

**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 OBJECTIONS TO THE ADMISSION OF
CERTAIN SECOND SUPPLEMENTAL PREFILED TESTIMONY & EXHIBITS AND
MOTION TO EXCLUDE OR REQUEST TO PROVIDE LIVE SURREBUTTAL
TESTIMONY IN RESPONSE**

Pursuant to Commission Rule 2.216(C), Conservation Law Foundation (CLF) objects to certain supplemental prefiled testimony and exhibits submitted by Joint Petitioners on March 9, 2018, and moves to exclude portions of the testimony or to be offered the opportunity to respond to it by providing limited live surrebuttal testimony at the technical hearings.

Introduction

Portions of the testimony of Joint Petitioners submitted on March 9, 2018, address matters raised by Conservation Law Foundation’s witness, Mr. Hill, in his initial testimony. To be considered as part of this proceeding this testimony from Joint Petitioners should have been

included in the rebuttal testimony of Joint Petitioners. This testimony of Joint Petitioners addresses matters beyond the limited scope of supporting the Memorandum of Understanding, and/or seeks to offer unqualified legal opinion, and/or is untimely as it could have been submitted earlier.

Conservation Law Foundation is denied due process and unfairly prejudiced by the inclusion of this testimony from Joint Petitioners at this late date. CLF has limited time to respond to the new testimony that should have been presented earlier. Having to respond to untimely testimony creates a distraction, thwarts judicial economy and detracts from CLF’s ability to follow the agreed upon schedule and present its testimony on the Memorandum of Understanding.

The following testimony and exhibits should be excluded:

Scott State Second Supplemental Prefiled Testimony (SSPFT)	4:2-9
T.Michael Twomey Second Supplemental Prefiled Testimony (SSPFT)	2:1-3:15; 4:20-6:22; Exhibits JP-TMT-4, 5, 6 & 7

Argument

I. Untimely and mischaracterizing and unsupported testimony of Scott State should be excluded, or response by live surrebuttal be permitted.

Mr. State’s Second Supplemental Prefiled Testimony (SSPT) at page 4, lines 2-9 addresses testimony Mr. Hill provided in August 2017. It specifically refers to Mr. Hill’s August testimony. (S.State SSPFT 4:6-7). To the extent this testimony of Mr. State is helpful, it should have been provided as part of the Joint Petitioner’s rebuttal testimony. PUC Rule 2.213; Procedural Order Adopting Revised Schedule, Docket 8880 (April 20, 2017) and Procedural Order Adopting New Schedule, Docket 8880 (July 24, 2017)(both provide schedule for Petitioners rebuttal testimony). It was not. Providing it now is untimely. It should be excluded or

CLF should be afforded an opportunity to respond. *In re VT Elec. Power Co. Inc, et al (NRP)*, Docket 6860, Order re Motion to Strike Testimony of Robert Blohm at 3 & fn.3, Docket 6860 (Oct 8, 2004). The testimony provided on March 9 was to support the Memorandum of Understanding. Procedural Order Re: Schedule, Docket 8880 (Mar. 7, 2018). It was not to raise new matters that could have been addressed previously. *Id.*; VT PUC Rule 2.213

The Commission also should reject and exclude or allow CLF to respond to Mr. State's mischaracterization of his testimony. Mr. State states that his testimony addresses "additional demands of Conservation Law Foundation." (S.State SSPFT 4:2-3). Conservation Law Foundation has made no "demands." The only information from Conservation Law Foundation in this proceeding is the testimony of its expert Mr. Hill. This is not a "demand," but information provided from one of the country's leading experts on liability transfers on the common practice of including insurance as part of the financial assurances provided. (M. Hill PFT 20-22).

The Commission should reject Mr. State's claim that additional insurance would be a material change to the MOU. (S. State SSPFT 4:7-9). It is a bald and unsupported conclusion. Mr. State is not a lawyer and provides no basis for claiming that requiring additional insurance would be a material change. V.R.E. 701 (lay witness opinion must be based on perception); V.R.E. 702 (expert opinion must be based on "sufficient facts or data"); V.R.E. 104 (preliminary question of admissibility); *Lundean v. Peerless Ins. Co.*, 170 Vt. 442, 445, 750 A.2d 1031, 1033-34 (2000)(interpretation of contract is question of law); *United States v. Ellsworth*, 738 F.2d 333, 336 (8th Cir. 1984) (expert's "conclusory statement" properly excluded for lack of foundation). It is untimely to the extent it addresses the testimony Mr. Hill filed in August and to which Joint Petitioners already responded without addressing this issue. VT PUC Rule 2.213; Procedural Order (April 20, 2017); Procedural Order (July 24, 2017) and Procedural Order (Mar. 7, 2018).

The Second Supplemental Testimony of Scott State at page 4, lines 2-9 should be excluded. In the alternative, and a preferable remedy, CLF requests the opportunity to provide limited live surrebuttal testimony to address these claims of Mr. State.

II. Untimely, unsupported, and overly broad testimony and exhibits of T. Michael Twomey should be excluded, or response by live surrebuttal be permitted.

