STATE OF VERMONT
PUBLIC SERVICE BOARD

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

WRC MOTION FOR REIMBURSMENT OF EXPENSES

The Windham Regional Commission (WRC) hereby requests that its expenses directly related to participation in this docket (and any subsequent docket established to relitigate the matters raised in this docket) that have been and will be incurred after August 7, 2009 be reimbursed by Entergy VY. Expenses directly related to participation in this docket include WRC staff time in reviewing and advancing the record in this docket; preparing for and attending Board hearings and related meetings; commissioner and staff travel, meal, and lodging costs associated with hearings, meetings, and docket development; and consulting costs as needed to assist in managing highly technical material.

In a written response to Board questions filed on March 16, 2012 WRC recommended that if the pending Entergy VY Motion Seeking Issuance of a Final Decision and Order Granting CPG was denied, the best course of action would be to open a new docket, and in making that recommendation WRC reserved the right to seek reimbursement for related expenses.

What follows is a history of WRC engagement in this docket, including expectations built upon the preponderance of formal and informal communication with Entergy VY; our position that Entergy VY has caused the continuation of this docket; a comparison of the basis for past approvals and denials of WRC requests for reimbursement by the Board; and a presentation of our basis for this request that is informed by these past decisions by the Board.

WRC represents 27 towns in Southeastern Vermont and neither supports nor opposes the continued operation of the Vermont Yankee nuclear station. We recognize many important issues in this docket, chief among them are overall reliability, prompt and complete decommissioning, and critical economic impacts of plant operation and eventual closure. WRC

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is committed to assisting the public in understanding all the issues, and in providing the public with access to accurate information.

WRC began its engagement in this docket through formal and informal communication with Entergy VY in 2007, prior to the official filing of the application by Entergy VY. At that time WRC fully expected this docket to reach a natural conclusion based upon the merits of the case as presented by Entergy VY and other Parties. This expectation flowed directly from statements and filings made by Entergy VY.

WRC reasonably believed it had concluded its participation in this docket with the filing of a Reply Brief on August 7, 2009. On April 18, 2011 Entergy VY filed a broad claim of preemption with the Federal District Court which, through a ruling issued on January 19, 2012, has returned the case to the Public Service Board.

WRC is mindful that our request is unusual, but so, too is the extended status of the Certificate action being considered in this docket, which has been ongoing for more than four years. WRC has reached out to Entergy VY in an attempt to develop an equitable settlement. Our email to Entergy VY attorney John Marshall dated February 27, 2012 received a reply on February 29, 2012 stating that he had “passed your request on to the company.” We have heard nothing further.

WRC argues that the continuation of this docket and need to relitigate the same subject under modified terms:

1) is caused by the actions of Entergy VY, including the early representation by Entergy VY of its role in the Certificate of Public Good process, and the failure of Entergy VY to assert or clarify any claim, even an informal claim, that the underlying process is preempted;

2) is unanticipated because in 2007 and 2008 Entergy VY provided WRC with reasonable assurance that it accepted a dual track process requiring the approval of the Public Service Board and the Vermont Legislature, and accepted the applicability of 30 V.S.A. §248;

3) is untimely because Act 160 imposed several burdensome conditions upon Entergy VY, including conditions that directly dictated the timing of the filing of the CPG

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2 Entergy VY was required by V.S.A. 30 § 248(f) and Board rule 5.402 to provide the WRC with 45 days advance notice of intent to file its application for an extended Certificate of Public Good. Entergy VY provided that notice on December 7, 2007.

3 Sworn Affidavit of Thomas Buchanan

4 WRC recognizes that Entergy VY has not completely surrendered all claims to federal preemption with regard to specific issues and conditions contained within a Board Order, and that from the beginning of this docket Entergy VY maintained a right to appeal a Board Order on the grounds that a contained condition was preempted. WRC does not appeal Public Service Board decisions, and instead considers the filing of a reply brief as the natural terminating point of our engagement in PSB.
application, and those conditions were ripe for review by the Public Service Board as early as 2007;

4) is untimely because issues that have been brought forward by Entergy VY in the federal preemption filing were ripe for review by the Public Service Board at or before the initiation of this docket, even if the review was not then ripe for federal action;

5) creates significant additional burdens, based upon a clear and direct connection between the representations made by Entergy VY and the expenses that have been and will be incurred by WRC;

6) will require WRC to commit substantial staff hours to a review of the issues in this docket, and will impose extraordinary unanticipated expenses upon WRC to relitigate issues that, but for representations of Entergy VY, would have been resolved much earlier in the proceedings.

History:

On June 13, 2002 the Board entered an Order and granted Entergy VY a Certificate of Public Good in docket 6545. The Order was predicated on a Memorandum of Understanding that included the following paragraph related to governing law:

16. Additional Provisions:
1. This Memorandum of Understanding is governed by Vermont law and any disputes under this Memorandum of Understanding shall be decided by the Board.

In 2005 the Vermont Legislature passed H.545, which would become Act 74. Among other things, this Act created a requirement that Entergy VY receive legislative approval for the storage of spent nuclear fuel derived from operations after March 21, 2012, which was the expiration date of its then-current Certificate of Public Good. The Act also established a Clean Energy Development Fund and required Entergy VY to make payments into that fund.

