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 REPLY TO OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT: THE BOARD'S ORDERS IN DOCKETS 7862 & 6545 CAN BE AMENDED ONLY PURSUANT TO VRCP 60(B)

INTRODUCTION

The New England Coalition submits this reply to NorthStar's opposition to the Coalition's Motion for Partial Summary Judgment, and also to the Department's submission.

NorthStar's arguments that Board Rule 2.221 and Vermont Rule of Civil Procedure 60(b) do not apply to amendments of conditions in a § 231 Certificate of Public Good distort beyond recognition the Board's prior discussion of whether Rule 60(b) applies to orders issued under § 231. NorthStar's arguments also rely on a strained reading of the Board's Rules.

Even if NorthStar is correct that Board Rule 2.221 and Vermont Rule of Civil Procedure 60(b) do not apply, NorthStar is apparently unaware of the standards the Supreme Court of Vermont has established and consistently applied to changes in permits that are not subject to Rule 60(b). NorthStar's statement of disputed facts – and all of its prefiled testimony – fail these Supreme Court standards. Therefore, even if NorthStar is correct that Rule 60(b) does not apply, summary judgment should be granted.

NORTHSTAR'S LEGAL ARGUMENTS IGNORE THE BOARD'S AND THE SUPREME COURT'S RULINGS

NorthStar has argued that it need not comply with Board Rule 2.221 because 30 V.S.A. § 231 contains a "good cause" clause which supersedes the rule and because in the past the Board has modified Certificates of Public Good without mention of Rule 2.221. In the alternative, NorthStar asks for waiver of the rule pursuant to Board Rule 2.107. NorthStar Reply p.7.

NorthStar's arguments are specious. In each of the cases cited by NorthStar, with one notable exception, no party in the amendment proceeding objected on the grounds that the petitioner was seeking to raise an issue that was or could have been litigated in the earlier case. Therefore, neither claim preclusion nor issue preclusion was before the Board to decide.

In the one exceptional case, Entergy raised the same argument that the New England Coalition raises in this case, that only a Rule 60(b) motion is appropriate -- and the Board rejected that solely on the basis of a statute that does not apply to the present case. The Board held that it exercises "continuing jurisdiction on a day-to-day basis" over utility conduct to ensure reliability and safety under 30 V.S.A. § 209, that system reliability was at issue in that matter, and therefore that it was irrelevant whether Rule 60(b) did or did not apply. The Board held that the Department did have the option of raising its concerns under Rule 60(b) but was not limited to that option "under section 209." *Petition of Vermont Department of Public Service for an investigation into the reliability of the steam dryer and resulting performance of the Vermont Yankee Nuclear Power Station under uprate conditions,* Docket No. 7195, Order issued September 18, 2006, pp.15-16, 2006 Vt PUC LEXIS 156 at 41-42. Obviously, § 209 does not apply to NorthStar's Petition and NorthStar's Petition does not rely upon § 209.

The Board in Docket No. 7195 was asked to address whether the "good cause" language in § 231 provided authority to revise the Certificate absent a Rule 60(b) motion. The Department argued that § 231 does provide that authority, while Entergy argued that it does not. The Board decided not to answer the question. Instead, the Board wrote, "…we rely upon Section 209 as the basis for our jurisdiction." The Board added that it was possible that § 231 "could also" provide jurisdiction, but it did not rely on that section. *Petition of Vermont Department of Public Service for an investigation into the reliability of the steam dryer and resulting performance of the Vermont Yankee Nuclear Power Station under uprate conditions, supra,* at p. 17, 2006 Vt PUC LEXIS 156 at 44.

NorthStar's argument, therefore, lacks support in any precedent. The one opinion which addressed this issue, and which NorthStar relies upon, chose not to decide the question.

NorthStar's argument, on its merits, must be rejected. Two hundred and seventy-four different Vermont statutes impose the amorphous "good cause" standard. Every title in the Vermont Statutes Annotated, except Titles 1 and 22, contains one or more statutes relying on the clause. "Good cause" is defined nowhere in Vermont statutes. Rule 2.221 imposes the well-known standards of Vermont Rule of Civil Procedure 60(b) to all requests to modify prior Board orders, including § 231 orders. By applying V.R.C.P. 60(b) to all requests to modify a Board order, including Certificates of Public Good under § 231, the Board imposed predictable and fair standards. NorthStar's position is that the amorphous good cause standard, adopted in 1947, three decades prior to Board adoption of Rule 2.221, is exempt from the later-adopted rule that applies to all requests to modify Board orders, even though the rule contains no such exemption. No precedent, rule of construction or other authority supports this remarkable proposition.

