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' OPPOSITION TO "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"

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 (together, "Joint Petitioners"), by their Attorneys, respectfully file this opposition to "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" ("CLF Mot."), which was filed on Friday, April 6, 2018.

INTRODUCTION

CLF's motion is meritless and should be denied in full. Joint Petitioners' March 9, 2018 prefiled testimony permissibly addresses the Memorandum of Understanding ("MOU") and how CLF's positions (as expressed in its previously submitted prefiled testimony) relate to the MOU.

The March 9th testimony likewise properly discusses facts that bear on whether CLF's proposed conditions, if adopted, would materially alter the MOU from Joint Petitioners' perspectives. CLF is thus entitled to no relief.

It appears that CLF's motive, in filing its motion (termed an objection under Rule of Practice 2.216(C)), is to secure amendment of the approved procedural schedule in this Docket to what it calls its "preferable" (CLF Mot. 4, 7) form of relief: allowing CLF's witness Michael Hill to present live direct (what CLF labels "live surrebuttal" (*id.* at 6)) testimony at the technical hearing. However, such relief is unwarranted. The time for CLF to address and respond to Joint Petitioners' March 9th testimony is on April 10, 2018, the date by which its prefiled testimony is due. Pursuant to the schedule that CLF agreed upon and jointly proposed with the MOU parties to the PUC, the non-signatories were given ample time—over four weeks—to conduct discovery and to prepare prefiled testimony in response to the testimony prefiled by the MOU signatories on March 9th. As discussed further below, CLF has not demonstrated good cause for why it needs an *additional* opportunity to respond to Joint Petitioners' limited ten and a half page prefiled testimony related to the MOU beyond that already afforded in the procedural schedule or, if it needed additional time to prepare its prefiled testimony, why it failed to seek an extension in a timely manner.

If, despite these problems with CLF's motion, the Commission determines that some relief is appropriate, CLF should be permitted at most an opportunity to submit further and final *written* prefiled testimony no later than April 20, 2018. CLF should not be permitted to present live direct testimony at the technical hearing, which would be inconsistent with the requirement of prefiled written testimony that the MOU signatories have observed and would unfairly deprive the MOU

signatories of the opportunity to prepare cross-examination questions in advance of the technical hearing.

BACKGROUND

On March 2, 2018, the Department of Public Service ("DPS") filed a memorandum of understanding ("MOU") signed by all of the principal parties[1] to this Docket aside from CLF. Negotiated after more than a year of vigorous litigation in this Docket, the MOU resolves the issues between the signing parties concerning the proposed transfer of Entergy Nuclear Vermont Yankee, LLC from Entergy ownership to NorthStar ownership in order to facilitate a prompt decommissioning and site restoration of the Vermont Yankee Nuclear Power Station site by NorthStar.

On March 7, 2018, the Commission issued a procedural order adopting a schedule that the MOU signatories *and* CLF had proposed on March 5, 2018. That schedule provided, *inter alia*, for the MOU signatories to submit prefiled testimony on March 9, 2018, and non-signatories to submit prefiled testimony on April 10, 2018.

Pursuant to this schedule, on March 9, 2018, Joint Petitioners submitted the prefiled testimony of Scott State and T. Michael Twomey. Mr. State's testimony is four pages long, and Mr. Twomey's testimony is six and a half pages long—a total of 10 and a half pages altogether. (By comparison, on October 17, 2017, Joint Petitioners prefiled testimony by five witnesses totaling 89 pages, and CLF filed surrebuttal testimony approximately six weeks later on December 1, 2017.)

[1] The MOU signatories include the Joint Petitioners, the Department of Public Service, the Attorney General's Office (in limited form), the Agency of Natural Resources, the Elnu Abenaki Tribe, the Abenaki Nation of Missisquoi, Windham Regional Commission, the New England Coalition on Nuclear Pollution, Inc., and the Town of Vernon Planning and Economic Development Commission.

