ARGUMENT

I. THE PROPOSED SPECIAL PROTOCOL PROVIDES NEC SUFFICIENT ACCESS TO THE TWO HIGHLY CONFIDENTIAL DOCUMENTS, GIVEN THAT NEC IS NOT ENTITLED TO ANY ACCESS AT ALL

NorthStar's motion and proposed special protocol provide for NEC (and any other non-State governmental party that signs the Protective Agreement, as NEC has already done¹) to access and to review the two highly confidential documents at issue. NEC complains that this level of access is insufficient, but that argument proceeds from the incorrect premise that NEC is entitled to any access at all. To the contrary, consistent with V.R.C.P. 26(c), which provides that the Board may make any order which justice requires to protect a party from "oppression" or "undue burden" including through a requirement that a "(7) trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way," the standard protective agreement entered into in proceedings before the Board (including this proceeding) contemplates a category of documents that are so sensitive that they will be disclosed "only to the Vermont Public Service Board ('Board') and/or to the Department," and not to other parties. Protective Agreement dated May 2, 2017; *see also, e.g., Petition of North Hartland, LLC for approval of a long-term power purchase agreement pursuant to Rule 4.100*, Docket 8569, Order of 6/29/2016 (approving and adopting protective agreement); *Petition of North Hartland, LLC for approval of a long-term power purchase agreement pursuant to Rule 4.100*, Docket 8569, Protective Agreement of 6/1/2016 (protective agreement providing, like the protective agreement in the instant proceeding, that "each

¹ The final sentence of NEC's opposition (at 10) states that Conservation Law Foundation ("CLF") joins in the opposition. CLF's joinder is puzzling, since CLF has not signed the Protective Agreement and thus has voluntarily disqualified itself even from the level of access to the two highly confidential documents that NorthStar has proposed and that NEC criticizes as insufficient.

disclosing Party desires to disclose Allegedly Confidential Information or CEII only to Parties that have executed Schedule IIa or Schedule IIb as appropriate to this Agreement *or, in certain situations, only to the State of Vermont Public Service Board ('Board') and/or to the Department for review in accordance with this Agreement*") (emphasis added).

Moreover, 30 V.S.A. § 231 contemplates a special role for the Department. For example, Section 231 requires the Petitioner to provide a copy of the Section 231 petition only to the Department (and the Board), requires only the Department to provide a recommendation to the Board, and provides that only the Department's request for a hearing (or the Board's *sua sponte* desire for one) shall require a hearing. While the Board in this matter exercised its discretion to allow other entities to intervene, the underlying spirit of Section 231 supports limiting disclosure of a petitioner's extremely sensitive commercial information to the Department and not to other parties.

The two highly confidential documents at issue qualify for this treatment, meaning that NEC is not entitled to access them at all. Specifically, as explained in the Affidavit of Scott E. State ("State Affidavit") filed on May 5, 2017 with NorthStar's motion, the documents contain

highly sensitive information [that] is known only to NorthStar's management team and regulatory counsel, was developed at NorthStar's expense, and is not known to others in NorthStar's industry or to the public in general. Were it to become known to NorthStar's competitors, they would likely be able to adopt it at NorthStar's expense and detriment, to use it unfairly to compete for future projects. . . . NorthStar would potentially lose the opportunity to earn hundreds of millions of dollars of revenue, along with reasonable profit thereon, if its work product was made available to its competitors.

State Affidavit ¶ 5. If these two highly confidential documents do not qualify for "Department's-eyes-only" treatment under the standard protective agreement that the Board has previously adopted, it is hard to imagine what would qualify.

NEC incorrectly asserts (at 7) that the State Affidavit does not address the requirements set forth in, among other orders, *Investigation of Petition of Vermont Gas Systems, Inc., for a Change of Rates*, Docket 8710, Protective Order of 5/26/2016. In fact, the State Affidavit addresses each requirement. As to “the extent the information is known by employees and independent contractors” and “measures taken to guard secrecy,” the State Affidavit explains that the highly confidential documents (and the information they contain) are “known only to NorthStar’s management team and regulatory counsel.” State Affidavit ¶ 5. As to “the amount of effort or money used to develop the information,” the State Affidavit describes NorthStar’s expenditure of “substantial effort and resources” to develop the information. *Id.* As to “the ease or difficulty of others in acquiring or duplicating the information,” the State Affidavit’s same point about the “substantial effort and resources” that were used by NorthStar to develop the information shows that NorthStar’s competitors would have to incur similar expenditures to do so; moreover, the State Affidavit makes clear that those competitors have not yet done so. *See id.* (the information “is not known to others in NorthStar’s industry”). As to the “justification of the period during which the submitting party asserts that material should not be available for public disclosure,” the State Affidavit explains that the material must be safeguarded for as long as NorthStar and its competitors compete for projects involving decommissioning and site restoration of commercial nuclear plants in the United States. *See id.* ¶ 4. Finally, as to an “explanation of whether partial disclosure, or disclosure of redacted versions, can adequately protect the allegedly confidential information,” the State Affidavit specifically notes that NorthStar “is making available, without the use of any special protocol, other forms of [the two highly confidential] documents that contain at a more aggregated and less competitively sensitive level information in the Detailed Pay Item Disbursement Schedule.” *Id.* ¶ 9; *see also id.* (“In

particular, a 90-line item version of the Pay Item Disbursement Schedule Attachment A.DPS.NS.1-77.1, is being produced under ordinary confidentiality designation, and a 4-page version of the Deal Model was already filed publicly, Exhibit JP-SES-Supp-1, Enclosure 4 (4 page deal model).”).

