REPLY MEMORANDUM SUBMITTED AT THE CLOSE OF THE EVIDENCE BY THE NEW ENGLAND COALITION ON NUCLEAR POLLUTION

1. Submissions by Entergy entities.

a. Initial Brief of Entergy.

A. Motion to Strike.

ENVY and ENO have included in their Initial Brief alleged facts which are not contained in proposed findings and did not appear in the evidence. They should be stricken. These are:

1. Page 20, lines 16-22. The sentence starts “For example, when El Paso...” and ends with a cite to a letter. The sentence is based on a letter from an E. Reiss. Mr. or Ms. Reiss is not identified. The letter is not in evidence. No publicly available citation is provided. It appears that the authors of the Brief have a copy of a letter that has never been published in any proceedings of the NRC. It is not a ruling or order of any judicial or quasi-judicial body. This information is hearsay, it is unauthenticated, it was not admitted into evidence, and it is not the type of information that the Board would admit into evidence has having indicia of reliability or fairness.

2. Page 22, paragraph beginning “At a Commission briefing...” and ending with a cite to a letter from a former NRC Chairman to a member of the Senate and a cite to a Senate bill that was not enacted into law. The paragraph relies on
the letter and the bill. Again, the letter is not in evidence. No publicly available citation is provided. It appears that the authors of the Brief have a copy of a letter that has never been published in any proceedings of the NRC. It is not a ruling or order of any judicial or quasi judicial body. This information is hearsay, it is unauthenticated, it was not admitted into evidence, and it is not the type of information that the Board would admit into evidence has having indicia of reliability or fairness. Reliance on a bill that did not become law, with no publicly available citation, suffers the same defects.

B. Failure by Entergy to Address A Key Board Question.

Vermont has set standards for lower levels of radioactivity than are permitted by the NRC. Sherman Testimony 4/18/02 pp.101-04, 172-89. Mr. Sherman and ENVY have not discussed these and ENVY has not agreed to them. 4/18/02 p.104. On 4/18/02 ENVY and ENO’s counsel committed to the Board that he would inform the Board whether ENVY and ENO will agree to comply with these standards. (p.104).

ENVY/ENO’s Brief is silent on this issue.

ENVY/ENO’s Brief contains a footnote, #2, on page 11, which says that the proposed Order includes those conditions which ENVY and ENO accept. The proposed Order is silent on this issue.

It does not require extensive briefing to recognize that radiological standards may, in some regulatory contexts, be subject to federal preemption. GMP and CVPS, the present majority owners of the VY facility, have already committed to meet state standards regardless of federal preemption. If GMP and CVPS go back on their word,
they must face the consequences in the regulatory and political environment in which they will continue to operate as regulated retail utilities.

It does not promote the general good of this state to transfer ownership of its aging nuclear power plant to an owner that, unlike the present owners, has not committed to meeting state radiation release standards.

Given the evidence from Mr. Sherman that these standards are found in regulations issued by the Vermont Department of Health, NECNP submits that as a matter of law the Board must either condition its permit upon compliance or it must deny the permit. The Board lacks the authority to declare state standards unconstitutional for any reason, including federal preemption. 


C. Failure by Entergy and the Department to Address Greenfielding.

NRC regulations do not address the environmental, public safety or aesthetic issues that arise once a site has been radiologically decontaminated. Mr. Sherman testified that Entergy had agreed to meet state standards in this area. Mr. Sherman testified that no particular standards had been agreed to, and that these standards would be set forth in the briefing. Sherman Testimony 4/18/02 pp. 101-04, 172-89.

Neither Entergy nor the Department has addressed them in their Briefs.

Some uses of the Decommissioning Trust Fund for “greenfielding” may be very much in the interests of the facility’s owners and against the interests of ratepayers. For example, some of these essentially public funds could be made to improve the commercial value of the property for ENVY. These essentially public funds could be used to make the VY real estate suitable for Entergy corporate offices, or to render the
site attractive to a commercial buyer, maximizing ENVY’s profit upon sale. Money that otherwise would be returned to ratepayers would enrich ENVY or its owner.