As noted, CLF's prefiled testimony is due on April 10, 2018. Accordingly, if CLF wished to seek an extension of this deadline, CLF's preferred relief to its claimed objection under Rule 2.216(C), it was required to follow the Commission's "Order re: Practice Regarding Requests for Deadline Extensions" (July 14, 2017), which, absent good cause (which CLF has not attempted to articulate), requires that any extension request must be made no later than three business days prior to the existing deadline (April 10, 2018), such that here the request was due by April 5th.[2] Instead, CLF filed the motion at issue a day later, on April 6th. In the motion, CLF initially requests exclusion of portions of Joint Petitioners' March 9, 2018 prefiled testimony, but CLF ultimately admits that it prefers a different remedy: "[A]s a preferable alternative, Conservation Law Foundation should be permitted to respond to it by providing limited live surrebuttal testimony at the technical hearings." CLF Mot. 7.

ARGUMENT

I. JOINT PETITIONERS' PREFILED TESTIMONY RELATES TO THE MOU AND DOES NOT OFFER AN IMPERMISSIBLE LEGAL OPINION ON MATERIALITY

CLF advances two main arguments in support of excluding portions of Mr. State's testimony and Mr. Twomey's testimony: (1) the testimony allegedly goes beyond topics germane to the MOU and instead offers rebuttals to CLF witness Michael Hill's earlier-prefiled testimony to which Joint Petitioners could allegedly have addressed earlier (CLF Mot. 2); and (2) the

[2] The General Order provides in relevant part: "[R]equests for extensions of existing deadlines will not be routinely granted, even if unopposed, unless such requests are filed at least three business days prior to the deadline that is the subject of such a request. Requests for deadline extensions filed less than three business days before the subject deadline will only be granted for good cause shown." Here, the existing deadline is April 10, 2018, a Tuesday. Monday (April 9) is the first business day before that deadline, Friday (April 6) is the second day before that deadline, and Thursday (April 5) is the third day before that deadline. Under the General Order, CLF was therefore required to file its motion by Thursday, April 5, 2018.

testimony opines, according to CLF impermissibly, on whether CLF's proposed conditions on the transaction, if adopted by the Commission, would constitute material departures from the MOU (CLF Mot. 3-4). Neither argument is persuasive.

First, the challenged portions of Joint Petitioners' March 9th testimony plainly address the MOU and how CLF's earlier-filed testimony bears on the MOU. The portion of Mr. State's testimony that CLF seeks to exclude (State March 9 PFT at 4:2-9) on its face addresses the MOU and explains why CLF witness Mr. Hill's proposed conditions on the transaction would constitute material departures *from the MOU*:

> I would like to make clear that *the additional demands of Conservation Law Foundation (which did not sign the MOU) and its proffered expert Michael Hill would constitute material changes to the MOU*, and their adoption would cause NorthStar to invoke its right to withdraw from the MOU under paragraph 13 and not to close the proposed transaction. For example, Mr. Hill's proposal (PFT 21:17-22:15; *see also, e.g.*, PFT 20:15-21:1) that NorthStar be required to obtain insurance in amounts higher than, and in forms different from, the various financial assurances required by the MOU would constitute a material change to the MOU.

(Emphasis added.) Joint Petitioners could not have offered such testimony before the MOU because the entire purpose of the testimony is to compare the MOU to CLF's proposed conditions, described in CLF's prefiled testimony submitted earlier in this Docket, conditions that the MOU did not adopt. It was entirely fair for Joint Petitioners to anticipate and respond to Mr. Hill's likely April 10th testimony because the schedule does not allow for Joint Petitioners to prefile any further written testimony after April 10th. Additionally, Joint Petitioners respectfully submit that this prefiled testimony will be helpful to the Commission because it advises the Commission of the consequences of a decision by the Commission to adopt the CLF conditions expressed in its prefiled testimony earlier in this Docket.

