

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.,) Docket No. 8880
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)

JOINT PETITIONERS' RESPONSE TO NEC'S STATEMENT
OF UNDISPUTED MATERIAL FACTS

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 Response in conformance with V.R.C.P. 56(C)(1) AND (C)(2) to the Statement of Undisputed Material Facts filed by the New England Coalition ("NEC") in conjunction with their Motion for Partial Summary Judgment on May 5, 2017.

NEC STATEMENT 1:

The Department of Public Service and Entergy Nuclear Vermont Yankee entered into a Memorandum of Understanding ("Docket No. 7862 MOU") in Docket 7862. Docket No. 7862 Order p.2.

JOINT PETITIONERS' RESPONSE TO STATEMENT 1:

Undisputed except to the extent that the Department of Public Service and Entergy Nuclear Vermont Yankee are not the only parties to that MOU. Additional parties are the Vermont Agency of Natural Resources and Entergy Nuclear Operations, Inc.

NEC STATEMENT 2:

The Board approved and adopted the MOU in its order dated March 28, 2014. Docket No. 7862 Order p.2.

JOINT PETITIONERS' RESPONSE TO STATEMENT 2:

Undisputed.

NEC STATEMENT 3:

The Board explicitly relied upon the commitments in the MOU as the basis for its order. Docket No. 7862 Order p.94.

JOINT PETITIONERS' RESPONSE TO STATEMENT 3:

Undisputed.

NEC STATEMENT 4:

The Board incorporated each of the terms of the MOU into its order. Docket No. 7862 Order p.95.

JOINT PETITIONERS' RESPONSE TO STATEMENT 4:

Undisputed.

NEC STATEMENT 5:

Entergy Nuclear Vermont Yankee (“ENVY” or “EVY”) and Entergy Nuclear Operations, LLC (“ENO”) were parties in Docket No. 7862. Docket No. 7862 Order p.2.

JOINT PETITIONERS' RESPONSE TO STATEMENT 5:

Undisputed.

NEC STATEMENT 6:

The Docket No. 7862 Order was not appealed and became a final judgment. (The Board is asked to take judicial or administrative notice of its own records.)

JOINT PETITIONERS' RESPONSE TO STATEMENT 6:

Undisputed.

NEC STATEMENT 7:

Paragraph 5 of the MOU states that “site restoration” as used in the MOU refers to the period after radiological decommissioning has been completed. Docket No. 7862 MOU ¶ 5.

JOINT PETITIONERS' RESPONSE TO STATEMENT 7:

Undisputed, except to the extent paragraph 5 of the Docket No. 7862 MOU specifically states: “As used in this MOU, the period of ‘site restoration’ applies only to the period of time after radiological decommissioning has been completed to the satisfaction of the NRC.”

NEC STATEMENT 8:

After radiological decommissioning has been completed, the NRC will terminate the license for the facility and NRC regulations will cease to apply to the site. Docket No. 7862 Order Finding 220, p. 83.

JOINT PETITIONERS' RESPONSE TO STATEMENT 8:

Undisputed, except to the extent that the NRC will not terminate the Part 50 license as it applies to the portion of the site required for spent fuel storage for as long as spent fuel remains on the site. Prefiled Testimony of Scott E. State, dated December 16, 2016, at 22:2-8. Paragraph 220 of the Board’s final order in Docket No. 7862 specifically states that “[s]ite restoration costs and

activities are not governed by NRC regulations, as they come after license termination and are outside the scope of the NRC definition of decommissioning.”

NEC STATEMENT 9:

After radiological decommissioning has been completed and the NRC has terminated the license for the facility, the State of Vermont will have exclusive jurisdiction over site restoration. Docket No. 7862 Order p. 54; see also Finding 220, p. 83.

JOINT PETITIONERS’ RESPONSE TO STATEMENT 9:

Undisputed to the extent that this Statement contemplates that site restoration commences after the NRC releases portions of the site from its license requirements following the completion of radiological decommissioning.

