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 Group Holdings, LLC, Entergy Nuclear Vermont Investment Company, LLC, 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	)	Docket No. 8880

JOINT PETITIONERS' OPPOSITION TO NEC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Joint Petitioners NorthStar Decommissioning Holdings, LLC, NorthStar Group Holdings, LLC, LVI Parent Corp., NorthStar Group Services, Inc., NorthStar Nuclear Decommissioning Company, LLC (together, "NorthStar"), Entergy Nuclear Vermont Investment Company, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy"), by their attorneys, respectfully submit this opposition to the motion for partial summary judgment filed by the New England Coalition ("NEC") on May 5, 2017.

INTRODUCTION

NEC's motion seeks to curtail the Board's statutory authority under Section 231 to amend a certificate of public good ("CPG") in a new docket by requiring that the Board only allow such amendment upon a motion under Vermont Rule of Civil Procedure 60(b) in the old docket. NEC's proposed approach is inconsistent with Section 231's plain meaning, which allows amendment of CPGs for good cause, and would overturn established Board practice. The Board should reject it.

The Joint Petition follows the appropriate process through which the Board may amend an earlier-granted CPG and orders pertaining thereto in a new docket that addresses new parties and a new proposed transaction that were not before the Board in the old docket. In this new docket, the Board will evaluate whether the transaction as a whole—which may involve certain departures from prior CPGs and orders but which will achieve decommissioning and site restoration of the Vermont Yankee Nuclear Power Station ("VY Station") site decades earlier than would be achieved under the status quo of Entergy's ownership—promotes the general good of the State.

Joint Petitioners are not aware of any instance in which the Board has required a Rule 60(b) motion in such circumstances, and NEC does not cite any Board orders imposing such a requirement. Indeed, in Docket 7862, in assessing continued operation of the VY Station, the Board *denied* Entergy's motion for Rule 60(b) relief from a provision in the Docket 6545 order, but ultimately *granted* Entergy's requested relief to amend provisions of the Docket 6545 CPG in the final Docket 7862 order. The Board did so without any objection that a Rule 60 motion was required from NEC, which was a party, or from NEC's current counsel, Mr. Dumont (who represented party Vermont Public Interest Research Group).

Beyond its request to upend established Board practice, NEC has failed to show that it meets the requirements for establishing issue or claim preclusion because neither the claims and issues litigated in Dockets 7862 and 6545, nor the parties in those dockets, are the same as in the instant Docket 8880.[1] The claims and issues are clearly different: Whereas Dockets 6545 and 7862 concerned the ongoing operation of the VY Station and an expectation of site restoration

[1] The principal new parties, of course, are the NorthStar entities. Joint Petitioners note that they served all Docket 7862 parties with their Joint Petition in this new docket (No. 8880). Each of the Docket 7862 parties thus had ample notice and opportunity to intervene in Docket 8880, and many did so, along with several parties that were not parties in Docket 7862.

only after an extended SAFSTOR period and completion of radiological decommissioning, the current Docket 8880 concerns a proposed sale of Entergy Nuclear Vermont Yankee, LLC ("ENVY") (which owns the VY Station) so that the VY Station can be *promptly* decommissioned and the site restored by an entity (NorthStar) that has various advantages over Entergy in its ability to complete those tasks. The parties are different as well: only Entergy was the VY Station's owner in Docket 7862 (and the prospective owner in Docket 6545), yet Docket 8880 includes NorthStar as the prospective owner.

In any event, if the Board finds any merit to NEC's argument that the Board should require Joint Petitioners to file a motion under Vermont Rule of Civil Procedure 60, the Board should exercise its authority under Board Rule 2.107 to waive application of Vermont Rule of Civil Procedure 60 under these circumstances, construe the Joint Petition as a Rule 60 motion, or permit Joint Petitioners to file such a motion now.

FACTUAL BACKGROUND[2]

NEC's motion relies on Board orders from two prior proceedings: (1) the Docket 6545 order, which approved the sale of the VY Station from its prior owners to Entergy; and (2) the Docket 7862 order, which approved continued operation of the VY Station for a limited period of time and continued ownership solely for the purpose of decommissioning following cessation of operations.