The portions of Mr. Twomey's testimony challenged by CLF are likewise addressed to the MOU, either in terms of explaining why CLF's conditions (if adopted by the Commission) would

constitute material departures from the MOU or, relatedly, describing how the MOU diverges from the positions that CLF has taken in this proceeding. *See* Twomey March 9 PFT at 2:5-6 ("**Q3. Do the terms of the MOU fully adopt the positions taken by CLF?** A3. No, not as I understand CLF's position. . . .") (bold in original); *id.* at 4:20-6:22 (explaining why, consistent with prior nuclear plant transactions, Entergy Corporation "is not assuming (and certainly not retaining) … general liability under the MOU.").[3] As to Mr. Twomey's exhibits JP-TMT-4, 5, 6, and 7, these all support Mr. Twomey's permissible testimony at 4:20-6:22, and in any event these exhibits would clearly be admissible in connection with cross-examination of CLF's witness at the technical hearing.[4]

Second, CLF is equally unpersuasive in arguing that Mr. State and Mr. Twomey impermissibly addressed a legal question (whether CLF's conditions would constitute material departures from the MOU). CLF cites no precedent supporting the notion that the principal businesspeople for the selling and buying entities here are not eligible *as fact witnesses* to testify concerning facts that bear on materiality. CLF disregards that materiality turns on facts, and those

[3] There is one exception that does not address the MOU. Specifically, Twomey March 9th PFT at 2:18-3:15 summarizes, for the Commission's convenience, some basic facts concerning the status quo of Entergy ownership as compared with the proposed transaction. This summary does not diverge in any respect from previously-filed prefiled testimony by Joint Petitioners on these points, and thus CLF can claim no possible prejudice.

[4] Although, as discussed in text, Joint Petitioners' March 9th testimony addressed the MOU (and how CLF's earlier-filed testimony relates to the MOU), Joint Petitioners note that no limitation was prescribed on that testimony. The Commission's March 7th order adopting the procedural schedule provided simply that, on March 9th, "MOU Parties submit prefiled testimony," with no limitation as to scope. Nor does the Commission's Rule 2.213 (cited at CLF Mot. 2) support CLF's notion that there was a restriction on the content of the March 9th prefiled testimony. Rule 2.213 merely describes the mandatory prefiling of "Direct Case" written testimony, the optional (in the Commission's discretion) prefiling of "Rebuttal Case" written testimony, and the format of such written testimony. It nowhere sets forth a rule that topics that could have been addressed in "Direct Case" written testimony (or some other previously prefiled written testimony) cannot be addressed in "Rebuttal Case" written testimony (or some other subsequently prefiled written testimony).

facts—in particular, how great an expense would be involved in satisfying CLF's conditions—are precisely the subject of these witnesses' testimony. Specifically, the Restatement (Second) of Contracts (1981), which Vermont courts follow, *see, e.g.*, *EverBank v. Marini*, 2015 VT 131, ¶ 17, recognizes that materiality turns on factual questions. *See* Restatement (Second) of Contracts § 241 ("In determining whether a failure to render or to offer performance is material the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected …."); *id.* cmt. a ("The standard of materiality … is to be applied *in light of the facts of each case* …") (emphasis added).[5]

II. CLF'S "PREFERABLE" REMEDY OF ALLOWING LIVE DIRECT TESTIMONY BY ITS WITNESS AT THE TECHNICAL HEARING WAS NOT TIMELY REQUESTED AND IN ANY EVENT IS IMPROPER

As noted, while CLF begins its motion by arguing for exclusion of portions of Joint Petitioners' March 9th prefiled testimony, CLF admits that its "preferable" (CLF Mot. 7) remedy is *not* exclusion of Joint Petitioners' testimony, but instead an order allowing CLF's witness to present live direct testimony at the technical hearing in May. This request is untimely, contrary to the Commission's rules, and unfairly prejudicial to Joint Petitioners and indeed all the MOU signatories.