On April 26, 2006 the Board concluded docket 7082 and granted Entergy VY a Certificate of Public Good to construct a Dry Fuel Storage Facility.

In 2006 the Vermont Legislature passed S.124, which would become Act 160. Among other things this Act added a requirement that the petition for continued operation be considered under 30 V.S.A. §248, and required approval of the “General Assembly” before the Public Service Board could issue a Certificate of Public Good for continued operations of the VY

5 WRC was not a party to Docket 6545.
6 10 V.S.A. § 6522(c)(4)
7 Entergy VY has stated that it is Act 160 that requires the Vermont Public Service Board to consider the criteria in 30 V.S.A. § 248. (Footnote 5 on page 6 of the Post Trial Brief of Entergy VY, filed in United States District Court on September 26, 2011, Case 1:11-cv-00099)
Station after March 21, 2012. It also allowed the Public Service Board to begin the Certificate process after July 1, 2008 if the General Assembly had not acted to approve the release of a final CPG, and it required that an application for a new or extended certificate be filed “no later than four years before the date upon which the approval may take effect.” The Act also directed the Public Service Department to arrange for a series of studies and a public engagement process to include at least three public meetings. The costs associated with the fact finding and public engagement process were authorized to be charged back to Entergy VY. And, Act 160 required the Public Service Board to notify the General Assembly upon receipt of a petition for approval of construction or operation of a nuclear energy generating plant within the state.

In late 2007 Windham Regional Commission recognized that the existing Vermont Yankee CPG would expire on March 21, 2012, and under Act 160, if Entergy VY wished to continue operating the Station it would need to file an application no later than March 21, 2008. WRC anticipated participating in the review of the preapplication and application (petition) as defined by 30 V.S.A. §248(f) and Board rule 5.402, and engaged with Entergy VY to establish a timeline for the filing of its plans and the filing of the required 45 day advance notice. WRC also sought Entergy VY’s understanding of the process to be used, and the relevancy of ACT 160 timelines and legislative approval. Discussions were ongoing between then WRC Executive Director Jim Matteau and Entergy VY officials who were directly engaged in the relicensing project, including David McElwee (Liaison Engineer) and Mike Metell (License Renewal Project Manager). These informal discussions, held mostly in October and November 2007, sought to establish a schedule for the filing of the CPG application prior to the March 21, 2008 deadline established under Act 160, which would also require a prefile notice to the municipality and regional commission 45 days in advance as described by PSB Rule 5.402 and 30 V.S.A. §248(f).

On October 31, 2007 WRC Commissioners toured the VY Station and met with Entergy VY officials who provided a detailed briefing about Station operation, the NRC license approval process, and Vermont CPG process.

On December 7, 2007 Entergy VY provided WRC with an official prefile notice by letter from Downs Rachlin Martin PLLC, signed by attorney Peter D. Van Oot in which Entergy VY stated its intent to file a petition for approvals required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A.

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8 30 V.S.A. § 248(e)(2)
9 30 V.S.A. § 248(e)(2)
10 30 V.S.A. § 254(a)(1)
11 30 V.S.A. §§ 254(a)(2) and 254(b)
12 30 V.S.A. § 254(b)(3)
13 30 V.S.A. § 254(a)(2)
14 Affidavit of Thomas Buchanan, WRC-TB-1
15 Affidavit of Thomas Buchanan
§§ 231(a), 248 and 254. The letter stated that PSB would be unable to review the application before July 1, 2008 unless the Vermont General Assembly first approved continued operation\textsuperscript{16}. The letter also stated\textsuperscript{17}:

In addition to the CPG petition that Entergy VY will be filing with the Public Service Board, Entergy VY will also take all necessary steps to comply with Chapter 157 of Title 10 of the Vermont Statutes Annotated for, storage of SNF at the Station after March 21, 2012, and other applicable statutes.

On December 13, 2007 Entergy VY representatives Dave McElwee, Mike Metell, and attorney Peter D. Van Oot participated in a public meeting hosted by WRC, at which they offered a presentation of the prefile application. The presentation was heavily focused on the 30 V.S.A. §248 criteria, and also included a slide titled “Plant License Renewal” with the following bullet points\textsuperscript{18}:

- State “Certificate of Public Good” (CPG)
  - Required by state statute
  - Will be submitted early 2008
  - PSB cannot review until July 2008
  - Legislative approval needed

The slide triggered a question by Commissioner Tom Buchanan who asked what would happen if the legislature failed to act, and in response Mr. McElwee stated that it would be the same as a “no” vote and would prohibit the release of a new CPG, and would thus prohibit continued operation\textsuperscript{19}.

On January 18, 2008 WRC filed a letter with Entergy VY and the Public Service Board with comments about the prefiled material\textsuperscript{20}.