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[2] Joint Petitioners have also included a Response to NEC's Statement of Undisputed Facts. As a general matter, Joint Petitioners do not dispute the direct quotations from various documents on which NEC relies. Rather, Joint Petitioners dispute NEC's efforts to expand upon the language of these documents, which speak for themselves, by suggesting an interpretation of the documents. Such statements regarding the intent of the MOUs and Board orders do not state facts under Vermont Rule of Civil Procedure 56, but rather set forth legal arguments not appropriate for a Rule 56 statement of undisputed material facts and improperly imbed inferences that NEC is not entitled to as a matter of law.

Docket 6545. In Docket 6545, the Board initiated an investigation into the proposed sale of the VY Station to ENVY under General Order 45.[3] Relatedly, ENVY and Entergy Nuclear Operations, Inc. ("ENOI") sought a CPG under Section 231 to own and to operate the VY Station. Dkt. 6545, Order of 6/13/2002 at 16. The Board ultimately granted the CPG, approving ENVY to own and ENOI to operate the VY Station through March 21, 2012, concurrent with the period of the then-existing federal operating license issued by the U.S. Nuclear Regulatory Commission. Dkt. 6545, Certificate of Public Good Issued Pursuant to 30 V.S.A. § 231 of 6/13/2002.

Docket 7862. In Docket 7862, which was initially commenced as Docket 7440, ENVY and ENOI sought amendment of their Docket 6545 CPG to allow for continued operation of the VY Station beyond March 21, 2012.[4] The Second Amended Petition specifically explained that "[t]his Board has the authority under Section 231 to issue an amended CPG for continued operation and any necessary incidents of operation, including the storage of spent nuclear fuel." Dkt. 7862, Second Amended Petition, ¶ 5. At the time, the parties and the Board both contemplated that the VY Station would enter SAFSTOR, likely for decades, before decommissioning of the VY Station would commence. Dkt. 7862, Order of 3/28/2014 at 82, 86. The Board amended the CPG to allow for continued operation and storage of spent nuclear fuel. *Id.* at 94-95. Material to the Board's approval was Entergy's commitment "to a process under which the scope of its site restoration obligations would be fully defined" and "to set aside $25

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[3] Dkt. 6545, *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*, Order of 6/13/2002 at 14-15.

[4] Dkt. 7862, *Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificate of Public Good and other approvals required under 30 V.S.A. § 231(a) for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent-nuclear fuel*, Second Amended Petition (Aug. 27, 2013).

million earmarked for site restoration." *Id.* at 5-6. The Board further explained that the Memorandum of Understanding among Entergy, the Department of Public Service, and the Agency of Natural Resources "does not purport to resolve post-operational issues, such as site restoration timing, funding and standards." *Id.* at 93. The Board acknowledged that the parties expected a further Board proceeding "to determine the [site restoration] standards that will apply." *Id.* at 88.

Docket 8880. In the instant proceeding, the Joint Petitioners, which include both Entergy and NorthStar entities, seek approval pursuant to 30 V.S.A. §§ 107, 231, and 232 to transfer ownership of ENVY to NorthStar Decommissioning Holdings, LLC. Dkt. 8880, Joint Petition of 12/16/2016. If the transaction is approved and the deal closes, the NorthStar entities then would decommission the VY Station on an accelerated schedule, in part by performing radiological decommissioning and site restoration simultaneously. *Id.* at ¶ 9. This approach would promote the public good by, *inter alia*, completing radiological decommissioning and site restoration (with the exception of the ISFSI area) by 2030, and allowing earlier re-development of the site. Dkt. 8880, State PFT at 3:3-13. The Joint Petition also asks the Board to approve proposed site restoration standards that would apply if NorthStar acquires the VY Station. Dkt. 8880, Joint Petition of 12/16/2016 at ¶ 8.

To be sure, the Joint Petition and supporting prefiled testimony request what may be considered departures from provisions of the Docket 7862 and 6545 orders concerning (1) the use of decontaminated concrete rubble as below-grade fill, *i.e.*, "rubblization"; (2) the maintenance of the site restoration trust fund in a wholly separate account (rather than a still-separate sub-account of the nuclear decommissioning trust fund); (3) the timing of site-restoration activities; and (4) Entergy Corporation's parent guarantee of the site restoration trust

fund. Joint Petitioners candidly acknowledged these proposed departures in their Joint Petition and supporting prefiled testimony, and Joint Petitioners recognize that the Board has authority to review them in connection with its overall determination whether the proposed transaction serves the general good of Vermont.

