

**STATE OF VERMONT
PUBLIC UTILITIES COMMISSION**

Docket No. 8880

**Joint petition of NorthStar Decommissioning)
Holdings, LLC, NorthStar Nuclear)
Decommissioning Company, LLC, NorthStar)
Group Services, Inc., LVI Parent Corporation,)
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. sec. 107, 231,)
and 232)**

**CONSERVATION LAW FOUNDATION’S OPPOSITION TO JOINT PETITIONERS’
OBJECTION TO CERTAIN PREFILED SURREBUTTAL TESTIMONY AND
EXHIBITS AND MOTION TO EXCLUDE**

Conservation Law Foundation (CLF), pursuant to Commission Rule 2.216 and V.R.C.P 78, opposes Joint Petitioners’ objection to certain prefiled surrebuttal testimony and exhibit of Conservation Law Foundation and motion to exclude.

Joint Petitioners have failed to demonstrate that the information presented by Conservation Law Foundation should not be considered by the Public Utilities Commission (Commission).

In support of this opposition, Conservation Law Foundation offers the following Memorandum of Law.

MEMORANDUM OF LAW

I. Introduction

The statements included in the testimony of Mr. Hill and in CLF-MOH-6 are relevant, admissible factual statements that are not hearsay, or in the alternative, are hearsay on which Mr. Hill reasonably relied or admissible hearsay under the relaxed evidentiary rules for administrative proceedings. The Joint Petitioners motions should be denied.

II. Statements of Petitioners' counsel were factual predicates.

The statements of Petitioners' counsel in CLF-MOH-6 were not simply questions; they contained (and were cited for) the factual predicates to the questions asked.¹ The questions reveal not just the facts that Mr. Hill was being asked about, but also the underlying and acknowledged facts that framed the specific issue in this case that is the crux of his testimony – the nature of the transfer being proposed. (Hill PF at 11-32). Mr. Hill was asked questions that were predicated on the fact that the proposal is a liability transfer. E.g. "[Y]ou're referring to *the liability transfer that petitioners propose here?*" Hill PFST at 5 quoting Deposition Transcript, CLF-MOH-6 at 209 (emphasis added). Mr. Hill's surrebuttal testimony then explains that this is one example of how Petitioners statements are at odds with Mr. Scheurich's testimony.

The statements by Petitioners' counsel are factual predicates and are relevant and reasonable for Mr. Hill, as an expert in the case, to rely upon in forming his testimony.

¹ See e.g., Counsel's Statement, Deposition Transcript (CLF-MOH-6) (attached) at:

- p. 209 (“[Y]ou’re referring to *the liability transfer contract the Petitioners propose here?*”) (emph. added) (shows Petitioners acknowledge that case is about a liability transfer contract);
- p. 79-80 (“You’ve never worked ... on a liability transfer ... involving a nuclear plant or nuclear contamination, is that correct?”) (shows Petitioners acknowledge the relevance of liability transfers to this matter);
- p. 83 (“How many cases have you presented as a witness during your 18 years of practicing in the specialized area of environmental liability transfers ...?”) (shows Petitioners acknowledge the relevance of liability transfers to this matter).

III. The sole case cited by Joint Petitioners does not support excluding CLF's evidence.

The sole case relied upon by Joint Petitioners, *Teske v. Wausau Heart & Lung Surgeons*, S.C., 2011 WI App 114, ¶ 17, 336 Wis. 2d 473, 801 N.W. 2d 348, fails to support Joint Petitioners' claims. Moreover, the case is unpublished, from Wisconsin and otherwise of no precedential value in Vermont.

Substantively, *Teske* addressed an attorney's silence (lack of objection) and unspecified questions. *Id.* Neither of those circumstances is present here, where Joint Petitioners seek to exclude statements made by Joint Petitioner's counsel during the deposition, as factual predicates to their questions (e.g. "[Y]ou're referring to *the liability transfer that petitioners propose here?*" (emphasis added)). The case fails to provide precedent or support for excluding the testimony of Mr. Hill or CLF-MOH-6.

IV. The statements of counsel are not hearsay.

The statements of counsel during the deposition are admissions of a party opponent and are not hearsay pursuant to V.R.E. 801(d)(2). Counsel was representing Joint Petitioners and as counsel was the agent of Joint Petitioners. Vermont law has long recognized that statements of counsel "concerning a matter within his employment may be admissible against the party retaining the attorney." *Contractor's Crane Serv., Inc. v. Vermont Whey Abatement Auth.*, 147 Vt. 441, 451, 519 A.2d 1166, 1173 (1986), citing *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir.1981). The rule itself states that "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship" is not hearsay. V.R.E. 801(d)(2)(D).

