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**

ENTERGY PETITIONERS' OBJECTION TO THE PUBLIC UTILITY COMMISSION'S PROPOSED RETENTION OF A CONSULTANT

Entergy Nuclear Vermont Investment Company, LLC and Entergy Nuclear Operations, Inc. (together, "Entergy Petitioners") respectfully submit this objection to the Public Utility Commission's ("Commission") proposed retention of a consultant in this Docket. *First*, the role that the Commission contemplates for this consultant improperly goes beyond what has traditionally been allowed for a non-testifying consultant. *Second*, and in any event, the Commission has not afforded any opportunity for the parties to assess, before the prospective consultant is retained, whether the prospective consultant has a bias.

I. THE ROLE CONTEMPLATED FOR THE COMMISSION'S CONSULTANT IS BROADER THAN WHAT PRECEDENT HAS ALLOWED

Entergy Petitioners recognize that 30 V.S.A. § 20(a)(1) authorizes the Commission (and the Department of Public Service) to retain "expert witnesses" and/or non-testifying "advisors," and that the Commission's precedent likewise observes this distinction. *See, e.g.*, *Petitions of Vermont Electric Power Co. (VELCO) et al.*, Docket 6860, Order of 4/8/2004, 2004 WL 834736. But neither the statute nor the Commission's precedent addresses the permissible scope of a non-

testifying advisor's or consultant's role. As shown below, precedent from the Vermont Supreme Court and other jurisdictions instructs that the role contemplated for the Commission's non-testifying consultant here is impermissibly broad.[1]

The Vermont Supreme Court has emphasized the importance of allowing the parties to probe evidence upon which the Commission (or its predecessor, the Public Service Board) may rely in reaching a decision. In *In re Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 618 A.2d 1295 (1992), for example, the Court disapproved the Board's reliance on "data and programs not in evidence," *id.* at 349, and the Board's creation from a party's spreadsheets of "evidence that went beyond recalculation," *id.* at 350. As the Court explained, "the process used by the Board made it impossible for intervenors to challenge the weight, accuracy and reliability of the output information before the Board made findings relying on it." *Id.* at 351; *see also Petition of Green Mountain Power Corp.*, 131 Vt. 284, 304-05, 305 A.2d 571, 583 (1973) (expressing concern that "no notice was given to the parties of the material noticed by the Board before or during the hearings, and, in addition, the parties were not given an opportunity to contest the material noticed").

The same concern is presented by the Commission's proposal in this Docket to retain a consultant and to give that consultant the sweeping mandate "to review, assess, and analyze the filed testimony and exhibits of multiple parties in this case related to the costs and benefits of various decommissioning proposals and *communicate with the PUC concerning the consultant's*

[1] Moreover, 3 V.S.A. § 810(1) requires, aside from exceptions not relevant here, that Vermont administrative agencies follow the rules of evidence that govern proceedings in civil courts of the State. 30 V.S.A. § 20 does not exempt persons appointed under that provision from the rules of evidence.

analysis and conclusions," Public Utility Commission, Request for Proposals at 1 ("RFP") (undated; transmitted by email dated Oct. 31, 2017 from Judith C. Whitney to Joslyn L. Wilschek and Sanford I. Weisburst) (emphasis added) (attached as Exhibit A hereto). The Commission's RFP states that "[t]his assignment will not require the consultant to prepare testimony or to testify at any evidentiary hearing." *Id.* at 2.[2] Thus, the parties will have no opportunity to probe the consultant's analysis and conclusions.[3]

The prejudice to the parties from denying them a forum to probe the views of the consultant is especially severe because "a technical advisor is brought in precisely because the [Commission] is not familiar with the complex, technical issues presented in the case," *Ass'n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 614 (9th Cir. 2000) (*en banc*) (Tashima, J.,

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[2] *See also* Letter from George Young to John Marshall, Sanford I. Weisburst, and Joslyn L. Wilschek dated Oct. 30, 2017 ("[T]he consultant will assist the Commission in assessing the costs and benefits of various decommissioning alternatives proposed by the parties to the extent they relate to matters within the jurisdiction of the Commission in this case.").

[3] Commission staff are State employees subject to the requirements of the Vermont Personnel Policy and Procedure Manual. *See, e.g.*, Section 3.01 ("Every employee … shall pursue the common good and shall uphold the public interest, as opposed to personal or group interests."), available at http://humanresources.vermont.gov/sites/dhr/files/Documents/Policy%20Manual/DHR-Personnel_Policy_and_Procedure_Manual.pdf. A temporary consultant, by contrast, will likely have commercial, reputational, and perhaps other interests separate from the "common good" and the "public interest." Such interests could be prejudicial to those of one or more parties to this proceeding and therefore should be subjected to examination by the parties to ensure a fair process.

