

STATE OF VERMONT

PUBLIC UTILITY COMMISSION

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, 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

Docket No. 8880

JOINT PETITIONERS’ REPLY BRIEF IN SUPPORT OF THEIR OBJECTIONS TO THE ADMISSION OF CERTAIN PREFILED TESTIMONY AND EXHIBITS AND MOTION TO EXCLUDE

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, and Entergy Nuclear Operations, Inc. (together, “Joint Petitioners”) submit this reply brief in support of their objections to and motion to exclude certain testimony and exhibits that the New England Coalition (“NEC”) prefiled on August 30, 2017.

INTRODUCTION

In its opposition to Joint Petitioners’ objections and motion to exclude, NEC concedes that certain documents should be excluded as hearsay and that certain testimony of NEC witness Raymond Shadis does not qualify as proper expert testimony. But NEC fails to show why any of the testimony of Mr. Shadis should be admitted as expert testimony or why all but certain limited portions of his testimony qualify as proper lay witness testimony. NEC further neglects to demonstrate how the methodology employed by NEC witness Arnold Gundersen, which discarded

detailed cost estimates prepared by NorthStar for a prompt decommissioning in favor of outdated estimates prepared by Entergy for a delayed decommissioning, provides a reliable basis for his conclusions as to the financial risks of the transaction. Finally, NEC offers no persuasive justification for admission of hearsay—whether through documents or testimony.

ARGUMENT

I. Unqualified Opinion Testimony Of NEC’s Witnesses Should Be Excluded

A. NEC Fails To Show That Mr. Shadis Possesses Either The Necessary Expertise Or Personal Knowledge As To The Subject Matter Of His Testimony

As Joint Petitioners explained, the Commission should exclude the testimony of Mr. Shadis in its entirety to the extent it is offered as expert testimony. To the extent NEC offers Mr. Shadis’ testimony as that of a lay witness, the Commission should exclude all of the testimony except for the portion regarding Mr. Shadis’ experience at Maine Yankee and his personal observations from his visit to the VY Station site.

First, NEC has not demonstrated that Mr. Shadis has any specialized scientific training—whether formal or informal—to support his conclusions about radiological decay, chemical reactions, or nuclear radiation exposure and health outcomes. The additional affidavit offered in support of Mr. Shadis’ testimony indicates he has participated in various conferences related to decommissioning, but nowhere demonstrates that Mr. Shadis gained any specialized technical knowledge through such participation. *See, e.g.*, Shadis Aff. ¶ 11; NEC Opp. 11. Thus, NEC has not demonstrated that Mr. Shadis has decades of hands-on experience, like the farmer in *Cappiallo v. Northrup*, 150 Vt. 317, 552 A.2d 415 (1988) (cited at NEC Opp. 12), or the relevant combination of education and experience, like the economist in *USGen New England, Inc. v. Town of*

Rockingham, 2004 VT 90, 177 Vt. 193, 862 A.2d 269 (2004) (cited at NEC Opp. 13). Testimony in these areas cannot be provided by a lay witness because it requires “scientific, technical or other specialized knowledge within the scope of Rule 702.” V.R.E. 701.

Second, Mr. Shadis attempts to bolster his purported expertise as to “the potential costs of decommissioning” and “financial strength to respond to large costs increases,” based on his experience with the Maine Yankee decommissioning, Shadis Aff. ¶ 15, which Mr. Shadis swears in his affidavit was “on-time, on-budget,” *id.* at ¶ 8. Yet again, NEC fails to demonstrate how Mr. Shadis’ experience at Maine Yankee gives him the expertise to opine on the fixed-contract approach that NorthStar plans to apply at the VY Station. *See, e.g.*, Shadis PFT at 21-22. And neither NEC nor the Shadis affidavit offers any indication that Mr. Shadis has the education or experience to support his speculation that “the local economy may actually benefit more” if the land is allowed to lie fallow or that the site cannot be used for solar generation until the Department of Energy removes the spent fuel on site. *Id.* at 11, 12. NEC indeed concedes that Mr. Shadis “is not providing *expert* testimony on aesthetics or planning or economics.” NEC Opp. 9 (emphasis added). But Mr. Shadis also should be precluded from submitting lay testimony on these subjects because he lacks personal knowledge on these topics.