First, the request is untimely. Effectively, CLF is seeking an extension (until the May technical hearing) of the April 10th deadline by which to present its direct testimony. But the Commission's General Order issued on July 14, 2017 requires that any request to extend a deadline must be made three business days before the deadline, absent good cause. Here, CLF had to make

[5] CLF also erroneously claims (CLF Mot. 4) that testimony by Mr. Twomey should be struck as repetitive of Mr. State's testimony. The testimony is not repetitive for the simple reason that Mr. State is testifying on behalf of the NorthStar entities, and Mr. Twomey is testifying on behalf of the Entergy entities.

the request by April 5th, but it filed its motion only on April 6th. CLF did not seek consent from the Joint Petitioners, and CLF has not even articulated any good cause for failing timely to request the extension. This alone requires denial of the request under the Commission's General Order of July 14, 2017.

Second, even if that General Order could be disregarded, CLF's request is inconsistent with both the parties' agreed-upon schedule and Commission Rule 2.213(A)'s requirement that direct (and rebuttal) testimony be presented in written format, with the technical hearing reserved for cross-examination by adverse parties, questions by the Commission, and re-direct by the party sponsoring the witness.

Third, allowing CLF to present live direct testimony would prejudice Joint Petitioners (as well as other MOU signatories), whose witnesses have exclusively filed written direct and rebuttal testimony. It is unfair to afford CLF the opportunity to prepare its cross-examination questions weeks before the technical hearing with the benefit of Joint Petitioners' written testimony, while depriving Joint Petitioners that same opportunity with respect to CLF's witness if he is allowed to present live direct testimony at the technical hearing. And CLF can claim no prejudice from the original April 10th deadline for its testimony. CLF has had Joint Petitioners' *ten and a half page long* March 9th testimony for more than *four weeks* leading up to the April 10th deadline. By comparison, CLF proved itself capable (notwithstanding its conclusory assertion that it now has insufficient resources) to file surrebuttal written testimony on December 1, 2017, within only *six weeks* of receiving Joint Petitioners' *89 pages* of rebuttal written testimony on October 17, 2017. *See Investigation into Least-Cost Investments, Energy Efficiency Conservation and Management of Demand for Energy in re: Fuel-Switching Issues Specific to CVPS*, Docket Nos. 5270-CV-1, 5270-CV-3, and 5686, 1994 WL 904812 (Sept. 26, 1994) (granting DPS's motion to require CVPS

to prefile anticipated surrebuttal testimony and denying CVPS's request to introduce said testimony through live testimony at hearing; explaining that CVPS's request was inconsistent with Board Rules and unnecessary given the ease and time available to submit written prefiled testimony).

Fourth, even if CLF had timely sought an extension of its April 10th deadline to submit prefiled testimony and CLF's request were otherwise justified, the only appropriate remedy by rule would be to grant an extension to submit prefiled, *i.e. written* testimony, not live direct testimony at the hearing. This is consistent with the manner in which the Commission (then the Public Service Board) has previously dealt with similar requests. *See, e.g.*, *In re: Revised Net-Metering Program Pursuant to Act 99 of 2014*, 2016 WL 4582561, at *22-23 (Aug. 29, 2016) (reinstating prefiled testimony requirement for net-metering projects because of the "benefit of affording parties an opportunity to plan their cross-examination" and "fostering the efficient and effective use of scarce hearing time"); *Investigation into Access Charge Flow-through Compliance Obligations of MCI Telecommunications Corp. and Sprint Communications Corp.*, Docket No. 6437, 2001 WL 34779052 at *2 (Feb. 6, 2001) (requiring rebuttal testimony to be prefiled to ensure that other parties were not prejudiced and to ensure that the testimony was limited to the relevant rebuttal areas). This approach is consistent with Rule 2.213. Requiring that CLF submit any further and final prefiled testimony no later than April 20, 2018, would allow the MOU parties sufficient time to receive, review, and prepare any cross examination necessary to test or impeach CLF's witness in an effective and efficient manner.

CONCLUSION

CLF's motion should be denied in full. In the event the Commission is inclined to grant CLF any relief, the Commission should not allow live direct testimony by CLF's witness at the

technical hearing, and at most should allow CLF to submit further and final written testimony no later than April 20, 2018.

DATED: April 10, 2018

Respectfully submitted,

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