NEC STATEMENT 10:

Paragraph 5 of the MOU states that ENVY, the Department of Public Service, the Agency of Natural Resources (“ANR”) and the Department of Health (“DOH”) shall work in good faith to develop site restoration standards “including that ENVY shall not employ rubbleization at the VY Station site (*i.e.*, demolition of above-grade decontaminated concrete structure into rubble that is buried on the site).” Docket No. 7862 MOU ¶ 5; Docket No. 7862 Order Finding 21 p.30.

JOINT PETITIONERS’ RESPONSE TO STATEMENT 10:

Undisputed.

NEC STATEMENT 11:

The MOU and the Board order, while committing ENVY, the Department, ANR and DOH to negotiate about site restoration standards generally, intended that the prohibition against use of rubbleization was not subject to further negotiation. The standards to be developed must include

that standard. Docket No. 7862 MOU ¶ 5; Docket No. 7862 Order Finding 21 p.30 (stating that the standards to be developed “will prohibit ENVY from employing rubblization.”)

JOINT PETITIONERS’ RESPONSE TO STATEMENT 11:

Disputed. This statement regarding the intent of the MOU and the Board order does not state a fact under Vermont Rule of Civil Procedure 56, but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. “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)). The Board’s prior Order and the Docket No. 7862 MOU speak for themselves. Finding 21 specifically indicates that the Board was not addressing the final standards, which remain open to negotiation between ENVY, the Department, the Agency of Natural Resources, and the Vermont Department of Health. Docket No. 7862 Order Finding 21 p.30. The Order and MOU are silent on the basis and reasons for prohibiting rubblization, except that, absent notice of the proposed transaction with NorthStar and the potential for accelerated decommissioning and reuse of the site, the Board adopted the MOU’s language. *Id.*

NEC STATEMENT 12:

Prior to the Board Order in Docket 7862, there existed no requirement that ENVY create a fund separate from the decommissioning trust fund to pay for site restoration. The availability of funds for site restoration depended upon the existence of a potential surplus in the NRC-regulated decommissioning trust fund. Docket No. 7862 Order pp.46-50.

JOINT PETITIONERS’ RESPONSE TO STATEMENT 12:

Undisputed.

NEC STATEMENT 13:

Paragraph 7 of the MOU imposed a requirement that a separate fund, not subject to NRC jurisdiction, be created and funded to pay for site restoration. Docket No. 7862 Order pp.46-50; MOU ¶ 7.

JOINT PETITIONERS' RESPONSE TO STATEMENT 13:

Disputed. The cited sources do not reference whether the separate fund is subject to NRC jurisdiction, and do not explicitly exclude the NRC from reviewing, monitoring, or directing the use of such funds. Dkt.. 7862 Order at pp.46-50; Dkt. 7862 MOU at ¶ 7. The statement regarding the jurisdiction of the NRC does not state a fact under Vermont Rule of Civil Procedure 56, but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. *Clarke*, 2013 VT 52 at ¶ 28, 194 Vt. at 313, 80 A.3d at 589 (“Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion.” (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998))).

NEC STATEMENT 14:

Without a separate fund, there was no guarantee that any funding would be available for site restoration. Docket No. 7862 Order pp.46-50.

JOINT PETITIONERS' RESPONSE TO STATEMENT 14:

Disputed. The documents cited do not support the statement. ENVY's decommissioning cost estimate at the time showed that the Nuclear Decommissioning Trust contained sufficient funds to complete site restoration using SAFSTOR. Dkt. 7862 Order at p.84, Finding 226.

NEC STATEMENT 15:

The Board relied on the commitment to create this separate fund in approving of the MOU. Docket No. 7862 Order pp.46-50.

JOINT PETITIONERS' RESPONSE TO STATEMENT 15:

Undisputed.

NEC STATEMENT 16:

Paragraph 6 of the MOU imposed a requirement that site restoration occur promptly after radiological decommissioning had been completed. Docket No. 7862 Order Findings 102, 167, pp. 52, 72.

JOINT PETITIONERS' RESPONSE TO STATEMENT 16:

Undisputed.

NEC STATEMENT 17:

The Board made clear that the plan to perform site restoration after completion of radiological decommissioning would leave the State with exclusive jurisdiction to regulate site restoration. Docket No. 7862 Order p. 54; see also Finding 220, p. 83.