Third, Mr. Shadis attempts to justify his testimony as to anthropological, archaeological, recreational, and historical matters by amending his testimony to rely upon the prefiled testimony of Richard Holschuh, the representative of intervenor Elnu Abenaki in this Docket. But, without any relevant expertise in these matters—which NEC does not demonstrate—it does not matter what Mr. Shadis seeks to rely upon. In this regard, NEC is wrong to argue that “regardless of whether Mr. Shadis is an expert in environmental impact statement review, or Blueway

designation, or Connecticut River recreation use, or the economic benefits of outdoor recreation, there is no prejudice to the Petitioners” NEC Opp. 10. Mr. Shadis cannot testify as to these subject matters as an *expert* if he does not have expertise and cannot testify as a *lay witness* if he does not have personal knowledge. NEC has not shown that Mr. Shadis possesses either the expertise or personal knowledge to support this testimony. Thus, regardless of whether the documents quoted in such testimony would be admissible, Mr. Shadis cannot submit testimony on these subjects.¹

Finally, NEC has clarified that Mr. Shadis does not seek to offer *expert* testimony in responses in A16, A17, and A18 of his prefiled testimony. NEC Opp. 18-19. NEC does not explain how these responses are proper lay witness testimony. Response A16 concerns the correctness of NEC’s motion for summary judgment and is not proper testimony for a lay witness to offer. Likewise, Mr. Shadis lacks the personal knowledge necessary to provide testimony as to the applicable regulatory framework for disposal of demolition debris and NorthStar’s understanding and compliance with such framework, as discussed in A17. And Mr. Shadis’ “fair partner” testimony in A18, is nothing more than a collection of unsupported, argumentative, and misinformed statements that demonstrate precisely why lay witnesses are not permitted to offer such opinion testimony. As Joint Petitioners explained, the only areas of Mr. Shadis’ testimony that fall within the permissible scope of lay witness testimony are his statements concerning his

¹ NEC argues (at 10 n.4) that the Environmental Impact Statement quoted on page 8 of Mr. Shadis’ testimony is not hearsay. Joint Petitioners did not challenge the excerpts on page 8 of Mr. Shadis’ testimony on hearsay grounds, *see* Mot. at App. B, but rather argue that Mr. Shadis did not have the necessary expertise or personal knowledge for this testimony.

participation as an observer of the Maine Yankee decommissioning process and his personal observations regarding the VY Station site. All other testimony should be excluded.

B. NEC Fails To Demonstrate That Mr. Gundersen Employed A Reliable Methodology

Joint Petitioners explained that Mr. Gundersen’s testimony should be excluded because he relied on an outdated cost estimate for the SAFSTOR approach to decommissioning and omitted from his analysis the key documents enumerating NorthStar’s breakdown of tasks and associated costs for decommissioning. NEC does not dispute that Mr. Gundersen proceeded in this manner, but rather argues that an expert may “determine that certain exhibits submitted in pretrial discovery were not useful,” NEC Opp. 20, relying on *985 Assocs., Ltd. v. Daewoo Elecs. Am. Inc.*, 2008 VT 14, 183 Vt. 208, 945 A.2d 381 (2008). In that case, however, while the fire investigator expert did not “read the report or examine the internal workings of the microwave,” the expert interviewed the author of the report and “examined the burn patterns on the microwave oven.” *Id.* ¶ 12. Here, by contrast, NEC points to no document other than the outdated Entergy decommissioning cost estimate to support Mr. Gundersen’s analysis of NorthStar’s decommissioning approach. Instead, as Joint Petitioners demonstrated, Mr. Gundersen failed to employ a reliable methodology in reaching his conclusion as to the reduction in decommissioning costs under the NorthStar approach (Gundersen PFT at A8), as to “the claimed financial savings and schedule reduction and underlying presumptions and cost analysis being used to justify the proposed sale of VY are incorrect” (*id.* at A9), and as to the “major financial risk to Vermont . . . caused by the unique contractual approach” (*id.* at A14). Nor has NEC pointed to anything that demonstrates that Mr. Gundersen’s use of a 2012 decommissioning cost estimate—as opposed to the 2014 estimate that is the basis for Entergy’s 2014 PSDAR or the updated 2016 annual cash flow analysis that supports Entergy’s

March 31, 2017 filing with the NRC pursuant to 10 C.F.R. § 50.82(a)(8)(v)—provides a reliable basis for Mr. Gundersen’s conclusions as to the timing of any decommissioning if the proposed transaction does not close (Gundersen PFT at A10, A11). Accordingly, the portions of Mr. Gundersen’s testimony set forth in Appendix A to Joint Petitioners’ motion should be excluded.²

II. NEC Does Not Justify The Use Of Hearsay Contained In And Attached To The Testimony Of Mr. Shadis And Mr. Gundersen

NEC likewise offers no basis for the Commission to admit hearsay in documents attached to and incorporated in the NEC prefiled testimony. NEC has agreed to withdraw Shadis Exhibit 3 and to strike the quotation from this document, *see* NEC Opp. 17, 24, and to withdraw the testimony excerpting the January 19, 2011 email (Gundersen PFT at 8) and the *Times Argus* article excerpt (Gundersen PFT at 20-21), *see* NEC Opp. 24.³ The remainder of the hearsay documents also should be excluded.