STANDARD OF REVIEW

A grant of summary judgment is only "appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Stone v. Town of Irasburg*, 2014 VT 43, ¶ 25, 196 Vt. 356, 367, 98 A.3d 769, 776 (2014) (citing V.R.C.P. 56(a)). In determining whether an issue of material fact exists, "the nonmoving party receives the benefit of all reasonable doubts and inferences," *Berge v. State*, 2006 VT 116, ¶ 5, 181 Vt. 1, 3, 915 A.2d 189, 190–91 (2006), and courts "[will] accept as true allegations made in opposition to [a] motion for summary judgment, so long as they are supported by affidavits or other evidentiary material," *Morway v. Trombly*, 173 Vt. 266, 270, 789 A.2d 965, 968 (2001) (citation omitted). "Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion." *Clarke v. Abate*, 2013 VT 52, ¶ 28, 194 Vt. 294, 313, 80 A.3d 578, 589 (2013) (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998)).

ARGUMENT

I. SECTION 231 AND BOARD PRACTICE PERMIT AMENDMENT OF A PRIOR CPG THROUGH A NEW PROCEEDING, AND DO NOT REQUIRE A RULE 60(B) MOTION IN THE PRIOR DOCKET

The NEC motion seeks to change normal Board practice by requiring Joint Petitioners to seek Rule 60(b) relief or else be bound by the existing CPG conditions from a prior docket. But Section 231 explicitly authorizes amendments of prior CPGs for good cause after a hearing, and the Board has made such amendments without imposing any requirement that a Rule 60(b)

motion be filed in the prior docket(s). There is no reason to deviate from this statutorily authorized prior practice, and NEC points to no Board precedent that followed NEC's proposed approach.

Section 231—the principal statute under which Joint Petitioners seek approval for the transaction—provides that, "[f]or good cause, after opportunity for hearing, the Board ***may amend*** or revoke any certificate awarded under the provisions of this section." 30 V.S.A. § 231 (emphasis added); *see also* Dkt. 6545, Order of 6/13/2002 at 80 ("The Board has the authority under Section 231(a) of Title 30 to amend or revoke any Certificate for good cause."); Dkt. 7195, *In Re Vermont Dep't of Pub. Serv*., Order of 9/18/2006 at 13-14 ("Under Section 231(a), the Board previously granted a CPG to Entergy VY to own and operate Vermont Yankee. That section also permits the Board to modify the CPG for good cause, after notice and an opportunity for hearing.").[5] The statute's plain language does not require that an amendment be made within the confines of the prior docket rather than in a new docket. And the Board routinely handles amendments in new dockets, including as to the VY Station in Docket 7862, which involved amendment of a prior order and CPG.[6]

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[5] *See also* Dkt. 8872, *Petition of Great River Hydro NE, LLC for an order (1) approving the acquisition by Great River Hydro NE of a controlling interest in TransCanada Hydro Northeast Inc. pursuant to 30 V.S.A. § 107, (2) authorizing the issuance of a certificate of public good (or amendment thereof) to Great River Hydro, LLC pursuant to 30 V.S.A. § 231, authorizing Great River Hydro to own and operate the existing TC HydroNE hydroelectric facilities located in Vermont, and (3) approving continued de minimis regulation under 30 V.S.A. §§ 107 & 108. Petition of TransCanada Hydro Northeast Inc. in connection with and in support of the Petition of Great River Hydro NE, LLC*., Order of 4/6/2017 at 7 ("The Board may amend a CPG issued under 30 V.S.A. § 231 for good cause.").

[6] The Board has permitted amendments of prior CPGs in new dockets in a variety of contexts. *See, e.g., Petition of Frontier Communications International, Inc. to amend its Certificate of Public Good to reflect a name change*, Dkt. 6438, 11/8/2000 (amending CPG to reflect name change in new docket).