JOINT PETITIONERS' RESPONSE TO STATEMENT 17:

Disputed. The statements and findings of the Board speak for themselves. The Board did not identify other potential sources of regulation of site restoration, but noted that it had “ultimate jurisdiction over non-radiological site restoration,” the standards and procedure of which would be determined at a future date and time in a new docket. Dkt. 7862 Order at p.54.

NEC STATEMENT 18:

The Department of Public Service and Entergy Nuclear Vermont Yankee entered into a Memorandum of Understanding (“Docket No. 6545 MOU”) in Docket 6545. Docket No. 6545 Order generally, *esp.* p.60.

JOINT PETITIONERS' RESPONSE TO STATEMENT 18:

Undisputed, except to the extent that the Department of Public Service and Entergy Nuclear Vermont Yankee are not the only parties to that MOU. Additional parties are Vermont Yankee Nuclear Power Corporation, Central Vermont Public Service Corporation, and Green Mountain Power Corporation.

NEC STATEMENT 19:

The Board approved and adopted the Docket No. 6545 MOU with certain amendments. The amended version of the Docket No. 6545 MOU is set forth in Board Order Appendix D.

JOINT PETITIONERS' RESPONSE TO STATEMENT 19:

Undisputed, except to the extent that Appendix D to the Board's June 13, 2002 Docket 6545 Order contains modifications only to Sections 3, 8, and 10 of the Docket 6545 MOU, and that the Board's July 11, July 15, July 26 and July 30, 2002 Docket 6545 orders further amend and/or clarify Appendix D.

NEC STATEMENT 20:

In both the original MOU and the amended MOU Section 3 states that "the site will be restored by removal of all structures, and, if appropriate, regrading and reseeding the land." Docket No. 6545 Order Appendix D; Docket No. 6545 MOU.

JOINT PETITIONERS' RESPONSE TO STATEMENT 20:

Undisputed except to the extent that the quoted language applies only "once the VYNPS site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property." Dkt. 6545 Order at Appendix D.

NEC STATEMENT 21:

“Removal” means “the act of moving or taking something away from a place.” Merriam-Webster.com.

JOINT PETITIONERS’ RESPONSE TO STATEMENT 21:

Undisputed to the extent this statement provides one of several definitions of “removal.”

NEC STATEMENT 22:

The Docket 6545 Order required the moving or taking away from the VY site of all structures.

JOINT PETITIONERS’ RESPONSE TO STATEMENT 22:

Disputed. This statement does not state a fact under Vermont Rule of Civil Procedure 56, but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. *Clarke*, 2013 VT 52 at ¶ 28, 194 Vt. at 313, 80 A.3d at 589 (“Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion.”) (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998)). The Final Order of Docket 6545, dated June 13, 2002, does not define the term “removal” or the term “all structures” or order the taking away of specific non-radiological material from the site. Dkt. 6545 Order at Appendix D (“Site restoration shall mean that, once the VYNPS site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the site will be restored by removal of all structures and, if appropriate, regrading and reseeded the land.”).

NEC STATEMENT 23:

The demolition of above-grade decontaminated concrete structures into rubble that is buried *on the site* does not constitute the moving or taking away from the VY site of the structures.

JOINT PETITIONERS' RESPONSE TO STATEMENT 23:

Disputed. This statement does not state a fact under Vermont Rule of Civil Procedure 56 but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. *Clarke*, 2013 VT 52 at ¶ 28, 194 Vt. at 313, 80 A.3d at 589 (“Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion.”) (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998)). Nothing in Docket 6545 deals with or addresses methods of removing buildings, rubble, or any other deconstruction practice.

NEC STATEMENT 24:

The Board explicitly relied upon the commitment in the MOU to removal of all structures as a basis for its order. Docket No. 6545 Order p.60 (2002 Vt. PUC LEXIS 279, pp.165-166). The Board's Order states:

113. The MOU contains, and ENVY has committed to, no specific “greenfield” standards. However, Paragraph 9 of the MOU provides that ENVY will perform site restoration according to Paragraph 3 of the MOU which provides that “Site restoration shall mean that, once the [Vermont Yankee] site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the site will be restored by removal of all structures and, if appropriate, regrading and reseeded the land. Exh. VY-42 at P P3, 9; tr. 4/18/02 at 101-04, 172-89 (Sherman).

