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' OBJECTION AND MOTION TO EXCLUDE CERTAIN PREFILED SUPPLEMENTAL SURREBUTTAL TESTIMONY OF MICHAEL HILL AND FOR A RULING *IN LIMINE* REGARDING THE SCOPE OF CLF WITNESS MICHAEL HILL'S TESTIMONY AND EXPERTISE

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 motion and objection under Commission Rule 2.216(C).

INTRODUCTION

Joint Petitioners bring this motion and objection (1) to Mr. Hill's impermissible assertions in supplemental surrebuttal prefiled testimony ("MOU PFT") that deposition questions and exhibits are evidence of Joint Petitioners' positions, and (2) to request a ruling *in limine* clarifying the scope of Mr. Hill's expertise and the breadth of his permitted testimony, given Mr. Hill's own statements about his role and expertise and his admissions about his failure to review of key documents and provisions in this proceeding.

ARGUMENT

I. Contrary to the Commission's Prior Order In This Docket, Mr. Hill's MOU PFT Relies On Deposition Questions And Exhibits As Evidence Of Joint Petitioners' Positions

In surrebuttal prefiled testimony filed on December 1, 2017, Mr. Hill impermissibly sought to admit as evidence hypothetical deposition questions posed to him by counsel for Joint Petitioners. Joint Petitioners objected, and the Commission agreed, excluding from Mr. Hill's surrebuttal testimony the offending portions. The Commission explained:

> Questions posed by an attorney to a witness during discovery, therefore, may not be premised on admissible facts at all, but may encompass hypothetical premises for witnesses to address. Here, Mr. Hill was being questioned about his opinions, which included an opinion that the proposed transaction involved a transfer of liability. The Joint Petitioners' counsel was free to question Mr. Hill on the bases of his opinions, including Mr. Hill's understanding of the liability transfer, even if counsel did not agree with Mr. Hill's opinions. *The questions posed by the Joint Petitioners' counsel, however, are not evidence. We sustain the Joint Petitioners' objection to Mr. Hill's prefiled testimony from page 4, line 35 to page 5, line 6.*

Order on Admissibility at 15 (Feb. 8, 2018) (emphasis added).

Mr. Hill's MOU PFT nonetheless again seeks to rely on questions posed by Joint Petitioners' counsel and exhibits presented during deposition as evidence, in clear contradiction of the Order on Admissibility. In his MOU PFT, Mr. Hill again claims that deposition questions posed by counsel for the Joint Petitioners represent the legal position of the Joint Petitioners. *See* Hill MOU PFT 4:11-13 ("Until at least partway through my October 2017 deposition, Petitioners appeared to agree that the Vermont Yankee ("VY") proposed transaction involves a transfer of environmental liabilities."); *id.* at 5:18-20 ("Petitioner's counsel attached my Expert Report and Deposition regarding the Mare Island BRAC site as Exhibits 4 and 6 to my October 2017

deposition in *this* matter.") (emphasis in original). These portions of Mr. Hill's MOU PFT should not be admitted.

II. The Commission Should Exclude Portions Of Mr. Hill's MOU PFT And Rule *In Limine* That Mr. Hill Lacks Expertise On Certain Topics, Cannot Address Topics That He Did Not Address In His MOU PFT, And Cannot Speculate On The Content Of Confidential Documents That He Chose Not To Review

Pursuant to Rule 2.216(C), Joint Petitioners object to certain portions of Mr. Hill's MOU PFT and also seek a ruling *in limine* concerning the permissible scope of Mr. Hill's testimony. *First*, Mr. Hill expressly admitted to limits on his expertise and the scope of his testimony, but then proceeded to opine on areas clearly beyond that scope. *Second*, Mr. Hill elected not to address certain portions of the MOU in his MOU PFT, including many of the financial assurances provided as part of the MOU, and he should not be allowed to address those portions of the MOU for the first time at the technical hearing. *Third*, Mr. Hill chose not to review many of the central documents and facts in this proceeding, but nonetheless attempted to speculate on those documents and facts.

