

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee)
LLC and Entergy Nuclear Operations, Inc., For)
Amendment of their Certificates of Public Good)
and other approvals under 10 V.S.A. §§ 6501-6504)
and 30 V.S.A. §§ 231(a), 248 & 254, for authority)
to continue after March 21, 2012, operation of the)
Vermont Yankee Nuclear Power Station, including)
storage of spent nuclear fuel)

Docket No. 7600

Investigation into (1) whether Entergy Nuclear)
Vermont Yankee and Entergy Nuclear Operations,)
Inc.. should be required to cease operations... ;)
(2) whether good cause exists to modify or revoke)
the 30 V.S.A. § 231 Certificate of Public Good)
Issued to Entergy VY for any identified violations)
of Vermont statutes or Board orders related to)
the violations.)

MOTION FOR SANCTIONS

The Vermont Public Interest Research Group (VPIRG) moves pursuant to Board Rule 2.204(G), Board Rule 2.214, Vermont Rule of Civil Procedure 15, Vermont Rule of Civil Procedure 26(j), Vermont Rule of Civil Procedure 37, and the Board's inherent power, for dismissal with prejudice of the Petition in Docket 7440, and for an award of past and future staff costs, attorneys fees and costs.

MEMORANDUM IN SUPPORT

It is an irrefutable legal proposition that an applicant to a tribunal that submits perjured testimony in support of its petition or complaint, including false discovery answers, is subject to

the full range of legal sanctions, including outright dismissal of the petition with prejudice, as well as lesser sanctions, such as imposition of fees and costs. Radecki v. GlaxoSmithKline, 646 F.Supp.2d 310, 316-319 (D.CT 2009). This principle governs administrative proceedings as well as court proceedings, Radecki, *supra*, at 317-318. Where false discovery answers are corrected by the party which submitted them, on its own volition, prior to trial, dismissal may be inappropriate; in such cases an award of the fees and costs associated with the false discovery is a more appropriate remedy. Radecki, *supra*, at 317. A court's authority to impose these sanctions arises under both V.R.C.P. 37(b) and the court's inherent power. This Board has all the authority of a court of record. 30 V.S.A. § 9, and Board rule 2.214 invokes Rule 37.

In ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 114 S.Ct. 835, 127 L.Ed.2d 152 (1994), the United States Supreme Court made very clear that an agency may dismiss an administrative proceeding when the applicant has submitted false testimony, regardless of whether the applicant otherwise deserves to prevail. The issue before the Court was whether an agency *must* dismiss the proceeding. The Court affirmed the NLRB's authority to reinstate a worker despite his false testimony, but the Court (and concurring opinions) suggest this should be the exception rather than the rule. The majority opinion states: "False testimony in a formal proceedings is intolerable. We must neither reward nor condone such a flagrant affront to the truth-seeking function of adversary proceedings." Justice Kennedy's concurring opinion criticized the NLRB's position on appeal as being akin to treating false testimony by a petitioner as no worse than "the student who claims the dog ate his homework." 510 U.S. 325-326. See also Chambers v NASCO, Inc., 501 U.S. 32, 45, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991) (inherent power of the court to order dismissal or an award of all costs and fees associated with the false submission).

Entergy has admitted it provided false information to the Board, the Department and the parties in this case regarding the existence of underground piping. Entergy Letter 1/21/10; Status Conference 1/24/10; Entergy Affidavit of Norm Rademacher 1/24/10. In addition, since that admission, Entergy has identified a specific discovery answer about underground piping that it provided in response to VPIRG's pretrial discovery requests; that answer was false or highly misleading Entergy Corrected Discovery VPIRG Response 1/29/10.

Entergy did not correct its false discovery and false testimony on its own volition prior to trial. The detection of tritium in monitoring wells compelled Entergy to admit, after the evidence had closed and after briefing had been completed, what has now become obvious. Events also have demonstrated that it is Entergy as an entity that is responsible, not a rogue individual. Numerous individuals were involved in the deception. The culture of providing half-truths continues into 2010, even after the Board's admonition at the January 27, 2010 hearing and even with a new cast of characters. See Department of Public Service letter to the PSB March 9, 2010.

VPIRG submits that the appropriate sanction is dismissal of the Petition. This Board cannot demonstrate the slightest tolerance for submission of materially deceptive sworn discovery and testimony by a regulated entity without placing its own credibility, indeed its own viability as a regulatory board, at great risk. An award of fees and costs, without dismissal, would send the wrong message. Such an award would inevitably be regarded as nothing more than the cost of doing business. An award of fees and costs would be too small to affect the company's behavior, even if it could not be passed along to the company's customers -- and this Board has no jurisdiction over Entergy's rates and cannot stop Entergy from shifting these costs to its ratepayers. Were the Board to set a precedent that parties may submit false information

and get away with it by paying an adversary's costs, this would jeopardize the reliability, credibility and sanctity of the Board's processes and rulings for the indefinite future.