On the other hand, these funds could be used to protect against nonradiological hazards, such as physically hazardous abandoned buildings. These funds could be used to decontaminate the site to meet state radiation standards more strict than those of the NRC.

Neither the Department nor ENVY chose to submit evidence on this important subject. Neither the Department nor ENVY chose to address this issue in their Briefs or proposed Order. This is not appropriate for proposing for the first time in reply briefing, since no opportunity for discussion by intervenors could then occur. If the Department or ENVY now choose to address this issue, NECNP asks that the evidence be re-opened to allow for discovery and cross-examination on whatever ENVY and the DPS propose. In the absence of a proposal, the Petitions should be denied or should be conditioned on a commitment by ENVY to comply with whatever standard is imposed by the Board in a separate or follow-up docket to be opened immediately on the heels of this docket.

E. Refusal of Parent Corporation to Commit to MOU.

The Brief, at page 23, states that Entergy would not accept any condition requiring the parent corporation to stand behind the MOU. The reason given is that this is not necessary, since adequate financing is being provided by other means. As to nonfinancial terms of the MOU, Entergy explains that an adequate remedy exists without Entergy’s commitment – the Board may revoke ENVY’s CPG.

This answer demonstrates a profound disrespect for the legal responsibilities of the Board to protect the people of Vermont, combined with disregard
of the evidence. The testimony of Dr. James Cotton, NECNP Exhibit 34, and of Steven McNeal, NECNP Exhibit 32, pp.14-17, demonstrate the need for the parent corporation to commit to abiding by the MOU. In the case of Entergy New Orleans, Entergy Corporation in the past has accepted hundreds of millions of dollars in dividends passed upstream – and then when the wholly owned subsidiary/child corporation was alleged to have violated local law in obtaining those funds, the parent corporation threatened to refuse to return those funds. If Entergy Corporation is to receive the financial benefit of having ENVY own Vermont Yankee, but is unwilling to subject itself to the jurisdiction of the Board to respond to violations of any part of the MOU or any conditions imposed by the Board, then no CPG should be granted to ENVY. It would be a meaningless remedy to revoke the child corporation’s CPG while the parent corporation keeps the benefits of ownership. For example, the Board might determine in 2010 that ENVY deliberately misled the Department or the Board in agreeing to the MOU or in carrying out any part of it, such as the sharing of information with the State nuclear engineer. Revocation of the CPG would leave Entergy with the benefits of the transgression. ENVY would be an empty shell corporation, in bankruptcy. Ratepayers funds in the Decommissioning Trust Fund would fund the decommissioning.

2. Joint Submissions by The Petitioners.

a. The Joint Submission Seeks Actual Findings on Prudence and the Used & Useful Test Should be Stricken; If the Board is Going to Allow This Change in Position, the Evidence Must Be Reopened.

The Memorandum of Understanding reads, in part, as follows:

WHEREAS, in connection with the proposed sale of VYNPS, VYNPC, Central Vermont Public Service Corporation ("CVPS"), and Green Mountain Power Corporation ("GMP") each petitioned and requested the Board to issue a determination that the proposed sale of

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VYNPS, in accordance with the terms and conditions of the PSA, PPA, and other related documents, is prudent and that the purchase of power by VYNPC from ENVY and subsequent resale by VYNPC to CVPS and GMP, including other products sold under the PPA and costs incurred by CVPS and GMP, are and will be used and useful; and . . . WHEREAS, on January 7, 2002, the Department of Public Service ("Department" or "DPS") filed testimony raising certain concerns regarding the proposed transaction.