A. Mr. Hill's Testimony Should Be Limited To The Topics Of Insurance And Non-Radiological Environmental Liability Transfers, Which Are The Only Topics On Which He Has The Requisite Background To Qualify As An Expert

Experts must have a basis for their opinions, and wide-ranging legal opinion outside the scope of an expert's area of expertise is not appropriate or admissible. The Vermont Administrative Procedure Act incorporates the Vermont Rules of Evidence, which "are generally applicable in administrative proceedings," including in proceedings before the Public Utility Commission. *See In re White*, 172 Vt. 335, 348, 779 A.2d 1264, 1274 (2001); 3 V.S.A. § 810(1) ("The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed.").

Under the Vermont Rules of Evidence, a qualified expert must base any opinion on sufficient facts or data, and the opinion must be "the product of reliable principles and methods," for which "the witness has applied the principles and methods reliably to the facts of the case." V.R.E. 702; *see also Lasek v. Vermont Vapor, Inc.*, 196 Vt. 243, 248, 95 A.3d 447, 451 (2014). Expert opinions "based on data, a methodology, or studies that are simply inadequate to support the conclusions reached" must be excluded. *Estate of George v. Vermont League of Cities & Towns*, 187 Vt. 229, 250–51, 993 A.2d 367, 379 (2010). Similarly, experts should be precluded from proffering junk science in order to gain a litigation advantage. *See 985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc.*, 183 Vt. 208, 213, 945 A.2d 381, 384 (2008) ("The *Daubert* trilogy created a flexible standard intended to keep misleading 'junk science' propagated primarily for litigation purposes out of the courtroom while simultaneously opening the door to well-reasoned but novel scientific or technical evidence."); *In re Costco Stormwater Discharge Permit*, 202 Vt. 564, 578, 151 A.3d 320, 330 (2016) (tribunals must "act as gatekeepers who screen expert testimony ensuring that it is reliable and helpful to the issue at hand").

Experts may not provide freewheeling *legal* opinion. They are limited to providing *expert factual opinion* on subjects where they have expertise in the subject matter. *See Investigation into Gen. Order No. 45 Notice Filed by Vermont Yankee Nuclear Power Corp. Re: Proposed Sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC, & Related Transactions*, Dkt. No. 6545, 2002 WL 32829114, at *5 (Mar. 21, 2002) ("With regard to [the expert's] expertise, she indicated earlier during the direct phase of this case that she was not able to provide an opinion regarding the implications of an Entergy bankruptcy upon the guarantees at issue in these proceedings. Thus, [the expert's] expertise does not extend to providing such a legal opinion. Her submission of an unsigned legal opinion entitled 'Decommissioning Liability

Associated with Power Reactor License,' included as Exhibit ENVY-Wells-3, is, consequently, inappropriate."). "Fed. R. Evid. 704 was held to not open the door to all opinions. [Q]uestions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions . . . . [A]llowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant." *Riess v. A.O. Smith Corp.*, 150 Vt. 527, 531, 556 A.2d 68, 71 (1988) (citing *Kerr–McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983)); *see also Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) ("This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion.").

Much of Mr. Hill's MOU PFT is legal advocacy, appropriate for a post-hearing legal brief by CLF (to be signed by CLF's counsel, not by Mr. Hill), but not for record evidence under the cloak of expert opinion. In proffering testimony that crosses the line between expert analysis and legal advocacy, Mr. Hill has made contradictory statements about his expertise and the scope of his analysis in this proceeding, often limiting his role and expertise to avoid questions from Joint Petitioners, but then opining on matters he has previously agreed were not within the scope of his expertise or analysis.

As an initial matter, Mr. Hill has proposed to testify that he has a "very limited role in these proceedings" as an "outside expert who has been asked to help this Commission understand the relatively recent (two decade) and complex use of liability transfers for environmental cleanups." Hill MOU PFT 3:14, 4:4-7. Similarly, during his January deposition, Mr. Hill conceded that he has no experience in *nuclear* decommissioning projects. Hill Tr. (Jan. 18, 2018) 107:19-22 ("Q. You have not yourself been involved in any nuclear power plant decommissioning projects, correct? A. That is correct."); *see also* A.JP.CLF.1-26 ("I want to make clear that I am not expert

in the history of attempted or actual liability transfers in the context of nuclear plants. My hope is to provide in the nuclear context knowledge gained from the nearly two decades of experience with attempted and actual transfers of liability for *conventional* pollutants.") (emphasis in original).