Additionally, the Commissioners are better able to pass independent judgment upon recommendations of Commission staff than upon recommendations of a specialized decommissioning consultant. *Cf. Ass'n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 613–14 (9th Cir. 2000) (*en banc*) (Tashima, J., dissenting) ("Because the judge is an expert in the law and fully understands legal theory and analyses, it is unlikely, to say the least, that a law clerk will impermissibly usurp the judicial function. On the other hand, a technical advisor is brought in precisely because the judge is not familiar with the complex, technical issues presented in the case.").

dissenting), and "[t]here is therefore an understandable concern that the technical advisor's opinion will carry undue weight with the [Commission]," *id*. Notably, the role contemplated for the Commission's consultant here—to reach "conclusions" and then to communicate them *ex parte* to the Commission, RFP at 1—is much broader than the limited role that has been deemed appropriate in prior cases: "a tutor who aids the court [or agency] in understanding the 'jargon and theory' relevant to the technical aspects of the evidence." *Conservation Law Found. v. Evans*, 203 F. Supp. 2d 27, 32 (D.D.C. 2002) (quoting *Ass'n of Mexican-Am. Educators*, 231 F.3d at 612 (Tashima, J., dissenting)) (some internal quotation marks omitted). Indeed, the *Conservation Law Foundation* court underscored that it would be improper for a non-testifying consultant to perform the role contemplated by the Commission here: "The advisor shall *not* give any advice to the Court on the ultimate issue of the remedy that is most appropriate in light of the entire record." 203 F. Supp. 2d at 32 (emphasis in original); *see also* Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 Harv. L. Rev. 941, 950 (1997) ("[B]ecause technical advisors do not make any 'findings,' courts have held that the parties' rights to depose, call, or cross-examine expert witnesses do not apply to technical advisors.") (footnote omitted).

This is not to say that the Commission is barred from retaining a person to perform "analysis" and to reach "conclusions" in this Docket, only that such a person must be treated as an expert witness under Vermont Rule of Evidence 706, and not as a non-testifying consultant. Rule 706 contains important procedural safeguards that ensure transparency and the ability of the parties to bring any weaknesses in the expert's analysis and conclusions to the attention of the Commission. Specifically, among other things, "[a] witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify

by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness." V.R.E. 706(a). *Cf. Petition of Twenty-Four Vt. Utils.*, 159 Vt. at 351 ("There was available to the Board a fairer and more open means of accomplishing the same objective. The Board could have described the question it wanted to address and asked the DPS witnesses to run their models in response. The output information would have been admissible as expert testimony, subject to cross-examination covering all of the methodology.").

II. IN ANY EVENT, THE COMMISSION SHOULD AFFORD THE PARTIES AN OPPORTUNITY TO LEARN OF THE PROSPECTIVE CONSULTANT'S IDENTITY AND BACKGROUND BEFORE THE COMMISSION RETAINS THE CONSULTANT

Even if it were appropriate for a non-testifying consultant to perform the broad role envisioned by the Commission, the parties should be given the opportunity to learn of the prospective consultant's identity and background before the Commission retains the consultant, so that the parties can assess whether the prospective consultant may be biased in favor of or against a particular party.

The Vermont Supreme Court has described as "universally recognized" the principle that "a person is entitled to a full and impartial hearing before a court that is not biased or prejudiced against him." *Emerson v. Hughes*, 117 Vt. 270, 279, 90 A.2d 910, 915 (1952). "This rule applies to an administrative officer exercising quasi-judicial functions." *Id.*

This principle applies with particular force in the context of selecting a court- or agency-appointed non-testifying consultant or advisor. "[E]xperts in the relevant field, particularly if it is a narrow and highly-specialized one, may be aligned with one of the parties; therefore, the district court must make every effort to ensure the technical advisor's neutrality, lest the advisor develop into, or give the appearance of being, an advocate for one side." *Ass'n of Mexican-Am. Educators,*

231 F.3d at 611 (Tashima, J., dissenting); *see also, e.g., Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1214-15 (9th Cir. 2004) (adopting Judge Tashima's recommendation that process for retaining a non-testifying consultant should include "address[ing] any allegations of bias, partiality, or lack of qualification"); Note, 110 Harv. L. Rev. at 954 ("The informal relationship between judges and advisors necessitates stronger party influence over the initial selection of the advisors. Granting the parties more power over the selection would increase the legitimacy of the appointment process and reduce the risk of the judge choosing a biased advisor. The bias-reduction rationale applies more strongly with regard to advisors than to expert witnesses: because technical advisors are not subject to deposition or cross-examination, parties have less knowledge of the advisor's influence on the judge and less ability to rebut the advisor's statements."). Here, however, it is unclear whether the Commission intends to give the parties this opportunity before the prospective consultant is retained.

CONCLUSION

The Commission should not retain a non-testifying consultant to perform the role the Commission contemplates. In any event, the parties should be afforded an opportunity to learn of the prospective consultant's identity and background and to submit an objection, before the prospective consultant is retained.

New York, New York
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Respectfully submitted,

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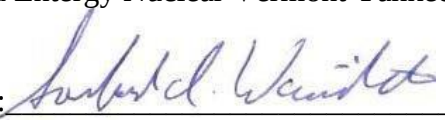
By: 

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