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 SURREBUTTAL 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") respectfully submit this reply brief in further support of their objections to and motion to exclude certain surrebuttal testimony.

INTRODUCTION

In opposition to Joint Petitioners' objections and motion to exclude, New England Coalition ("NEC") argues that its witnesses, Mr. Shadis and Mr. Gundersen, are experts and that their submission of hearsay should be allowed because they rely upon it as experts. In its opposition, Conservation Law Foundation ("CLF") argues that (1) its use of deposition questions is permissible because they are not hearsay but admissions of a party opponent, and (2) even if they are hearsay, the questions posed by a lawyer in deposition are properly the sort of materials

relied upon by experts and reasonably prudent persons. As explained below, none of these arguments are persuasive. The testimony and exhibits in Appendices A and B should be excluded.

ARGUMENT

I. Expert Testimony Cannot Provide A Backdoor To Impermissible Hearsay Under Vermont Law

Vermont Rule of Evidence 703 "is not to be treated as either an auxiliary hearsay exception, or as a backdoor to an expansive reading of existing hearsay exceptions." *Chickanosky v. Chickanosky*, 190 Vt. 435, 443–44, 35 A.3d 132, 139 (2011); *State v. Recor*, 150 Vt. 40, 48, 549 A.2d 1382, 1388 (1988). This interpretation is consistent with federal and state courts that have refused to allow an expert witness to act as a "conduit" for hearsay. *See, e.g.*, *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) ("Allowing a witness simply to parrot "out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion" would provide an end run around *Crawford v. Washington*, 541 U.S. 36 (2004)." (citing *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007)); *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991) (a party may not use an expert "as a conduit for hearsay testimony"); *United States v. Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2003) (an expert may not "repeat[] hearsay evidence without applying any expertise whatsoever, thereby enabling the [proffering party] to circumvent the rules prohibiting hearsay"); *Smithson v. V.M.S. Realty, Inc.*, 536 So.2d 260, 261-62 (Fla. App. 1988) (noting that "the [expert] witness may not serve merely as a conduit for the presentation of inadmissible evidence."). NEC and CLF seek to do precisely what the law prohibits: to use their experts as mouthpieces for the admission of impermissible hearsay evidence that is not within any exception and not otherwise properly before the Commission.

II. Hearsay Contained In Or Attached To The Testimony Of NEC Witnesses Mr. Shadis And Mr. Gundersen Should Be Excluded

NEC has claimed that both Mr. Gundersen and Mr. Shadis are experts in the topics and issues underlying the statements and exhibits at issue, and NEC seeks to use its purported experts to admit into evidence out-of-court statements offered for the truth of the matter. Instead of proffering witnesses with first-hand knowledge of the issues, and without offering the declarants themselves for cross-examination by the parties and the Commission, NEC seeks to couch in its own testimony statements that would prejudice the interests of other parties and frustrate the administration of justice.

As identified in Joint Petitioners' Motion, Mr. Gundersen offers for the truth of the matter an account of a verbal exchange with Mr. Sauger, an individual employed by a company that directly competes in the decommissioning industry with NorthStar. *See* Gundersen PFST 3:5-16. NEC defends this introduction of hearsay by claiming that Mr. Gundersen is an expert, but nowhere points to any legal support for the proposition that verbal conclusions, rather than reports containing evidence, facts, and support, constitute proper reliance materials for experts. Similarly, NEC's Mr. Shadis offers a report of Mr. Meisner regarding Maine Yankee for the truth of the matter, and NEC defends the hearsay by again claiming that it is the type relied upon by experts. *See* Shadis PFST 3:15-17; 14:12-15:33. This excuse is likewise unavailing. Mr. Meisner could have been offered as a witness, but he was not.

NEC is not seeking to provide information that Mr. Gundersen and Mr. Shadis relied upon in forming their alleged expert opinions that is properly of a "type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Vt. R. Evid. 703. Instead, NEC is seeking a backdoor to admit impermissible hearsay, which would prejudice

Joint Petitioners and frustrate the process of truth-seeking. The declarants could have been made available for cross-examination as witnesses, but NEC has chosen not to do so, leaving these statements unsupported and untested. They should not be admitted.