Indeed, as to the VY Station, the Board has not only amended a prior CPG/order in a new docket, it additionally has *rejected* a Rule 60(b) motion in an old docket. In 2012, the Board denied Entergy's Rule 60 motion for relief from the Docket 6545 judgment to the extent the Board order and CPG prevented operation after March 21, 2012. At the time of this denial, the Board explicitly recognized the pendency of Entergy's Docket 7862 petition seeking that same relief through an amendment of the Docket 6545 CPG. Dkt. 6545, Order of 11/29/2012 at 3 ("We address only Entergy VY's request for relief under Rule 60(b). . . . *[W]e deny the request and do not reach any conclusions concerning the merits of modifying or extending Entergy VY's obligations under existing Orders and CPGs.*") (emphasis added).[7] Ultimately, the Board granted Entergy's requested relief in the Board's final order in Docket 7862, confirming that Section 231 was entirely sufficient to grant that relief, without requiring a renewed Rule 60(b) motion. *See* Dkt. 7862, Order of 3/28/2014 at 94 (amending the CPG to allow for continued operation past March 21, 2012, because such operation would promote the general good of the State).

The Board's authority under Section 231 and past practice are alone sufficient to defeat NEC's motion.[8] NEC's argument (at 2) that Joint Petitioners' "sole remedy is the filing and service of motions under Board Rule 2.221 and Vermont Rule of Civil Procedure 60(b) to reopen Docket Nos. 7862 and 6545," conflicts with the standard process applicable to proceedings before this Board under Section 231. NEC's approach would remove from the Board's consideration of the public good certain provisions of prior Board orders that NEC argues are

[7] As noted in the Introduction, both NEC and NEC's current counsel were involved in Docket 7862. Neither objected to the Board's ruling that, while Rule 60 relief was unavailable, relief at the conclusion of Docket 7862 remained possible.

[8] As a general matter, the cases NEC cites (at 9-10), do not concern Section 231 or proceedings before the Board. *See, e.g.*, *In re Tariff Filing of Central Vermont Public Service Corp.*, 172 Vt. 14, 16 (2001) (involving a rate proceeding not subject to Section 231).

entitled to preclusive effect, instead of allowing proposed changes to those provisions to be considered in the context of the entire proposed transaction, of which the proposed changes are a material part.[9] The need for a new proceeding is clear here, where the Board may find that accelerating the decommissioning of the VY Station on the terms set forth in the proposed transaction will promote the general good of the State. *Accord In re Application of Lathrop Ltd.*, 2015 VT 49, ¶ 63 (holding "environmental court's decision [to require Rule 60 motion for successive zoning application] goes in the wrong direction i[n] that it elevates form over substance").

Application of the Board's usual practice is particularly appropriate here, where the Entergy entities specifically do not seek to modify the prior Board orders as applied to Entergy's continued ownership of the VY Station if the proposed transaction is not approved and consummated. As the Entergy petitioners have made clear, the Entergy petitioners will remain bound by the prior Board orders applicable to the VY Station. *See* Dkt. 8880 Joint Petitioners' Discovery Response of 4/26/17 at A.DPS:EN.1-4 ("Entergy petitioner companies admit that, absent a closing of the anticipated transfer of control of ENVY to NorthStar, the terms and conditions of the Docket 7862 MOU will remain unchanged as they apply to the Entergy companies that are parties to that MOU, subject to any changes that the parties and the Board may make in the future."). In these circumstances, a Rule 60 motion is neither necessary nor proper.

For these reasons, the Board should deny NEC's partial summary judgment motion.

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[9] *See* State PFT at 28:8-10 ("NorthStar's contract with Entergy makes it a condition to closing of the transaction that no final order of this Board shall include a term that would have a material adverse effect on NorthStar.").

II. NEC FAILS TO DEMONSTRATE THAT THE REQUIREMENTS FOR CLAIM OR ISSUE PRECLUSION ARE SATISFIED HERE

Given the Board's clear authority under Section 231 to amend prior CPGs and orders without the need for a Rule 60(b) motion,[10] the Board need not reach the question whether claim or issue preclusion applies to the four "conditions" NEC identifies (at 8) concerning rubblization, the maintenance of a separate fund for site restoration, the requirement to commence site restoration "after completion of radiological decommissioning and NRC license termination," and the Entergy Corporation guarantee of the site restoration trust. But even if the Board addresses NEC's preclusion arguments, NEC has failed to establish that these "conditions" are entitled to claim- or issue-preclusive effect.

Claim preclusion (res judicata) applies where there is: "(1) a valid final judgment in [a] prior action, (2) identity between the parties to the prior action and the present action, (3) the same subject matter involved in both actions and (4) the same causes of action involved." *State v. Carroll*, 171 Vt. 395, 397, 765 A.2d 500, 502 (2000). The elements of issue preclusion (collateral estoppel) are:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

State v. Nutbrown-Covey, 2017 VT 26, ¶ 8. These principles are applied flexibly in administrative proceedings. *See In re Jolley Assocs.*, 2006 VT 132, ¶ 12.