Discussion

ENVY has committed to return the Vermont Yankee site to “greenfield” conditions. ENVY's witness Wells provided the following testimony:

Q. But you're willing to go forward with the existing decommissioning trust fund, are you not?

A. As is to meet the NRC minimum.

Q. Will it be adequate to meet the NRC minimum and also to return the site to greenfield condition?

A. After a period of time.

Q. Using SAF[E]STOR?

A. Yes, sir.

While directing ENVY to restore the Vermont Yankee site once it is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the MOU provides no definition of greenfield, nor standards by which to measure that status. Given Ms. Well's testimony, we interpret the term "restored" within the context of paragraph 3 of the Memorandum of Understanding to mean that, once the Vermont Yankee site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, "the site will be restored by removal of all structures and, if appropriate, regrading and reseeded the land."

JOINT PETITIONERS' RESPONSE TO STATEMENT 24:

Undisputed to the extent that the quoted statement (with footnotes omitted) appears at pages 82-83 of the Board's order, but disputed to the extent that the statement purports to interpret the Board's order and what the Board may have relied upon in its order. To the latter extent, this statement does not state a fact under Vermont Rule of Civil Procedure 56, but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. *Clarke*, 2013 VT 52 at ¶ 28, 194 Vt. at 313, 80 A.3d at 589 ("Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion.") (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998)). As noted in the language quoted, neither the parties nor the Board in Docket 6545 offered or adopted specific "greenfield" standards or demolition practices for the "removal" of "all structures" or their non-radiological compositional material and such site restoration standards would apply only "once the [Vermont Yankee] site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses."

NEC STATEMENT 25:

Entergy Nuclear Vermont Yankee ("ENVY" or "EVY") and Entergy Nuclear Operations, LLC ("ENO") were parties in Docket No. 6545. Docket No. 6545 Order p.2.

JOINT PETITIONERS' RESPONSE TO STATEMENT 25:

Undisputed.

NEC STATEMENT 26:

The Docket No. 6545 Order was affirmed on appeal and became a final judgment. *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 2003 VT 53, 175 Vt. 368, 829 A.2d 1284.

JOINT PETITIONERS' RESPONSE TO STATEMENT 26:

Undisputed except to the extent that the Docket 6545 Order was subject to several motions to modify, alter, or amend prior to the affirmance on appeal to the Vermont Supreme Court.

NEC STATEMENT 27:

The NorthStar entities have entered into a contract with Entergy Nuclear Vermont Investment Company, LLC (“ENVIC”) and ENO by which NorthStar Decommissioning Holdings, LLC will purchase ENVY from ENVIC on detailed terms. Scott State 12/16/16 PFT generally and p.17; Steven Scheurich 12/16/16 PFT generally.

JOINT PETITIONERS' RESPONSE TO STATEMENT 27:

Undisputed except to the extent that Entergy Nuclear Operations, Inc., is not a party to the Member Interest Purchase and Sale Agreement.

NEC STATEMENT 28:

The three Entergy entities – ENVY, ENO and ENVIC – are in privity with each other because they have contracts governing their relationships. ENVIC owns ENVY and ENVY is in effect a subdivision of ENVIC. Docket No. 6545 Order Findings 126-135, p.80.

JOINT PETITIONERS' RESPONSE TO STATEMENT 28:

Disputed. This statement does not state a fact under Vermont Rule of Civil Procedure 56, but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. *Clarke*, 2013 VT 52 at ¶ 28, 194 Vt. at 313, 80 A.3d at 589 (“Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion.”) (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998)). The Board’s Orders in Docket 6545 do not discuss privity, and the Board’s description of the corporate structures of ENVY, Entergy Nuclear Operations, Inc. (“ENOI”), and ENVIC speaks for itself.