Even if the "good cause" standard applies, NorthStar has utterly failed to satisfy, in its statement of disputed facts or its prefiled testimony, the requirements of proof set by the Supreme Court for modification of permits that are not subject to Rule 60(b). Prior Board orders provide no standard by which to apply the amorphous "good cause" clause, other than the general "public good" standard that underlies any § 231 order. See, *e.g., Petition of Great River Hydro NE, LLC,* Docket No. 8872, Order issued April 6, 2017. This "public good" standard, by itself, does not address the considerations of finality and fairness which are the basis of claim preclusion and issue preclusion. If "good cause" is to be used in lieu of Board Rule 2.221 and Vermont Rule of Civil Procedure, the Board must address these concerns, as our Supreme Court has held in similar matters.

The Supreme Court has held that zoning and Act 250 permit conditions are not subject to the strict requirements of Rule 60(b) but any request to amend those permits or conditions must take into consideration the need for finality and fairness. Therefore, any proposed amendment must address the concern that was the basis for the original condition, and the moving party must demonstrate that the changed circumstances adequately address that concern. *In re: Application of Lathrop Limited Partnership I*, 2015 VT 49 at ¶¶ 57-73[1] (summarizing and applying precedents).

In general, to satisfy this test, the permit-holder must demonstrate: (a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or

[1] "…the main question is whether the permit amendment is motivated by changes in construction or operation of the project not reasonably foreseeable at the time the permit was issued, one of the three critical factors in *Hildebrand*, 2007 VT 5, ¶ 7. The testimony regarding the contested application conditions indicates that no such change in circumstances occurred, but rather that Lathrop finds the conditions impractical."

operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology." Second, if such a change has been demonstrated, "there are certain situations where an amendment may not be justified, for instance where the change was reasonably foreseeable at the time of permit application. Otherwise, the initial permitting process would be merely a prologue to continued applications for permit amendments." *In Re Hildebrand*, 2007 VT 5 ¶ 7, 181 Vt. 568.

The Supreme Court of Vermont's decision in the Vermont Yankee sale case, *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 2003 VT 53 ¶ 11, 175 Vt. 368, 829 A.2d 1184, strongly suggests that the Court would apply the *Lathrop/Hildebrand* approach to § 231 if Board Rule 2.221 does not apply. The Court rejected Appellant's argument that a § 248 certificate was required for the changed use of the grandfathered facility, relying on §§ 102 and 231, both of which contain the "good cause" clause. The Court held that if the circumstances upon which the initial § 231 certificate had been based no longer apply, there would be good cause to amend or revoke the certificate:

> Good cause to amend or revoke ENVY and ENO's CPGs might be found if the companies materially alter the circumstances they presented to the PSB as grounds for it to find that the sale and associated power purchase agreement promote the general good of Vermont.

The Court's reasoning echoes the holdings in *Lathrop, Hildebrand* and their precedents.

Therefore, to justify alteration of the prior orders of this Board in this matter, NorthStar would have to set forth: 1) why each of the conditions it seeks to vacate or alter was imposed, 2) how its proposal would satisfy the concerns that led the Board to impose each of these conditions, and 3) that these methods were not reasonably foreseeable when the conditions were imposed.

NorthStar's statement of disputed facts – and all of its prefiled testimony – are utterly devoid of facts that would meet the *Lathrop/Hildebrand* standard.

NorthStar cites to *Lathrop* (NorthStar Reply p. 12), but fails to comprehend *Lathrop's* holding. NorthStar cites *Lathrop* for the proposition that claim preclusion does not apply because the circumstances have changed and therefore the causes of action are not the same. *Lathrop* does not hold that where the facts have changed the causes of action are not the same. *Lathrop* holds that a party who seeks to change a permit condition must submit evidence showing that the facts have changed, that the changed facts address the initial concern that the condition was designed to remedy or mitigate, and that the changed facts were not foreseeable. 2015 VT 49 at ¶¶ 57-73. These are facts NorthStar has not alleged or proven.

NorthStar also relies on Rule 2.107, which authorizes the Board to waive any rule, but neither the Joint Petition nor any motion has sought waiver of any Board Rule. The first mention of seeking waiver of a Board Rule is found in its reply to the motion for summary judgment. The Board's rules, by incorporating the Civil Rules, require that every request for relief be set forth in the initial petition or a motion (and be supported by a memorandum of law, if a motion). V.R.C.P. 7, 8, 78. NorthStar has not done so.