On March 3, 2008 Entergy VY filed a cover letter with the Public Service Board to amend its Certificates of Public Good with the subject line:

SUBJ: Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their certificates of public good and other approvals required 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 the storage of spent-nuclear fuel

\textsuperscript{16} WRC-TB-2-App-D
\textsuperscript{17} WRC-TB-2-App D, page 11
\textsuperscript{18} WRC-TB-15b, page 13 (presentation document provided by Entergy VY, scanned by WRC)
\textsuperscript{19} Affidavit of Thomas Buchanan
\textsuperscript{20} WRC-TB-2
The cover letter also sought “all other approvals required under Vermont law, including under Sections 248 and 254 of Title 30 and Chapter 157 of Title 10.” The cover letter noted the PSB could not commence proceedings on the petition until July 1, 2008 unless the legislature has approved continued operations before that time, and noted the Board must provide notice of the application to the Speaker of the House and the President of the Senate.

The March 3, 2008 petition filed with the Public Service Board included prefilled testimony structured around the 30 V.S.A. §248 criteria, and the Entergy VY petition represented that:

4. Such a petition requires this Board's approval under Subsection (a) of Section 231 as well as this Board's approval and the approval of the General Assembly under Paragraph (2) of Subsection 248 (e) of Title 30, Vermont Statutes Annotated, in accordance with the criteria established by Subsection (b) of Section 248 and Subsections (b) and (c) of Section 254 of Title 30 and a finding under Subsection (a) of Section 248 that issuance of a CPG for continued operation of the VY Station will promote the public good of the state.

5. As continued operation of the VY Station will require storage of spent-nuclear fuel generated after March 21, 2012, at the VY Station, such petition also requires the General Assembly's approval under Chapter 157 of Title 10, Vermont Statutes Annotated.

6. Entergy VY represents that its continued operation of the VY Station after March 21, 2012, and until March 21, 2032, the period of time for which it has applied to renew its license to operate the VY Station from the U.S. Nuclear Regulatory Commission, will meet each applicable criterion established by Subsection (b) of Section 248 and Subsections (b) and (c) of Section 254 and will promote the general good of the state as required by Subsection 248 (a).

On March 20, 2008 WRC hosted a public meeting at which Entergy VY presented its petition. Attending the meeting on behalf of Entergy VY were representatives Dave McElwee, Mike Metell, Larry Smith, Rob Williams, attorney Peter Von Oot, and contracted economist Richard Heaps.

On April 16, 2008 WRC filed additional comments with PSB and Entergy VY about the actual application. In that letter WRC made special note that Entergy VY “has been an active and willing participant, has made an effort to attend all public events, and has frequently made their expertise and information available to us. The discourse at all of our public meetings and hearings has been informed and respectful, and this has assisted in better understanding of the application and its implications.”

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21 Affidavit of Thomas Buchanan
22 WRC-TB-3
23 WRC-TB-3, page 5
On July 10, 2008 a Prehearing Conference was held to begin the CPG process in docket 7440. The Department of Public Service proposed a schedule based on the stated goal of having the Board issue at least a Preliminary Order in time for the legislature to act before the 2009 recess. Entergy VY endorsed the schedule with the caveat that the Board and Parties should be flexible. Throughout the fifty minute Prehearing Conference, Entergy VY raised no objections to 30 V.S.A. §248, Acts 74, 160, or 189, and termed Act 189 “...a pretty extraordinary and important piece of legislation. It's -- in Entergy's feeling is probably the most in-depth analysis of the reliability of a nuclear power station that has been undertaken in any state proceeding. So it's clearly important as the Parties have recognized.” At the same Prehearing Conference the Department initiated a short discussion about jurisdictional preemption and the relationship between radiological health and safety, and reliability and environmental concerns, to which Entergy VY did not articulate any objection or clarification. Later in the Prehearing Conference Board Member Burke and Chairman Volz provided short clarifying overview of the Board’s understanding of federal preemption, which limited preemption to matters of “radiological health and safety” as distinct from just “safety.” Entergy VY raised no objection to this characterization.

On July 17, 2009 Entergy VY filed an Initial Brief and proposed CPG. Much of the proposed CPG was structured around the 30 V.S.A. §248 criteria.

On August 7, 2009 Entergy VY filed a Reply Brief. Section IV of this brief specifically addressed Section 248’s Environmental, Transportation, and Local Impact criteria. Entergy VY concluded the Reply Brief by stating “…The Board should accordingly authorize Continued Operation by issuing an amended CPG to Entergy VY under Section 231 and a CPG for the VY Station’s Continued Operation under Section 248.” Entergy VY then added a footnote stating that a preliminary decision from the Board would be premature, and cited 30 V.S.A. §248(e)(2).

On August 7, 2009 WRC filed a concluding Reply Brief in this docket. The Reply Brief was the natural culmination of WRC’s participation in this docket, and no further participation was or should have been expected.

In early March 2010 WRC filed a Motion for Reimbursement of Expenses in docket 7600. That docket had been opened to consider issues surrounding a leak of radionuclides from underground pipes.