Portions of Mr. Twomey’s testimony, and the new exhibits provided by him should similarly be excluded or CLF should be permitted to provide limited live surrebuttal testimony to respond to them. As with the testimony of Mr. State, Mr. Twomey’s testimony also addresses and cites Mr. Hill’s original prefiled testimony. (See T.M. Twomey SSPFT 2:13).

Mr. Twomey’s testimony repeats Mr. State’s testimony and those portions should be excluded as redundant. (T.M. Twomey SSPFT 2:8-11). 3 V.S.A. § 810(1); V.R.E 403; *Whitmore v. Mut. Life Ins. Co. of N. Y.*, 122 Vt. 328, 338, 173 A.2d 584, 592 (1961) (repetitive evidence excluded).

Mr. Twomey’s testimony is also unsupported and should be excluded. Mr. Twomey testifies that “ENVIC and/or its ultimate parent Entergy Corporation” retaining existing liability would “constitute a material change to the MOU.” (T.M. Twomey SSPFT 2:8-11). As with Mr. State’s testimony, the claim that this would be a material change is unsupported. Mr. Twomey is not offered as a legal expert and is not qualified to offer a legal opinion. He also provides no basis for claiming that retaining existing liabilities would be a material change. V.R.E. 701 (lay witness opinion must be based on perception); V.R.E. 702 (expert opinion must be based on “sufficient facts or data”); V.R.E. 104 (preliminary question of admissibility); *United States v. Williams*, 95 F.3d 723, 729 (8th Cir. 1996) (“It is the burden of the party offering expert testimony to lay a foundation for its admission.”); *Lundean v Peerless Ins. Co.*, 170 Vt. 442, 445,

750 A2d 1031, 1033–34 (2000)(interpretation of contract is question of law); *United States v. Ellsworth*, 738 F.2d 333, 336 (8th Cir. 1984) (expert's "conclusory statement" properly excluded for lack of foundation).

Mr. Twomey's remaining testimony about the effect of a transfer and the exhibits he provides also address the initial testimony of Mr. Hill and to the extent it is relevant it should have been provided as part of Joint Petitioners' rebuttal testimony. (T.M. Twomey SSPFT 4:20-6:22). This testimony also falls beyond the scope of explaining the MOU and its terms. The scope of Entergy's general liability is not addressed in the MOU and this testimony provides no information that explains or clarifies any terms in the MOU. It is telling that the MOU is never even referred to in this portion of Mr. Twomey's testimony. The testimony is overly broad and beyond the scope of testimony on the MOU. Procedural Order Re: Schedule, Docket 8880 (Mar. 7, 2018).

Mr. Twomey's specific testimony about the scope of Entergy's liability is also an unsupported legal opinion. (T.M. Twomey SSPFT 4:20). V.R.E. 702; *Lasek v. Vermont Vapor, Inc.*, 2014 VT 33, ¶ 12, 196 Vt. 243, 250–51, 95 A.3d 447, 453 (2014)(opinion must be based on sufficient facts or data).

Exhibits provided with Mr. Twomey's testimony also fail to address any MOU terms and to the extent they are responsive to anything, they seem to respond to Mr. Hill's initial prefiled testimony. They should also be excluded as untimely. VT PUC Rule 2.213; Procedural Order (April 20, 2017); Procedural Order (July 24, 2017) and Procedural Order (Mar. 7, 2018).

III. Live Surrebuttal to Respond

Most of the Joint Petitioners' supplemental testimony goes well beyond the scope of testimony to explain or address the MOU. It is thus overly broad and/or untimely or without foundation. VT PUC Rule 2.213; Procedural Order (April 20, 2017); Procedural Order (July 24, 2017) and Procedural Order (Mar. 7, 2018).

CLF is prepared to address the new testimony. In place of excluding the testimony, CLF requests the opportunity to provide limited live surrebuttal testimony to respond to these specific matters that should have been raised earlier. CLF's witness is qualified to address all these new and untimely claims. In preparing written testimony to be filed on April 10, 2018 in accordance with the agreed upon schedule, CLF's witness will focus on the Memorandum of Understanding as that is the scope of the testimony to be provided. Procedural Order (Mar. 7, 2018). With the limited time to respond to the Joint Petitioners' testimony and falling only a few days after objections are due, it is unreasonable, unfairly prejudicial and a denial of CLF's due process rights to require CLF to respond to the untimely testimony in its written rebuttal due on April 10, 2018. Unlike the Joint Petitioners, CLF has far more limited resources. To advance judicial economy and enable CLF an ability to efficiently and effectively address the untimely testimony, CLF requests the ability to provide limited live surrebuttal testimony during the technical hearings when Mr. Hill will be testifying. CLF anticipates that the response will take no more than twenty minutes of hearing time, and allowing CLF to respond in this manner would be an efficient use of CLF's, the PUC's and other parties' time.

Conclusion

The identified testimony and exhibits should be excluded from the record in this proceeding or as a preferable alternative, Conservation Law Foundation should be permitted to respond to it by providing limited live surrebuttal testimony at the technical hearings.

Dated at Montpelier, Vermont, this 6th day of April, 2018.

CONSERVATION LAW FOUNDATION

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