Even if NorthStar were allowed to seek a waiver of the Board's rules without a motion or pleading seeking that relief, NorthStar has not demonstrated why the Board's rules should be waived. Because of the compelling public interest in the finality of decisions and because of the potential unfairness of allowing reopening of decisions without adequate justification, the Supreme Court's standards from *Hildebrand* and *Lathrop* must be read into the Rule 2.107 good cause standard when waiver of Rule 2.221 is sought. Otherwise "the initial permitting process would be merely a prologue to continued applications for permit amendments."

NORTHSTAR'S OBJECTION TO PRIVITY IGNORES ITS CONTRACT AND SUPREME COURT PRECEDENT

NorthStar disputes that claim preclusion and issue preclusion apply because, it says, it disputes that it is in privity with Entergy. (NorthStar Reply pp.13-14). This is disingenuous. NorthStar admits in response to Undisputed Fact 27 that it has "entered into a contract with Entergy Nuclear Vermont Investment Company ("ENVIC") and ENO by which NorthStar Decommissioning Holdings, LLC, will purchase ENVY from ENVIC on detailed terms." Entergy and NorthStar are the *Joint* Petitioners in this matter, seeking the *same* relief from the Board, pursuant to that contract. This clearly places them in privity under the Supreme Court's precedents.

> Identity of parties exists where the parties or their privies are involved in both actions. *Department of Human Servs. v. Comeau, 663 A.2d 46, 48 (Me. 1995)*. "A privity relationship generally involves a party so identified in interest with the other party that they represent one single legal right." *Id*.; see *First Wisconsin Mortgage 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 really and substantially same interest in successive proceedings).

Lamb v. Geovjian, 165 Vt. 375, 379-80, 683 A.2d 731 (1996).

NorthStar's memorandum seeks to evade this simple principle by inventing a new definition of privity. On pages 13 and 14 it argues that it will be in privity only if and when the Board approves of the sale and a closing is held ("Unless and until the Board approves of transfer of the VY Station and Entergy and NorthStar close the transaction, no NorthStar entity will be bound by any Board order.") The Vermont law on claim preclusion and issue preclusion requires only privity, as discussed in *Lamb v. Geovjian, supra*, not transfer of ownership.

THE DEPARTMENT'S POSITION WILL CAUSE WASTE OF THE BOARD'S AND THE PARTIES' RESOURCES

The Joint Petitioners have neither obtained relief requested from the terms of the orders in Docket Nos. 7862 and 6545 under V.R.C.P.60(b) nor submitted evidence in this proceeding that addresses the standards of *Lathrop* and *Hildebrand*. Even if *Lathrop* and *Hildebrand* apply, rather than Rule 60(b), the deadline for filing of testimony by the Joint Petitioners has passed. There is nothing in the record that would support a ruling in their favor under *Lathrop* and *Hildebrand.*

The Department has argued that this issue may be decided later, as part of ruling on the merits. The New England Coalition respectfully points out, however, that that is true of all motions for summary judgment. The purpose of the rule is to avoid costly and time-consuming trials where a dispositive issue does not hinge on genuinely disputed facts.

It would be a waste of the Board's and the parties' time and resources for the Board and the parties to prepare for and go through a trial and post-trial briefing on all of the other issues in this complicated litigation where the facts material to this dispositive issue are undisputed. The Joint Petition cannot be granted because Rule 60(b) has not been complied with and there is no evidence to support affirmative findings under *Lathrop* and *Hildebrand.*

CONCLUSION

The Board should grant summary judgment to the New England Coalition by declaring that the following terms cannot be vacated or altered in this proceeding, because Rule 60(b) has not been complied with and there is no evidence to support affirmative findings under *Lathrop* and *Hildebrand*: A) the requirement that structures be removed from the site, and the prohibition against rubblization of those structures; B) the requirement that funds for site restoration be held in a trust separate from the decommissioning trust fund; C) the requirement that site restoration commence promptly *after* completion of radiological decommissioning and NRC License

Termination for Vermont Yankee; and D) the requirement that ENVY provide a parent guarantee from the Entergy Corporation for site restoration costs.

Dated at Bristol, Vermont this 15th day of June, 2017.

BY: /s/ James A. Dumont

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