Even though NEC is not entitled to any degree of access to the highly confidential documents, NorthStar, in an effort to facilitate participation by NEC while safeguarding these crucially sensitive documents so that NorthStar’s business is not destroyed, has gone above and beyond by proposing a special protocol that affords NEC some access to the documents in a controlled environment. Since NEC is entitled to no access at all, NorthStar’s proposed special protocol, which provides some access, should be accepted.

There is no basis to adopt any of the four modifications proposed by NEC (Opp. 10). NEC’s first proposed modification would deprive NorthStar of the protective measures in the special protocol by allowing “note-taking by intervenors’ counsel and expert witnesses.” NEC Opp. 10. Such note-taking would substantially increase the risk that the information could fall into the hands of unauthorized persons, including ultimately NorthStar’s competitors. NEC’s second proposed modification, to allow NEC to conduct depositions using the highly confidential documents, is impracticable without allowing NEC to take notes (to which NorthStar is opposed, as just explained). NEC’s third modification, to require NorthStar to pay certain of NEC’s costs, is inconsistent with the Board’s standard practice of requiring intervenors to bear their own costs. *See, e.g., Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction of Phase II of the “Addison Natural Gas Project,”* Docket 8180, Order of 6/5/2015, at 9 n.42 (“all of the parties to this case who have requested an assessment of attorneys’ fees and costs are permissive

intervenor who have been on notice from the outset of this proceeding that they would be expected to bear their own costs”); *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 et al.*, Docket 7600, Order of 4/19/2010, at 5 (rejecting NEC’s request for litigation costs based on “the American Rule requiring parties to bear their own litigation costs in the absence of a statute or a contractual agreement to the contrary”). NEC’s fourth proposed modification, seeking an unspecified amount of “additional time” to prepare prefiled testimony and responses to discovery, should be rejected because NEC does not explain why a single visit to view the documents is insufficient.

Finally, NorthStar has particular reason to be concerned that NEC and/or its counsel will disclose confidential information based on a prior incident in which the Board observed that certain “facts raise[d] the possibility that Mr. Dumont disclosed confidential information,” and the Board ordered further proceedings and a hearing on that issue. *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*, Docket 6545, Order of 10/8/2002, at 8; *see also 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*, Docket 6545, Order of 10/28/2002, at 1 (canceling hearing based on parties’ settlement of the issue following the 10/8/2002 Order). This history at least provides cause for concern, and supports the special protocol’s provisions granting NEC only limited access to the two highly confidential documents.

II. NORTHSTAR'S PROPOSED SPECIAL PROTOCOL APPROPRIATELY RECOGNIZES THAT THE STATE AGENCIES MUST COMPLY WITH VERMONT LAW, INCLUDING THE VERMONT PUBLIC RECORDS ACT

NEC's second complaint concerns the provision of the special protocol (paragraph 13) concerning the Vermont governmental agencies' return or destruction of the highly confidential documents after the proceeding. Specifically, NEC describes the proposed special protocol as "authoriz[ing] state agencies to return to NorthStar these critical documents upon conclusion of the proceedings." Opp. 2.

NEC ignores that the special protocol carefully recognizes that the state agencies must comply with Vermont law, including the Vermont Public Records Act. The special protocol, as revised on May 12, 2017, specifically recognizes that the Vermont governmental agencies must "comply with the Vermont Public Records Law ([3 V.S.A.] § 317a), which prohibits such parties from destroying, giving away, or discarding any records maintained by those entities, 'unless specifically authorized by law or under a record schedule approved by the State Archivist pursuant to 3 V.S.A. § 117(a)(5).'" Highly Confidential Document Protocol ¶ 13. And NorthStar confirmed in an email to NEC (attached to NEC's opposition) that this paragraph of the special protocol was intended to track the similar paragraph (11) of the standard protective agreement, which emphasizes that "nothing in this paragraph shall require the Department or a public agency to destroy notes, documents, or information in violation of statute." NEC provides no reason to conclude that the Vermont governmental agencies will not abide by Vermont law in determining whether to retain (instead of to return or to destroy) the documents at the conclusion of the proceeding.

CONCLUSION

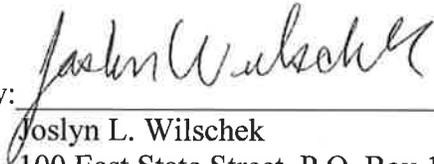
The Board should approve and adopt NorthStar's special protocol, as filed on May 12, 2017.

DATED at Montpelier, Vermont, this 25th day of May, 2017.

Respectfully submitted,

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