Mr. Hill also admitted that he has no understanding of the prior owners or past sales of Vermont Yankee (Hill Tr. (Jan. 18, 2018) 106:2-3 ("I have no knowledge of prior owners or prior sales, as previously testified.")), no opinion about the liability structure between various Entergy entities (A.JP.CLF.2-5 ("Mr. Hill has not testified that ENVIC or any other corporate affiliate of ENVY has liability.")), and no awareness of any obligations of any Entergy entities to decommission and restore the Vermont Yankee site (Hill Tr. (Jan. 18, 2018) 29:12-14 ("I'm not able to identify the specific affirmative obligations that entities have here.")). Mr. Hill similarly conceded that he is not arguing that *Bestfoods* affiliate liability applies here (Hill Tr. (Jan. 18, 2018) at 26:4-5 ("I'm not arguing what affirmative obligations ENVIC does have under *Bestfoods*.")), and that he is not advocating for any newly imposed liability (Hill MOU PFT 8:16-9:1 ("I am not advocating (and have never advocated) that liability be somehow newly imposed on any of the Entergy entities.")).

Notwithstanding his own statements as to the scope of his expertise, Mr. Hill's MOU PFT went beyond that scope. Specifically, Mr. Hill's MOU PFT responded to Joint Petitioners' prefiled testimony relating to the sale of nuclear power plants (including the Vermont Yankee Nuclear Power Station, when sold by its prior owners to Entergy) and the attendant responsibility of the buyer (not the seller) to decommission the sites. Hill MOU PFT 6:5-16. And Mr. Hill's MOU PFT also claimed that Entergy entities should not be released from liability after the sale at issue in this Docket, without identifying any of those alleged liabilities or their alleged sources. *Id.* at

9:1-15. Those portions of the MOU PFT should be excluded, and Mr. Hill should not be allowed to address such topics during his testimony at the technical hearing.

B. Mr. Hill Should Not Be Allowed To Testify At The Technical Hearing Concerning Aspects Of The Transaction That He Did Not Address In His MOU PFT

Even aside from the above argument concerning Mr. Hill's limited expertise, Joint Petitioners respectfully request that the PUC preclude Mr. Hill from opining during the technical hearing on portions of the MOU relating to financial assurances and other provisions that he never addressed in the MOU PFT. Pursuant to Rule 2.213(A) and the March 7, 2018 Procedural Order adopting the current schedule, direct and rebuttal testimony is to be presented in written format prior to the technical hearings. *See also Investigation into Least-Cost Investments, Energy Efficiency Conservation and Management of Demand for Energy in re: Fuel-Switching Issues Specific to CVPS,* Dkt. Nos. 5270-CV-1, 5270-CV-3, and 5686, 1994 WL 904812 (Sept. 26, 1994). Mr. Hill's MOU PFT addressed only certain portions of the financial assurance package provided by the Joint Petitioners in the MOU. Mr. Hill did not address, and therefore should not be heard at the technical hearing to opine on, the following financial assurances:

i. Entergy's contribution to the SRT to bring the balance to $60 million.

ii. The $55 million in escrowed funds available to support the project.

iii. The $40 million from expected Round 3 DOE proceeds available to support the project.

iv. The $140 million support agreement available to support the project.

v. The approximately $400 million of performance bonds or equivalent performance assurance available to support the project.

vi. The $25 million contingent letter of credit tied to the start and/or completion date milestones, to ensure the project is timely undertaken and completed.