NOW, THEREFORE, the parties hereto agree as follows:

15. Prudence, Used and Useful: Based on the commitment to make the compromises described above, and solely in settlement of the respective positions in Docket No. 6545 of the parties hereto, the parties agree that the Board should issue a final order in that docket (the "Order"): 

1. Finding that the transactions described in the PSA, as modified by the commitments set forth herein (made for purposes of such settlement), and the process by which VYNPC sold its assets shall be treated as if it were prudent as to all decisions and actions taken by Petitioners prior to the close of evidence in Docket No. 6545 and which were reviewed by the Board in Docket No. 6545;

2. Finding that the purchase of capacity and associated energy by VYNPC from ENVY and subsequent resale by VYNPC to CVPS and GMP, including all other products sold under the PPA and costs incurred by CVPS and GMP under the PPA and Amendatory Agreements, shall be treated as if it were used and useful for the PPA’s and Amendatory Agreement’s term;

3. Finding that the execution of this Memorandum of Understanding and of the Amendatory Agreements for the continued purchase of capacity, associated energy and other products from VYNPC and payment of the costs incurred thereunder by CVPS and GMP shall be treated as if it were prudent as to all decisions and actions taken by Petitioners prior to the close of evidence in Docket No. 6545 and which were reviewed by the Board in Docket No. 6545;

4. Stating that the above provisions are intended to provide the same level of assurance to the financial community and ENVY that each would obtain from a declaration that (a) such transactions and process, and the execution of the MOU and Amendatory Agreements and payments of costs thereunder are in fact prudent and (b) that such purchases of power under the PPA and the Amendatory Agreements and costs and payments thereunder are in fact used and useful; ...
The MOU was signed by the Department and each Petitioner. In paragraph 15 each Petitioner agreed to seek a ruling from the Board that the costs associated with the transaction be treated “as if” prudently incurred and “as if” used and useful. This was a clear withdrawal of the requests in the Petitions for actual findings on prudence, used and useful. Mr. Sherman testified that the Department understood this to be a “waiver” of the previously filed requests for actual findings of prudence, and that the resource is used and useful. William Sherman testimony, 4/18/02, pp.189-90. NECNP understood this paragraph to constitute a waiver as well. NECNP relied on this paragraph. In reliance on it, NECNP conducted its preparation for the last two weeks of hearings. NECNP did not cross-examine witnesses that it would have cross-examined on this basis. NECNP did not call witnesses it would have called. NECNP did not question certain witnesses on issues that it would have questioned them about. NECNP did not submit detailed proposed findings on actual prudence, whether the PPA and PSA will be “used,” and whether it will be economically useful.

NECNP submission of the testimony of Mr. Bradford on these issues proves the point. Mr. Bradford was not asked to review the actual prudence or the actual used and usefulness qualities of the transaction. Mr. Bradford was asked to review the concept of pre-approval. No witness from the Department reviewed actual prudence or actual used and usefulness.

The Petitioners, however, have switched course again. They now seek actual findings. See page 40 of the jointly filed “Initial Brief.”
It would be a denial of fundamental fairness and due process under the Fourteenth Amendment and Vermont Constitution Articles 9 and 10, the Board's rules, the Vermont Rules of Civil Procedure (especially Rule 15, incorporated into the Board's rules), and the Administrative Procedure Act, §§ 809, 810, were Petitioners' reversal of course in the briefing to be allowed. NECNP in particular relies on Title 3 V.S.A. § 809(c), which states that all parties “shall” be given opportunity to “respond and present evidence on all issues.” NECNP therefore moves to strike all of the language in the jointly submitted Brief and the jointly submitted proposed findings seeking actual findings on these matters. This is section III of the Brief and part II.E. of the Proposal for Decision. If the motion to strike is not granted, NECNP moves for an order re-opening the evidence in this matter for further direct and cross-examination, and for an order re-opening the briefing in this matter to allow sufficient time for detailed briefing and proposed findings on prudence, and whether the contract will be used and useful.

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THE NEW ENGLAND COALITION ON NUCLEAR POLLUTION

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