24 Prehearing Conference July 10, 2008, Transcript page 9, line 2
25 Prehearing Conference July 10, 2008, Transcript page 11, line 4
26 Prehearing Conference July 10, 2008, Transcript page 43, line 3
27 Prehearing Conference July 10, 2008, Transcript page 20, line 17
28 Prehearing Conference July 10, 2008, Transcript page 34, line 20
29 The WRC Motion for Reimbursement of Expenses in docket 7600 is dated March 11, 2010 but was filed by email on March 16, 2010, and appears to have been recorded by the Board as being filed on March 18, 2010.
On April 9, 2010 WRC filed a Motion for Reimbursement of Expenses in docket 7440, related to unanticipated ongoing participation in this docket caused by incorrect statements Entergy VY had made regarding underground pipes that carry radionuclides.

On April 19, 2010 the Board issued an Order re: Attorney’s Fees and Costs in docket 7600, in which it rejected the request of WRC, and rejected the similar requests of other Parties.

On June 4, 2010 the Board issued an Order Re: Request for Sanctions and Attorney’s Fees and Costs in which the Board granted WRC’s request for reimbursement of costs specifically related to the incorrect statements regarding of underground pipes in docket 7440.

On July 2, 2010 WRC entered into a Settlement Agreement with Entergy VY for those costs related to the June 4, 2010 Reimbursement Order. The settlement is limited to “attorney’s fees and costs reasonably incurred in this Docket as a direct result of Entergy VY’s provision of incorrect information regarding underground piping,30 and does not cover unrelated matters, including the continuation of this docket necessitated by the subsequent preemption challenge or the change in regulatory and statutory authorizations being sought31.

On April 18, 2011 Entergy VY filed a Complaint for Declaratory and Injunctive Relief with the United States District Court in Burlington, Vermont, stating, among other things32:

6. The question presented by this case is whether the State of Vermont, either through a state administrative agency (the PSB) and/or the state legislature (the General Assembly) may effectively veto the federal government’s authorization to operate the Vermont Yankee Station though March 21, 2032. The answer is no.

7. Vermont’s attempt to shut down operations at the Vermont Yankee Station through regulatory or legislative denial of a CPG is preempted by the federal Atomic Energy Act.

On September 26, 2011 Entergy VY filed a Post Trial Brief with the United States District Court in which it argued that once the preempted sections added by Acts 74 and 160 are stricken and removed, the Board could not act under section 248, stating:

Specifically, the PSB would have authority to consider a CPG for VY’s continued operation under 30 V.S.A. § 231(a) (a company “which desires to own or to operate a business over which the [PSB] has jurisdiction under the provisions of this chapter shall first petition the board to determine whether the operation of such business will promote the general good of the state”), but not under 30 V.S.A. § 248 (covering only “site preparation for or construction of an electric

30 Docket 7440 Board Order Re: Requests for Sanctions and Attorney’s Fees and Costs, June 4, 2010, page 12
31 The agreement provided immediate reimbursement of $3,823.56 for past expenses, and up to an additional $30,000 for future expenses related only to this topic in this docket.
32 Complaint for Declaratory and Injunctive Relief, page 3, Case 1:11-cv-00099.
On January 19, 2012 the United States District Court issued a Decision and Order on the Merits of Plaintiff’s Complaint in which the court found substantially in Entergy VY’s favor regarding legislative action, and returned the matter to the Public Service Board for a decision on newly limited grounds. The decision struck Act 160 in its entirety, struck a single provision in Act 74 that would have otherwise granted the legislature authority to grant or deny storage of spent nuclear fuel derived from operation of Vermont Yankee after March 21, 2012, and effectively prevents the State of Vermont from conditioning continued operations on the existence of a below market power purchase agreement.

On March 29, 2012 the Board issued an Order Re: Entergy VY Motion Seeing Final Decision and Other Procedural Issues. The Order denied a request from Entergy VY for a decision on the existing record and required Entergy VY to “…file an amended petition that identifies the specific approval or approvals that it is seeking from the Board, and the state-law authority under which the Board would issue each approval that Entergy VY seeks. A new docket shall be opened to consider Entergy VY’s amended petition.”

Discussion:

1) The continuation of this docket and need to relitigate the same subject under modified terms is caused by the actions of Entergy VY, including the early representation by Entergy VY of its role in the Certificate of Public Good process, and the failure of Entergy VY to assert or clarify any claim, even an informal claim, that the underlying process is preempted:

While the Vermont legislature created an underlying controversy by passing Acts 74 and 160, the failure of Entergy VY to raise credible objections in 2007 or 2008 to the underlying process, the applicability of 30 V.S.A. §248, or to raise concerns about preemption of the process, allowed this docket to move forward on unstable ground known only to Entergy VY.

WRC went to great lengths to understand the process under which Entergy VY intended to file, and then did file, for authorization to continue to operate the VY Station after March 21, 2012.

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33 Post Trial Brief of Entergy VY, page 6, Case 1:11-cv-00099; WRC notes that in its federal brief Entergy VY argues the PSB may consider the “General Good” but not the specific criteria under 30 V.S.A. §248, but on page 23 of its Docket 7440 Initial Brief dated July 17, 2009 Entergy VY argued that the “General Good” is “standardless without the 30 V.S.A. § 248 criteria, and that it would raise “a serious constitutional issue.”