Excerpts of Email and Letter. NEC contends that Mr. Shadis can rely on an email purportedly sent by an employee of the New Jersey Department of Environmental Protection regarding remediation standards, Shadis PFT at 16, and a 1996 letter from Carol Browner, then-Administrator of EPA, *id.* at 17, because experts in Mr. Shadis’ field rely on such documents. NEC Opp. 15-16. But, as described *supra*, Mr. Shadis is not an expert on radiation exposure and, even if he were, NEC cites no support for its assertion that experts in the field rely on such

² To the extent the Commission excludes Mr. Gundersen’s testimony, it also should exclude the summaries of such testimony in A19, contrary to NEC’s argument (NEC Opp. 23).

³ NEC argues (NEC Opp. 23) that Joint Petitioners have not demonstrated that Mr. Gundersen’s testimony in A15 and A16 have any relation to Mr. Gundersen’s failure to consider NorthStar proprietary documents. But that was not Joint Petitioners’ basis for seeking to exclude this part of the testimony. Instead, Joint Petitioners’ basis was that these answers quote extensively from hearsay material.

documents. Beyond that, even if NEC had shown that experts rely on such documents, an expert may not introduce into evidence inadmissible hearsay simply because the expert relied upon the hearsay. *See State v. Recor*, 150 Vt. 40, 48, 549 A.2d 1382, 1388 (1988). The testimony excerpting these documents should be excluded.

Outside Analysis. For this same reason, NEC is wrong to argue (Opp. 14-16) that the Synapse Energy Economics (Shadis PFT at 24, NEC RS PFT EXHIBIT 4), the EPRI report excerpt (Shadis PFT at 7, NEC RS PFT EXHIBIT 2), and the 2005 National Academies Committee to Assess Health Risks from Exposure to Low Levels of Radiation report (Shadis PFT at 17-18) may be admitted because Mr. Shadis relied upon them. Further, when a witness is acting as a lay witness, the witness cannot introduce the expert opinion of others. *See, e.g., Petition of Vermont Electric Power Co., and Vermont Transco, LLC*, Docket No. 7386, Order of 1/8/2009, 2009 WL 124934, at 1 (excluding as hearsay a witness’s attempt to introduce an appraisal prepared by someone else, and noting that “the admission of such testimony without the opportunity for cross-examination . . . is prejudicial”).

Newspaper Articles and Online Sources. NEC has agreed to withdraw the challenged newspaper articles except for the *Keene Sentinel* newspaper article excerpt (Gundersen PFT at 17-18), which NEC argues Mr. Gundersen quotes “only to show that NorthStar was on notice of contamination” and not for the truth of the matter.⁴ NEC Opp. 24. Such testimony, however, necessarily relies on the article for the truth of its contents, and the testimony regarding it should be excluded. And NEC offers no justification for the extensive quotation in Mr. Shadis’ testimony

⁴ NEC has moved to amend Mr. Shadis’ prefiled testimony. Joint Petitioners do not oppose the motion but the proposed amendments do not cure the deficiencies in Mr. Shadis’ testimony.

(Shadis PFT at 11) from an Outdoor Industry Association Report. It, too, should be excluded as hearsay. Mot. 10.

Prior Testimony. As Joint Petitioners' explained, NEC may not offer testimony from a prior proceeding without offering the witness for cross-examination. Just as the submission of the affidavit of William Irwin was improper, it is improper to offer the testimony of Uldis Vanags contained in NEC RS EXHIBIT 5.

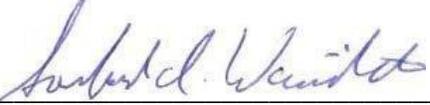
CONCLUSION

The Commission should exclude from this proceeding the exhibits and testimony listed in Appendices A and B to Joint Petitioners' motion.

New York, New York

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Respectfully submitted,
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