[10] NEC concedes (at 10) that claim and issue preclusion are not obstacles to a Rule 60(b) motion.

NEC asserts in a cursory manner (at 9-10) that these elements are satisfied. But NEC has not demonstrated either (1) that the claims or issues in this proceeding and the prior proceedings are the same, or (2) that the parties are the same or are in privity.

First, claim preclusion does not apply because NEC identifies no "claim" that is the same in Docket 8880 as compared to either Docket 7862 or Docket 6545. The Vermont Supreme Court has "characterized causes of action as the same for purposes of claim preclusion where the same evidence will support the action in both instances." *Am. Trucking Ass'ns, Inc. v. Conway*, 152 Vt. 363, 370 (1989) (internal quotation marks omitted). The relevant inquiry is "whether the two causes of action are so interrelated that [a party] ought to have raised both in that litigation." *Id.* Thus, this Board has held claim preclusion inapplicable when "the underlying cause of action is different." Dkt. 7862, Order of 6/19/2013 at 15.

Here, the cause of action or "claim" in the instant Docket 8880 differs from the cause of action in both Docket 6545 and Docket 7862. The evidence concerning the NorthStar transaction and NorthStar's new approach to decommissioning and site restoration did not exist at the time of Dockets 6545 or 7862, and therefore had no relevance in those dockets. Docket 7862 concerned the continued operation of the VY Station as an electric generation facility and contemplated that the VY Station would be decommissioned decades in the future after a lengthy SAFSTOR period; Docket 6545 concerned the sale of the operating VY Station from its prior owners to Entergy. In the instant Docket 8880, by contrast, the proposed sale does not involve an electric generation facility, but rather a contaminated site. At this point, the VY Station already has shut down and the proposed transaction to transfer ownership of the VY Station to the NorthStar entities will allow for accelerated decommissioning and site restoration (which will be done concurrently) in the near term, to be completed by 2030. The Joint Petition requests

approval of the proposed terms for such a transfer, which include both entirely new terms and terms that may differ from terms included in prior Board orders. *Accord In re Application of Lathrop Ltd. P'ship I,* 2015 VT 49, ¶ 58, 199 Vt. 19, 46, 121 A.3d 630, 650 (2015) (holding that zoning board may entertain a successive application regarding the same property if "a substantial change of conditions had occurred or other considerations materially affecting the merits of the request have intervened between the first and second application") (citing *In re Carrier*, 155 Vt. 152, 158 (1990)). The fundamental differences between this Docket and the prior Dockets forecloses any argument that the "cause of action" is the same for claim preclusion purposes.

Second, for similar reasons, NEC identifies no "issue" raised here that "is the same as [] one raised in [an] [earlier] action" that was "resolved by a final judgment on the merits." *Nutbrown-Covey*, 2017 VT 26, ¶ 8. Issue preclusion is narrower in scope than claim preclusion, *see In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 20, 769 A.2d 668, 673 (2001), and "bars the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the same parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action," *Am. Trucking Ass'ns,* 152 Vt. at 369, 566 A.2d at 1327. The "conditions" NEC argues are entitled to preclusive effect are not finally determined "issues" because, again, they were determined against a backdrop of Entergy operating the VY Station for a limited period of time and then undertaking decommissioning after a lengthy SAFSTOR period, followed by site restoration. The question now before the Board is whether transfer of the shut-down VY Station to the NorthStar entities for purposes of accelerated decommissioning and site restoration will promote the general good of the State; the specific issues NEC identifies (concerning rubblization, transfer of the site restoration trust into a sub-account of the nuclear decommissioning trust, concurrent performance of decommissioning

and site restoration, and elimination of the Entergy Corporation guarantee) are part and parcel of NorthStar's larger plan. These "issues" are therefore distinct for preclusion purposes. *See, e.g Trickett v. Ochs*, 2003 VT 91, ¶ 14, 176 Vt. 89, 95, 838 A.2d 66, 71 (2003) (holding that issue preclusion did not bar a lawsuit against an apple orchard for noise-related nuisance and trespass claims even though zoning board previously had determined "whether defendants fully complied with the zoning ordinance," because compliance with the zoning ordinance was not determinative and therefore the issues were not the same); *see also* Dkt. 7862, Order of 6/19/2013 at 15 (rejecting argument that claim or issue preclusion barred the Board from revisiting findings determined in National Pollutant Discharge Elimination System permit proceeding).