34 10 V.S.A. § 6522(c)(4)

35 Order Re: Entergy VY Motion Seeing Final Decision and Other Procedural Issues, March 29, 2012, page 9

36 WRC does not mean to imply that Entergy VY nefariously moved forward with a plan to accept the various Acts and statutes and then raise preemption as a late-term defense. WRC is not concerned with ‘why’ Entergy VY changed its strategic approach, but argues that regardless of the ‘why,’ WRC has been inappropriately disadvantaged by the change.
Throughout several months of direct communication before the application was filed, and for years after the application was filed, Entergy VY acknowledged that it would willingly proceed along a dual track regulatory process including 30 V.S.A. §248, and that it required approval from both the Vermont Legislature and the Vermont Public Service Board. These statements of acknowledgement were offered formally, informally, in writing, and orally as part of the official review defined by Board Rule 5.402 and 30 V.S.A. § 248(f). During the development of this docket Entergy VY did not raise credible legal objection to existing Vermont statutes or processes. Through communications with WRC in 2007 and 2008 Entergy VY freely discussed preemption and the legal concept of the ripeness of a claim with regards to specific issues within the docket, but did not suggest such concerns with the process itself. Had Entergy VY raised credible objection to the process or the validity of any of the Acts or statutes it now asserts are preempted, WRC would have covered the topic in our official comment letters to the Board identified as WRC-TB-2 and WRC-TB-3, and would have sought immediate clarification.

If Entergy VY objected to specific statutes, or anticipated filing a preemption claim if the claim became ripe at the federal level, it could have filed a CPG petition that would allow easy severability, but Entergy VY did not do so. Nor did Entergy VY raise any objection at the July 10, 2008 Prehearing Conference regarding the specific statutes under which the docket would be reviewed, Act 74, Act 160, Act 189, the process itself, or the very narrow definition of preemption defined by the Board.

From the beginning WRC recognized that Entergy VY may argue that specific issues presented by a Party or actions taken by the Board related to specific issues are preempted by federal law. WRC agrees that issues placed ‘on the table’ are open to the appeal process following a decision of the Board, but we argue that once the docket was opened “the table” itself had been firmly established as common ground, and any later claim that the underlying process is preempted is thus untimely.

2) The continuation of this docket and need to relitigate the same subject under modified terms is unanticipated because in 2007 and 2008 Entergy VY provided WRC with reasonable assurance that it accepted a dual track process requiring the approval of the Public Service Board and the Vermont Legislature, and accepted the applicability of 30 V.S.A. §248:

WRC independently reviewed applicable regulations and statutes and then relied upon statements and filings by Entergy VY that created a clear expectation that Entergy VY accepted the legislative role in CPG approval, the finality of a negative decision by the legislature, the finality of failure of the legislature to act, accepted existing statutes including 30 V.S.A §248, and accepted Board restrictions including a limit on the storage of spent nuclear fuel derived from operations after March 21, 2012 without additional legislative authority. WRC expected this docket to reach a natural conclusion through the CPG process, and by legislative approval or disapproval through legislative action or inaction. Those expectations were directly tied to multiple
assertions and filings by Entergy VY beginning in 2007, including the actual petition and cover letter filed on March 3, 2008 which specifically cited a request for authorization under statutes Entergy VY has since deemed to be preempted. It was absolutely reasonable for WRC to conclude that Entergy VY accepted the conditions imposed by Acts 74 and 160 and 30 V.S.A §248, and fully accepted the dual track legislative and Public Service Board process that Entergy VY itself described in multiple meetings with WRC and the public. Thus, the need to relitigate this docket was necessarily unanticipated.

3) **The continuation of this docket and need to relitigate the same subject under modified terms is untimely because Act 160 imposed several burdensome conditions upon Entergy VY, including conditions that directly dictated the timing of the filing of the CPG application, and those conditions were ripe for review by the Public Service Board as early as 2007:**

WRC began its involvement in this docket in 2007 through direct communication with Entergy VY regarding the proposed schedule for the filing of the CPG request. The schedule itself was dictated by a requirement in Act 160 that the application must be filed at least four years before the expiration of the existing CPG, and by a restriction placed upon the PSB that effectively prohibited consideration of the application by PSB until after July 1, 2008. These unusual requirements dictated by Act 160 created a scheduling burden for Entergy VY, and presented Entergy VY with a reasonable point at which to raise either limited or expansive objections to Act 160. Entergy VY raised no such objection. Likewise, Act 160 created an expensive fact finding and public engagement process and charged those expenses to Entergy VY, a burden that gave Entergy VY another immediate avenue to challenge the Act. And, Act 160 required the Public Service Board to notify the legislature upon receipt of an application for an extended CPG by Entergy VY. Entergy VY raised no objection, and even listed this notification requirement in its March 3, 2008 cover letter to the Board. Finally, Act 160 required Entergy VY to apply for approvals under 30 V.S.A. §248, a provision that added additional burdens and expenses, and was also ripe for review by the PSB at the time of the mandated filing.