The statements at the deposition are not hearsay as they were statements by Joint Petitioners' attorney acting within the scope of his employment.

V. Even if the statements are hearsay, they are admissible under Rule 703.

In the alternative, the statements are admissible hearsay. Mr. Hill is providing expert testimony in this case. Mr. Hill's surrebuttal testimony on pages 4-5 refers to hearsay that is reasonable for an expert to rely on. As noted in footnote 1 of Mr. Hill's surrebuttal testimony:

Although Petitioners' pre-Petition statements (and statements at deposition) may not be admissible evidence by themselves, I believe that the Commission is entitled to learn of and consider them because they are statements of the kind upon which experts in the field of environmental liability transfers would reasonably rely in forming an opinion on the transfer. VT R. Evid. 703; accord Fed. R. Evid. 703.

Hill PRST at 5, fn.1 (12/1/17).

Mr. Hill's surrebuttal testimony appropriately identifies with specificity the information he relies on to demonstrate that the testimony offered by Mr. Scheurich is "at plain odds not only with common sense but also with petitioners' own statements, including in the Petition itself."

Hill PFST at 4. Mr. Hill's testimony and the exhibits provide specific examples where Joint Petitioners or counsel provided statements at odds with the testimony of Mr. Scheurich. *Id.* at 4-5; CLF-MOH-6. This identifies not only the actual information and statements Mr. Hill relied upon, but it is also the sort of information that an expert can rely on in forming an opinion.

V.R.E. 703; 12 V.S.A. sec 1643.

VI. Even if the statements are hearsay, they are admissible under 3 V.S.A sec. 810.

Moreover, in administrative hearings, Vermont law allows the admission of hearsay provided it is "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." 3 V.S.A. sec. 810(1). Mr. Hill was reasonable to rely on these statements in providing to the Commission helpful information that would commonly be relied upon. As such, the information is admissible hearsay.

VII. The statements are relevant.

Apart from being admissible as hearsay on which CLF's expert relied, the statements identified in Mr. Hill's prefiled surrebuttal testimony at pages 4-5 and in CLF-MOH-6 are relevant - indeed, central to - Mr. Hill's testimony. The very fact that Joint Petitioners' counsel spent so much time during the deposition focusing on "the liability transfer that Petitioners propose here," (CLF-MOH-6), and asking about Mr. Hill's experience with "liability transfers," combine to demonstrate that the nature of the transfer is relevant. V.R.E. 401 (evidence that has tendency to make existence of fact more or less probable is relevant); V.R.E. 402 (all relevant evidence admissible).

VIII. Reliance on statements affects weight not admissibility.

Any concern about Mr. Hill's reliance on the statements of Joint Petitioners' counsel goes to the weight of the evidence presented and not to its admissibility. *Investigation Pursuant to 30 V.S.A. Sec. 30 and 209 and Pub. Serv. Bd. Rule 5.110(d) into Alleged Lack of Adequate Notice and Violations of Certificate of Pub. Good #nmp-7438 Concerning the Constr. of A Group Metered Solar Electric Generation Facility in Guilford, Vermont.*, 2017 WL 3843482, at *6 (Aug. 22, 2017).

IX. Joint Petitioners fail to identify with specificity what evidence they seek to exclude.

Finally, the Joint Petitioners' motion must be denied because it fails to identify with specificity what information or testimony they seek to exclude. Motions must state, with specificity, the specific relief requested. V.R.C.P. 7(b)(1). Absent a clear identification of the

relief requested and the basis for the motion, the motion must fail. *Gardner v. Town of Ludlow*, 135 Vt. 87, 91, 369 A.2d 1382, 1384 (1977).²

The Joint Petitioners' motion fails to support any claim for excluding Mr. Hill's prefiled surrebuttal testimony at pages 9 line 35 to page 10 line 6 and should be denied.

X. Conclusion

For the foregoing reasons, the Public Utilities Commission should deny Joint Petitioners' request to exclude portions of Mr. Hill's prefiled surrebuttal testimony and CLF-MOH-6.

Dated at Montpelier, Vermont, this 11th day of January, 2018.

CONSERVATION LAW FOUNDATION

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² Appendix A of the Joint Petitioners' motion identifies a portion of Mr. Hill's testimony that Joint Petitioners seek to exclude. The testimony identified (Hill PFST 9:35 -10:6) does not correspond to either the exhibit identified in Appendix B (CLF-MOH-6) or the substance of the Joint Petitioners' claim on page 4 of the motion.