Mr. Hill should also not be heard to testify regarding the oversight and reporting mechanisms available in the MOU, the characterization work to be undertaken pursuant to the MOU, the site restoration standards agreed to among the MOU signing parties, or any other provision of the MOU that went unaddressed in Mr. Hill's MOU PFT.[1]

C. Mr. Hill Should Not Be Permitted To Speculate On The Content Of Confidential Documents That He Chose Not To Review

Under Vermont law, Mr. Hill cannot offer an expert opinion without having reviewed relevant materials and documents. *See* V.R.E. 702 ("[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data."); *In re Rezulin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 550 (S.D.N.Y. 2004) ("Because [the expert] wrote his report before having the supporting data, his opinions are not based upon sufficient facts or data and do not proceed from reliable principles and methods, as required by Rule 702. Accordingly, all of [the expert's] testimony is excluded.") (footnote and internal citation omitted).

In forming his opinions, Mr. Hill did not review confidential documents, including the Membership Interest Purchase And Sale Agreement ("MIPA"),[2] the deal model, the pay-item

[1] Although the PUC provided Mr. Hill an opportunity to supplement his MOU PFT on May 9, that supplementation right is limited to the portions of Joint Petitioners' MOU PFT to which CLF objected and thus does not provide an avenue for Mr. Hill to address the areas discussed in text. *See* PUC Order re: Commission Questions and Requests and Motion of Conservation Law Foundation at 1-2 ("To the extent that CLF believes that additional testimony is required, it may submit a written supplementation to Mr. Hill's prefiled testimony addressing the testimony identified in its objections on May 9, 2018, along with its prefiled testimony responding to the Commission's question.").

[2] The confidential version of the MIPA was produced to parties that had signed the protective order in this Docket as Attachment A.DPS.JP.1-12.1. A public (redacted) version of the MIPA was filed as part of Exhibit JP-SES-Supp-1 on March 10, 2017, and was available to all parties, whether or not they had signed the protective agreement. Mr. Hill appears not to have reviewed this public version, based on his assertion that he has not seen the "Contract." *See* Hill

disbursement schedule, and company financial reports (Hill Tr. (Jan. 18, 2018) 19:10-11 ("I've not reviewed any confidential documents."); *id.* 62:11-12 ("I have not read any confidential information.")), yet his MOU PFT opined freely on the substance he claims to be included in each of those documents and the adequacy of certain financial assurances for the project (Hill MOU PFT 10:3-13:2 (Section titled "Transferee's Incentives under the Contract"); *id.* at 13:3-19 (Section titled "Transferee's Financial Ability to Meet Its Liabilities")). Worse, Mr. Hill has used his refusal to review confidential documents to shield his testimony from cross-examination. *See* Hill Tr. (Jan. 18, 2018) at 62:5-12 ("Q. Mr. Hill, can you answer my question? A. I don't think so, for the reasons I've stated. Q. Including because you haven't read any of the material that's been designated confidential, correct? A. Oh, that's true. I have not read any confidential information."). That raises a serious issue of sufficiency as to the facts and data on which Mr. Hill relies as well as the reliability of the methodology he used to offer expert opinion on liability and financial assurances for the transaction as a whole, including in particular nuclear aspects of decommissioning and site restoration that the transaction will facilitate. Mr. Hill cannot be permitted to offer junk science with no basis in the evidentiary record and no reasonable methodology. Mr. Hill's MOU PFT 10:3-13:2 and 13:3-19 should be excluded, and the Commission should rule *in limine* that Mr. Hill is precluded during the technical hearing from engaging in speculation as to the content of confidential documents or their bearing on this Docket.

CONCLUSION

Joint Petitioners respectfully request that the following portions of Mr. Hill's MOU PFT be excluded: 4:11-13, 5:18-20, 6:5-16, 9:1-15, 10:3-13:2, and 13:3-19. Additionally, the

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MOU PFT 10:7-12 ("Petitioners have refused to release even a page of the Contract to the public despite CLF's discovery requests for the Contract. To my knowledge, the only means through which CLF or I could have seen the Contract was to sign a Non-Disclosure Agreement").

Commission should issue a ruling *in limine* that Mr. Hill is precluded at the technical hearing from offering expert opinion on topics beyond insurance policies and non-radiological environmental liability transfers, on aspects of the MOU pertinent to the proposed transaction that Mr. Hill did not address in his MOU PFT, and on the content of confidential documents that he chose not to review.

DATED: April 27, 2018

Respectfully submitted,

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