4) **The continuation of this docket and need to relitigate the same subject under modified terms is untimely because issues that have been brought forward by Entergy VY in the federal preemption filing were ripe for review by the Public Service Board at or before the initiation of this docket, even if the review was not then ripe for federal action:**

When viewed from the lay perspective, the complaint that Entergy VY brought to the United States District Court logically cleaves into two key elements. The first element, addressed by the District Court as a defense offered by the State, revolved around Paragraph 12 of the MOU that

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37 At the July 10, 2008 Prehearing Conference Chairman Volz expressed his own frustration that consideration of the petition had been delayed by legislative restrictions contained in Act 160, and that the delay was at least partially responsible for compressing the schedule which presented a burden with regard to scheduling a public hearing. (Transcript page 15, line 19)

38 WRC is represented pro se in this docket.
Entergy VY signed as part of docket 6545, and sought to determine to what degree Entergy VY waived claims to preemption within that MOU. The second element of the complaint sought a determination as to the reasonableness of the actions taken by the Vermont legislature and the Board, and whether those actions were preempted by federal law. Another component of this second element questioned a requirement for a favorable power purchase agreement. The first element was essentially a contract question regarding the intent and enforceability of the language in the MOU, which given paragraph 16(1) of the MOU, could have been brought to the Public Service Board before Entergy VY filed a broader preemption complaint with the United States District Court. The second element (preemption and the PPA) might well have also been addressed by the PSB, and given the experience PSB has with matters of preemption and ratemaking the Board could have issued a ruling long before the NRC granted a license extension, and long before the matter reached the stage at which Entergy VY considered it ripe for federal review. Given that Entergy VY was required to submit its petition for a CPG four years “before the date upon which the approval may take effect,” which was well before the anticipated granting of the NRC license, a timely preemption claim to the Public Service Board rather than the federal court would have been appropriate and would have aided the efficient consideration of this docket.

Throughout the long period this docket was naturally before the Board Entergy VY raised multiple questions about preemption of specific issues and discovery inquiries, but did not question the CPG process itself. The matter of issue preemption was touched on throughout live testimony in the technical hearings conducted in May and June 2008, but Entergy VY failed to articulate meaningful objections to the CPG process itself, or to the application of the 30 V.S.A. § 248 criteria, around which it structured its petition, and which it has since challenged.

Finally, Entergy VY filed a Reply Brief in docket 7440 on August 7, 2009 in which it raised the specter of issue preemption numerous times, but still did not dispute the validity of the process itself, or the role of the Board or the legislature. Indeed, the very last line on the very last page

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39 Entergy VY Complaint for Declaratory and Injunctive Relief, April 18, 2011 (Case 1:11-cv-00099), paragraphs 53-58 and 64-66.
40 Paragraph 16(1) of the MOU in Docket 6545: “This Memorandum of Understanding is governed by Vermont law and any disputes under this Memorandum of Understanding shall be decided by the Board.”
41 Entergy VY’s Complaint for Declaratory and Injunctive Relief, April 18, 2011 (Case 1:11-cv-00099) paragraph 68 states that Entergy VY did not bring the disputed issues forward in 2008 in an effort to “avoid a lengthy and costly litigation.” The delay in seeking timely resolution has added substantial inefficiency, and has precipitated the very “lengthy and costly litigation” that Entergy VY stated it wished to avoid.
42 WRC does not object to the filing of the federal claim and fully accepts the decision of the federal court. WRC does not suggest the Board should reconsider those settled issues. We argue that the early remedies available at the state level would have been timelier, and would have allowed the docket to move forward more efficiently.
43 On July 17, 2009 Entergy VY filed an Initial Brief and a separate Proposal for Decision. Condition 9 of the Entergy proposed Certificate of Public Good offered the following language for the Board to use in defining preemption: “Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. shall comply fully with Vermont law to the extent that its requirements are not inconsistent with specific requirements imposed by FERC.
of the Entergy VY Reply Brief was a footnote in which Entergy VY responded to a Board invitation for comments about the issuance of a preliminary decision. Entergy VY used that last bit of ink to state that a preliminary decision at that time would be “premature,” and cited 30 V.S.A 248(e)(2), which was created by Act 160 and mandates legislative approval before a “final” Order or Certificate of Public Good can be issued.\(^{44}\)

The January 19, 2012 decision of the United States District Court discusses the concept of “laches”\(^{45}\), and notes that a federal preemption claim filed prior to the issuance of an extended operating license by the NRC might have been made moot if the NRC denied a new license. The decision also notes that Entergy VY was engaged in negotiations with Governor Shumlin as late as March 30, 2011 and a federal claim of preemption might have prejudiced other CPGs sought by Entergy VY. Nevertheless, notwithstanding the decision of the United States District Court with regard to a filing of a federal preemption claim, Entergy VY did not just fail to bring forward claims of preemption before the Public Service Board, but instead actively supported the regulations and processes established under the Acts and statutes it later sought to have adjudicated as preempted. There was ample opportunity for Entergy VY to raise preemption concerns at the state level about the process without a formal filing of a federal claim, as it did repeatedly with regard to individual issues, but Entergy VY failed to articulate these concerns in a timely manner either formally or informally. Indeed, the prefile notification dictated by 30 V.S.A. §248(f) and Board rule 5.402 is designed to identify problems and concerns early in the CPG process to avoid exactly the kind of inefficient presentation of a docket that has been exhibited here. The failure of Entergy VY to access any of the multiple remedies available prior to the natural conclusion of this docket in 2009 is directly responsible for the delay and associated expenses that WRC now faces.