If the Petition were not dismissed, only two choices would be left to the Board. One is an award of fees and costs followed by revocation of the CPG. The revocation option is being explored by the Board in these proceedings, but (as VPIRG argued in its July 17, 2009 brief) if adopted this option would mean the Board would have to address and remedy the looming uncertainty of how decommissioning would be carried out once Entergy is no longer doing business in Vermont. Once ENVY's income stream ceases because it is no longer selling power, the threat of revocation of the CPG is not unlike the threat to throw Brer' Rabbit into the briar patch -- implementation of decommissioning, based on a fixed investment, will be some other entity's problem. The other option is simply awarding fees and costs. VPIRG submits that dismissal of the Petition with prejudice, coupled with a fee and cost award, is the only meaningful and fair option available to the Board.

With or without dismissal, VPIRG's staff costs, attorneys fees and costs associated with the deception should be reimbursed. Obviously, the presence of underground piping is directly linked to the cost of decommissioning. Removal of contaminated soil is one of the major costs of decommissioning. As explicitly stated in Exhibit EN-TLG 2, Section 3.3.2, pp.5-6, "discovery of... contaminated soil previously undiscovered" is a type of "financial risk" that the TLG study did not address. This was because "there is insufficient historical data from which to project future liabilities." The TLG report does estimate the cost of the 135,000 cubic feet of "potentially contaminated soil" on the site. EN-TLG section 3.4.7, p.15, which apparently was based on "a preliminary assessment of the potential for contamination of the soil around the plant (based upon historical evidence.)" EN-TLG 2 section 6, page 3. The cost of decommissioning

has been one of the principal issues that VPIRG has raised in this proceeding. See VPIRG Post-Hearing Brief pp. 31-32, 35-47. Events now have demonstrated that VPIRG's briefing was based upon an illusion -- an illusion created by Entergy's deceptive representations.

The issue of plant reliability was also one that VPIRG focused on in the discovery process. Entergy, by providing materially false information about the existence of underground pipes carrying radioactive material and the apparent deteriorating condition of those pipes has kept VPIRG and other parties from fully investigating the reliability of the plant.

VPIRG therefore seeks reimbursement for its past staff costs, attorneys fees and its litigation costs which were incurred while addressing the cost of decommissioning and reliability, during the proceedings. VPIRG seeks compensation as well for its ongoing and future staff costs, attorneys fees and litigation costs incurred in responding to these disclosures. The Board's authority rests on its inherent power, Board Rule 2.214, and on Rule 37(b), and also Board Rule 2.204(G) and Rule 15, as the prefiled testimony was referenced in and became part of the Petition. See 12/1500 order in Docket 6300 General Order 45 Notice (AmerGen), pp.6-10.

VPIRG's prior counsel spent a large amount of time on discovery. VPIRG's present counsel was retained just prior to the commencement of the hearings. The undersigned has reviewed his billing records and finds that he spent 123 hours on this matter in 2009. Approximately half of this time was associated with the subject matter of the false testimony. These hours involved reading discovery and transcript about the costs of going forward with the Vermont Yankee, the costs of decommissioning, the costs of renewable alternatives to Vermont Yankee, and developing the argument that the real costs and benefits of going forward, when compared to the costs and benefits of renewable alternatives, mean that under Pacific Gas &

Electric the best economic decision for the people of Vermont is rejection of continued operation of VY . The undersigned's hourly billing rate is \$180 an hour. VPIRG's Clean Energy Advocate, James Moore, devoted hundreds of hours of his time on aspects of this case that, it turns out, were wasted hours, because they were based on the same assumption, that no underground piping existed. Hundreds of dollars in printing and travel costs also have been incurred. VPIRG's counsel and VPIRG's staff will submit an affidavit as to all of the attorneys fees, staff costs, and related litigation costs within ten days.

VPIRG's present counsel has spent over 38 hours in 2010 responding to the evidence about Entergy's misconduct. VPIRG's counsel reasonably expects to spend at least twice that in both dockets going forward, for a total of 114 hours, plus the costs of travel and printing. See Chambers, supra, awarding all of the moving party's attorneys fees and costs, for the entire litigation, including legal fees incurred in related proceedings before an administrative agency.

Finally, Entergy has suggested that attorneys fees for different intervenors should not be duplicated. However, VPIRG has taken, and will continue to take, different positions on important issues than other intervenors. VPIRG's post-hearing briefs argued that some of the remedies sought by other intervenors should not be relied upon to protect the public because of the reach of federal preemption. VPIRG has not joined in CLF's motion to show cause because of similar preemption concerns. VPIRG's position continues to be, as it stated in its reply brief, at pages 31-32:

VPIRG's position is this.... Instead of relying upon such thin reeds, the Board should examine the costs and benefits of continued operation strictly within the confines of Pacific Gas & Electric:... Solid economic reasons support discontinuing the operation of this facility. They include ... the chill that continued nuclear operation will cast over alternative sources of energy that lack the economic risks associated with nuclear power...

Conclusion

The Board should dismiss with prejudice Entergy's Petition in Docket 7440. The Board should also award sums of money to compensate VPIRG for its staff costs, and to compensate VPIRG for attorneys fees and costs that were connected with or affected by Entergy's false submissions, in the past, and in the ongoing proceedings. Affidavits addressing these sums will be submitted within ten days.

Date: March 18, 2010

The Vermont Public Interest Research Group

By:

James A. Dumont

James A. Dumont, Esq.

Law Office of James A. Dumont, Esq. PC

15 Main St., PO Box 229

Bristol VT 05443

jim@dumontlawvt.com