NEC STATEMENT 29:

The NorthStar entities are in privity with ENVY, ENO and ENVIC because of the contract to purchase ENVY. Scott State 12/16/16 PFT generally and p.17; Steven Scheurich 12/16/16 PFT generally. (The Joint Petitioners have not yet produced in discovery the contract, despite discovery requests calling for its production.)

JOINT PETITIONERS' RESPONSE TO STATEMENT 29:

Disputed. This statement does not state a fact under Vermont Rule of Civil Procedure 56, but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. *Clarke*, 2013 VT 52 at ¶ 28, 194 Vt. at 313, 80 A.3d at 589 (“Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion.”) (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998)). The NorthStar entities are not presently in privity with ENVY, ENOI, or ENVIC with respect to obligations imposed upon ENVY and ENOI by prior MOUs and orders. The issue of privity is a legal conclusion that will not arise for purposes of claim or issue preclusion until the sale and

transfer is approved by the Board and subsequently consummated. Further disputed to the extent that a redacted version of the Member Interest Purchase and Sale Agreement is publicly available as Exhibit JP-SES-SUPP-1 and thus a version of the contract has been provided as of March 10, 2017.

NEC STATEMENT 30:

No motion under Board Rule 2.221 and V.R.C.P. 60(b) has been served or filed in Docket Nos. 7862 or 6545 to modify or vacate the terms referenced above. (The Board is asked to take judicial or administrative notice of its own records.)

JOINT PETITIONERS' RESPONSE TO STATEMENT 30:

Undisputed except to the extent that the Joint Petition under Section 231 does put forward new parties, new proposals, and new information for the Board and parties to review and consider, and seeks the modification of certain conditions if the proposed transaction, new owners, and new timeline are approved by the Board. *See* Dkt. 8880, Joint Petition of 12/16/2016.

NEC STATEMENT 31:

The Joint Petition seeks to have each of these conditions vacated:

- A. Elimination of the prohibition against rubblization. Joint Petition p.8 ¶ 3e; Scott State 12/16/16 PFT pp.18, 32; Discovery Response CLF:JP.1-16; Discovery Response DPS:NS-59. *See also* Discovery Response NEC:JP1-2(p).¹
- B. Elimination of the requirement that funds for site restoration -- which the State of Vermont has a compelling interest in, and regulates -- be held in a trust fund separate from the exclusively NRC-jurisdictional decommissioning trust fund. Joint Petition pp.5-6 ¶ 9; Scott State 12/16/16 PFT pp.22-24; Discovery Response CLF:JP.1-16; Discovery Response DPS:NS-59.
- C. Elimination of the requirement that site restoration commence promptly *after* completion of radiological decommissioning and NRC license termination for Vermont Yankee. Joint Petition pp.5-6 ¶ 9; State 12/16/16 PFT pp.22-24; Discovery Response CLF:JP.1-16; Discovery Response DPS:NS-59.
- D. Elimination of the requirement that ENVY provide a “parent guarantee” from the Entergy Corporation, which was not a party to the proceedings, for site restoration


costs. Joint Petition pp.4-8, ¶ 6-9 and d-f; Michael Twomey 12/16/16 PFT pp.8-10; Discovery Response CLF:JP.1-16.

JOINT PETITIONERS' RESPONSE TO STATEMENT 31:

Undisputed to the extent the Joint Petition seeks elimination of these “conditions” as part of the proposed transaction that will accomplish earlier radiological decommissioning and site restoration compared to the status quo. This statement otherwise does not state a fact under Vermont Rule of Civil Procedure 56, but rather makes a legal argument not appropriate for a Rule 56 statement of undisputed material facts. *Clarke*, 2013 VT 52 at ¶ 28, 194 Vt. at 313, 80 A.3d at 589 (“Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary-judgment motion.”) (quoting 10B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2738 at 346-56 (3d ed. 1998)).

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

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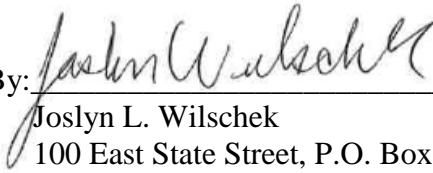
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