5) The continuation of this docket and need to relitigate the same subject under modified terms creates significant additional burdens, based upon a clear and direct connection between the representations made by Entergy VY and the expenses that have been and will be incurred by WRC:

WRC exercised appropriate diligence in developing its approach to this docket, including numerous formal and informal meetings with Entergy VY in which Entergy VY carefully explained the CPG process and how it expected to participate in that process. Entergy VY represented that it recognized the role of the legislature in approving or disapproving of the release of a CPG, and recognized the applicability of 30 V.S.A. §248. If WRC had been aware of Entergy VY’s recently developed objection to the role of the Vermont Legislature, or claims to preemption of the process itself, WRC would have been able to advise the Board in comments filed in response to Board Rule 5.402 and § 30 V.S.A. 248(f), and would likely have sought

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\(^{44}\) Reply Brief of Entergy VY in docket 7440, dated August 7, 2009, footnote 273 on page 62

\(^{45}\) Decision and Order on the Merits of Plaintiffs’ Complaint, Case 1:11-cv-00099, pages 98-99
additional clarification in 2007 or 2008 before committing extraordinary public resources and the
time of volunteer Regional Commissioners to the development of this docket. The present
continuation and delay would be unnecessary but for the actions and inaction of Entergy VY.

6) The continuation of this docket and need to relitigate the same subject under
modified terms will require WRC to commit substantial staff hours to a review of
the issues in this docket, and will impose extraordinary unanticipated expenses upon
WRC to relitigate issues that, but for representations of Entergy VY, would have
been resolved much earlier in the proceedings:

WRC is funded by a variety of sources, chief among them state contracts and grants, and
municipal assessments, all of which are strictly limited. Continuation in this docket beyond the
natural conclusion point reached on August 7, 2009 without additional funding will require
shifting of resources from other critical projects, and will disadvantage the 27 municipal
members of the Windham Regional Commission.

During the more than two years since this docket was naturally concluded on August 7, 2009,
WRC has replaced its executive director, and replaced the staff person assigned to the energy
committee. Both of these new professional employees will need to spend many hours to
thoroughly review the entire record, as will new volunteer commissioners. Significant additional
staff time will need to be devoted to developing the new record as the docket moves forward, and
additional expenses will be incurred for staff and commissioner travel time, and potentially for
consultants to assist in managing the highly technical and legally challenging docket. All of the
expenses that have been and will be incurred after the natural conclusion of this docket are
directly attributable to the actions and inactions of Entergy VY in representing its position with
regard to the Acts and statutes it now considers preempted. Had Entergy VY been forthcoming in
2007 and 2008 WRC would have sought clarification regarding preemption; would have been
reasonably prepared to cover the expenses associated with the continuation of this docket; or
would have elected not to participate as aggressively. However, in spite of careful review and
engagement with Entergy VY at the earliest juncture in this docket, WRC was led astray and
now is faced with significant additional costs that, but for the actions and inactions of Entergy
VY, would not otherwise be necessary, and are thus unanticipated and burdensome.

WRC Prior Requests to the Board for Reimbursement in Dockets 7600 and 7440:

In March 2010 WRC filed a Motion for Reimbursement of Expenses in docket 7600. The Board
denied the request with an Order dated April 19, 2010. In that Order the Board found that WRC
had not demonstrated a causal connection between misstatements by Entergy VY and the
expenses expected to be incurred in docket 7600\textsuperscript{46}. Here we have described a direct connection
between the representations made by Entergy VY in 2007 and 2008 and the present need to
relitigate docket 7440 following Entergy VY’s substantially revised approach to the docket, and
the costs associated with relitigating.

\textsuperscript{46} Docket 7600, Order Re: Attorney’s Fees and Costs, April 19, 2010, page 5
The Board also found that WRC was granted permissive intervener status in docket 7600 and was thus a voluntary participant\(^{47}\). Although also granted permissive intervener status in docket 7440\(^{48}\), we have described a very different motive for participation. In docket 7440 WRC received initial filings from Entergy VY as directed by Board rule and statute, and responded accordingly\(^ {49}\). WRC did not choose to participate, but was instead compelled to receive and analyze the prefile notification. Once WRC received prefile notification WRC did opt to actively participate, however that decision was based on the representations Entergy VY made in mandatory filings and multiple additional communications that grew from the mandatory filings.

In the same Order of April 19, 2010 the Board denied a similar request for funding in docket 7600 made by NEC. In its request for reimbursement NEC attempted to show that if Entergy VY had been truthful about the existence of underground pipes, then a monitoring program would have been in place, and that monitoring program would have identified the leak about which docket 7600 was established, which would have prevented the need for the investigation, which in turn would have made the need for expenses NEC expected to incur unnecessary. The Board found that, “At best, NEC’s argument amounts to a ladder of speculation, and not a chain of causation...” In today’s filing WRC argues that if Entergy VY had expressed a significant concern about preemption of the process or the role of the legislature or Board at the inception of docket 7440, the uncertainty would have been easily addressed earlier in the process; or WRC would have chosen not to actively participate; or WRC would have otherwise been prepared for a protracted engagement. The connection is causal, and the potential remedies would have been timely, simple, and effective.