Finally, NEC concedes (as it must) that preclusion applies only where "the party raising the objection and *the party against whom it is raised were the same (or in privity), in both cases*." NEC Mot. at 9 (emphasis added). But, contrary to NEC's suggestion (at 9), the parties here are not the same or in privity. "[I]dentity of parties for res judicata purposes is present when one party is so identified in interest with other party that they represent one single legal right." *Larkin v. City of Burlington*, 172 Vt. 566, 569, 772 A.2d 553, 558 (2001) (citation omitted); *see also First Wis. Mortg. Trust v. Wyman's, Inc.*, 139 Vt. 350, 358–59, 428 A.2d 1119, 1124 (1981) (for purposes of res judicata, test for privity is whether parties have substantially the same interest in successive proceedings).

The Entergy and NorthStar petitioners are not in privity with each other for purposes of preclusion doctrines. NorthStar had no interest or involvement in any of the prior Dockets. Unless and until the Board approves transfer of the VY Station ***and*** Entergy and NorthStar close the transaction, no NorthStar entity will be bound by any Board order. Conversely, if the Board

does not approve the proposed transaction and issue a CPG for NorthStar to decommission the VY Station, Entergy will remain bound by all of the currently existing Board orders, CPGs, and MOUs. Because identity of parties is required for both issue and claim preclusion, NEC cannot satisfy the requirements for either doctrine. This Board has rejected res judicata and collateral estoppel arguments when "not all of the parties are the same," Dkt. 7862, Order of 6/19/2013 at 15, and should do so here as well.

III. IN THE ALTERNATIVE, THE BOARD SHOULD FOREGO STRICT APPLICATION OF VERMONT RULE OF CIVIL PROCEDURE 60(B)

If the Board determines that its normal process does not apply and that the prior conditions are entitled to preclusive effect, the Board should waive application of Rule 60(b), construe the Joint Petition as a Rule 60(b) filing, or permit the Joint Petitioners to file a Rule 60(b) motion.

First, under Board Rule 2.107, the Board may waive application of a rule "to prevent unnecessary hardship or delay, in order to prevent injustice, or for other good cause." If the Board otherwise agrees with NEC that Rule 60(b) is the exclusive route to relief here, the Board should waive strict application of that Rule so as to allow the Board to consider the "conditions" identified by NEC (at 8) in the context of the entire proposed transaction and whether the transaction promotes the general good of the State under Section 231. NEC has identified no compelling reason for a strict application of the rule, particularly in light of prior Board practice allowing for amendment of CPG conditions without requiring petitioners to seek relief from prior Board orders. Thus, good cause exists for waiving its application here.

Second, in the alternative, the Board should construe the Joint Petition as satisfying the need for a Rule 60(b) motion because the Joint Petition and prefiled testimony specifically identify the terms of the proposed transaction that may be viewed as a departure from prior

Board orders. No party would be prejudiced by such an approach because all parties to Docket 7862 received notice of the current proceeding and all parties that sought to intervene in this Docket 8880 were allowed to intervene.

Third, in the further alternative, the Board should permit Joint Petitioners to file a Rule 60(b) motion in Dockets 7862 and 6545 and adjudicate that motion within the schedule of the instant Docket 8880.

CONCLUSION

The Board should deny NEC's motion. In the alternative, if the Board is inclined to agree with NEC's argument that Vermont Rule of Civil Procedure 60(b) is the exclusive means to relief in these circumstances, the Board should use Board Rule 2.107 to waive the application of Vermont Rule of Civil Procedure 60(b), construe Joint Petitioners' petition in this Docket as a Rule 60(b) motion, or allow Joint Petitioners to file a new Rule 60(b) motion.

DATED at New York, New York, this 5th day of June, 2017.

Respectfully submitted,

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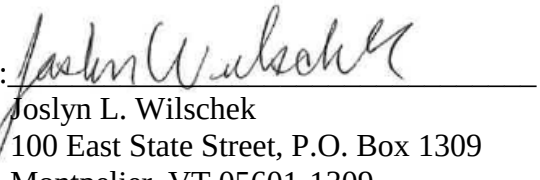
By: 

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