III. Mr. Hill Should Not Be Permitted To Offer Into Evidence Questions Posed By Entergy's Counsel At Mr. Hill's October 2017 Deposition

CLF claims that counsel's deposition questions are admissions of a party opponent, and supports this claim by pointing to a case that addresses only formal letters issued by an attorney on behalf of his client, not hypothetical scenarios used to probe a witness at deposition. *See Contractor's Crane Serv., Inc. v. Vt. 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). As an initial matter, CLF is seeking to turn a deposition of an expert witness into a deposition of another party's lawyer. This is impermissible under the law, it confuses the issues in the case, and it is plainly against public policy. If every hypothetical and question offered by an attorney in deposition is a party admission, depositions would be perverted from a forum for free questioning to elicit facts, evidence, and truth, to an over-formalized performance where the questioner is effectively under oath and potentially disabled from posing probing or hypothetical questions.

In one of the only cases to tackle this issue directly, a Wisconsin circuit court rejected arguments similar to CLF's. *Teske v. Wausau Heart & Lung Surgeons, S.C.*, 336 Wis.2d 473, at ¶¶ 8, 15-18 (Wis. App. 2011). The Wisconsin Court of Appeals affirmed the trial court's finding three reasons supporting the exclusion of such an offer. *Id.* First, deposition questions as a category do not rise to the level of "statements" as defined under the rules of evidence. *Id.* at ¶ 16. Second, deposition questions are distinguishable from cases involving admission found in attorney letters. As the Court noted, those cases are distinguishable because they all "involve a very

conscious attempt by an attorney to set forth a key issue of fact." *Id.* at ¶ 17. Third, the Court noted that it was against public policy and noted that "to allow questions that may have been asked by a party's attorney or the silence of that attorney to be an admission by that party opponent would deter rigorous or legitimate advocacy" and thus adversely affect the discovery process and the attorney-client privilege." *Id.* at ¶ 8.

These points apply with equal weight to the present effort by CLF and are fully consistent with Vermont law.[1] CLF's theory of admissibility and reading of the case law to the contrary would upend the rules of civil procedure and the process of litigation in Vermont and nationwide. It is an absurd claim, squarely against the public policy of fact-finding and arriving at the truth through adversary proceedings, and cannot be defended.

Further, CLF argues that even if the hypothetical questions in deposition are hearsay, they should be admitted as evidence because they are of the sort relied upon by experts or reasonably prudent persons. CLF can point to no support for its argument that experts or reasonably prudent persons routinely and appropriately rely upon deposition questions in forming their impressions and opinions, nor can it. The only case cited by CLF, *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 7438 Concerning the Constr. of A Group Met-Metered Solar Electric Generation Facility in Guilford, Vermont.*, 2017 WL 3843482, at *6 (Aug. 22, 2017), in support of its claim that the deposition questions should be admitted as evidence and any questions about

[1] Vermont and Wisconsin both define "statements" under Rule 801 as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." *Compare* V.R.E. 801(a); *with* WIS. STAT. § 908.01. In *Teske*, the Court found that deposition questions do not rise to the level of "statements" under this definition. 336 Wis.2d 473, at ¶ 17.

them should go to weight of the evidence is also off base. The case does not relate to the facts at hand here. It involved a motion to exclude a *pro se* neighbor's prefiled testimony and comments on an applicant's written discovery responses and it provides no support for the claim that experts or reasonably prudent persons routinely rely upon deposition questions. The only hearsay that was admitted in that order was a notarized statement supported by additional indicia of truthfulness, *id.* at 5-6, a far cry from a hypothetical question posed to an expert witness in deposition.

CONCLUSION

The exhibits and testimony listed in Appendices A and B should be excluded from the record in this proceeding.

New York, New York

DATED: January 19, 2018

Respectfully submitted,
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APPENDIX A

Testimony To Be Excluded From the Record

Shadis PFST	3:15-17; 14:12-15:33
Gundersen PFST	3:5-16
Hill PFST	9:35-10:6

APPENDIX B

Exhibits and Documents To Be Excluded From the Record

CLF-MOH-6	In its entirety