On April 9, 2010 WRC filed a *Motion for Reimbursement of Expenses* in docket 7440. The Board responded on June 4, 2010 and granted the request\(^ {51}\). The Board began its discussion by recognizing that it is vested with “the powers of a court of record in the determination and adjudication of all matters over which it has jurisdiction.” Although the Board stated a desire to use the power to award attorney’s fees and costs sparingly, it said such an award may be warranted “...when it is appropriate to off-set the additional litigation costs incurred by one party in responding to another party’s untimely or inefficient actions in presenting its case.” This is exactly the position in which WRC now finds itself. In the April 9, 2010 Order the Board also

\(^{48}\) If the request were made today, WRC might now meet the standard for Intervention as of Right under Board rule 2,209(A)(3): “…when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.”
\(^{49}\) WRC is a regional planning commission acting under 24 V.S.A. Chapter 117 to support the Windham Regional Plan adopted on October 24, 2006 and approved by its 27 municipal constituents. The Plan includes several relevant policies listed in Docket 7440 exhibits WRC-TB-2 and WRC-TB-3, including 4.6(4)(d) which applies to “…all energy generation, transmission, and distribution projects,” and calls on the Commission to “Effectively and adequately address all issues related to facility operation and reliability...” WRC would have been remiss in its commitment to statutory constituents if it completely ignored the Entergy VY prefile notification and subsequent CPG application.
\(^{50}\) Docket 7600, *Order re: Attorney’s Fees and Costs*, April 19, 2010, page 8
\(^{51}\) Docket 7440, *Order Re: Request for Sanctions and Attorney’s Fees and Costs*, June 4, 2010
identified “…a clear causal connection between the misrepresentations made by Entergy VY and additional expenses that WRC, VPIRG, and NEC would incur, and in fact have incurred... 54,”

The request WRC now files is similar to the request granted by the Board on June 4, 2010 because WRC has drawn a causal connection between the representations made at the beginning of this docket and the costs WRC has and will incur. The Board later stated that “As in Gadhue and Docket 6860, here VPIRG, NEC, and the WRC have been “drawn into litigation beyond the point that should have been the natural culmination55.” Again, the Boards reasoning in the awarding of attorney’s fees and costs in June 2010 is equally applicable here.

**Conclusion:**

The underlying controversy created by Act 74 in 2005 and Act 160 in 2006 can be attributed to the legislature, but the delay in resolution of this docket, and the associated burdensome inefficiencies of continuing the docket after the August 7, 2009 natural conclusion, are exclusively the result of actions and inaction by Entergy VY during and following WRC reviews stipulated by Board Rule 5.402 and 30 V.S.A. § 248(f).

WRC acted in good faith to ascertain the rules and procedures under which this docket would proceed. WRC independently researched the appropriate Acts, statutes, rules, and procedures, and then confirmed our understanding with Entergy VY. Based on appropriate diligence including review of the written and oral statements and filings of Entergy VY, WRC reasonably concluded that this docket would be structured upon the criteria of 30 V.S.A. §248 (as well as other statutes) and proceed on a dual track requiring affirmative actions by both the Public Service Board and the Vermont legislature, and that Entergy VY accepted these jurisdictions.

WRC argues that in order to advance this docket efficiently, Entergy VY had a duty to advise the Board and other Parties of their objections to the existing statutory process before filing its CPG application, or at the latest, at the July 10, 2008 Prehearing Conference, but instead, Entergy VY expressed its support for the underlying Acts and statutes. The willful representation of acceptance by Entergy VY of the legislative and regulatory process added extraordinary inefficiency to the process itself, and created an unnecessary burden upon WRC. WRC would not have participated in the docket to the degree we have, but for the statements and actions of Entergy VY.

It is not possible for WRC to accurately calculate the expenses and costs of the supporting this docket through the natural conclusion on August 7, 2009. Not only were those costs not tracked and broken out within our budget, but the key professional participants are no longer employed by WRC.

We ask then, that the Board grant necessary relief by requiring Entergy VY to reimburse all of WRC’s expenses directly related to participation in this docket (and any subsequent docket established to relitigate the matters raised in this docket) that have been and will be incurred after

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54 Docket 7440, Order Re: Request for Sanctions and Attorney’s Fees and Costs, June 4, 2010, page 10
55 Docket 7440, Order Re: Request for Sanctions and Attorney’s Fees and Costs, June 4, 2010, page 12
August 7, 2009, the date on which WRC filed its Reply Brief and reasonably believed it had concluded its participation in this docket. Expenses directly related to participation in this docket include WRC staff time in reviewing and advancing the record in this docket, preparing for and attending Board hearings and related meetings, commissioner and staff travel, meal, and lodging costs associated with hearings, meetings, and docket development, and consulting costs as needed.

Dated at Brattleboro, Vermont this 13th day of April 1012.

Windham Regional Commission

By: _______________________

Christopher Campany

Executive Director