

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 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 – )

Order entered: 6/4/2010

**ORDER RE: REQUESTS FOR SANCTIONS AND ATTORNEY'S FEES AND COSTS**

**I. INTRODUCTION**

In this Order, the Vermont Public Service Board ("Board") addresses motions for sanctions and costs filed by the Vermont Public Interest Research Group ("VPIRG"), the New England Coalition, Inc. ("NEC") and the Windham Regional Commission ("WRC"). These motions variously (1) request that Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (jointly, "Entergy VY") reimburse the movants for certain of their costs in this proceeding, (2) request that the Board dismiss the pending petition of Entergy VY for relicensing of the Vermont Yankee Nuclear Power Station ("Vermont Yankee"), (3) request that Entergy VY provide owner financing for decommissioning, and (4) seek to require Vermont Yankee to remain off-line after the spring 2010 outage ends. For the reasons discussed herein, we grant the requests for reimbursement of costs, but deny the requests for dismissal of the petition, for decommissioning financing, and for Vermont Yankee to remain off-line.

## II. PROCEDURAL HISTORY

In this proceeding, the Board is considering the petition of Entergy VY for authority to continue operation of Vermont Yankee after March 21, 2012 (when its current authority ends). On January 14, 2010, the Vermont Department of Public Service ("Department") filed a letter stating that Entergy VY had not provided accurate information to the Department or its contractor Nuclear Safety Associates ("NSA") in conjunction with the reliability assessment of Vermont Yankee required by Act 189 of the 2007–2009 Vermont Legislature. The Department's letter indicated that Entergy VY had incorrectly informed the Department and NSA that no underground pipes existed that fell within the statutory directive, when in fact such pipes did exist, thus raising questions about whether the requirements of Act 189 had been met. On January 19 and 25, respectively, NEC and CLF also filed requests for the Board to take further steps in response to the new information on underground piping, as well as the recent discovery of tritium in monitoring wells surrounding Vermont Yankee. NEC and CLF also stated that this new information indicated that sworn testimony provided by Entergy VY witnesses to this Board was inaccurate. In its January 19, 2010, letter, NEC stated that it believed that the Board "should require ENVY to compensate the parties for the time and expense necessary to examine and address" the information related to the underground pipes that was not provided originally.

On January 27, 2010, the Board convened a status conference to address the Department's January 14 filing. At the status conference, Entergy VY stated that it was considering NEC's request for costs, and offered that it would present a proposal on cost reimbursement after it has completed an investigation into its provision of incorrect information. We concluded that "[a]ccordingly, we will not address the issue of compensation for costs at the present time, but will await ENVY's proposal. If further issues remain, NEC or other parties may file a properly supported motion requesting cost recovery."<sup>1</sup>

On March 19, 2010, VPIRG filed a Motion for Sanctions that included a request for an award of staff costs, attorney's fees and costs.

On March 22, 2010, Entergy VY filed a letter providing its initial response to VPIRG's Motion. In its letter, Entergy VY states that "the Board should defer action on the Motion until

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1. Procedural Order of 1/29/10, at 5.

the Attorney General's [criminal] investigation is completed," and requesting "that the Board set a schedule for parties to respond to the motion promptly following completion of the Attorney General's investigation."

On March 26, 2010, NEC filed a "Response to VPIRG's Motion for Sanctions and Motion for Additional Sanctions and for Payment of Attorney's Fees and Costs," which included a request for payment of attorney's fees and costs. NEC's filing also included a response to Entergy VY's request to defer consideration of sanctions pending the Attorney General's investigation.

On March 30, 2010, the Clerk of the Board issued a memorandum asking the parties to respond to Entergy VY's proposal that the Board defer its consideration of sanctions until the Vermont Attorney General's office completes its "criminal investigation focusing on the statements and submissions that underlie VPIRG's Motion."<sup>2</sup>

On March 30, 2010, the Clerk of the Board issued a second memorandum asking Entergy VY "to file, by April 6, 2010, a report on the status of its consideration of NEC's request for costs."

On April 5, 2010, Entergy VY filed a memorandum opposing VPIRG's and NEC's motions.

On April 6, 2010, in response to the Clerk's memorandum, Entergy VY filed a status report on its consideration of NEC's request for costs. In its report, Entergy VY stated that "it is premature for the Board to consider requests that [Entergy VY] be compelled to pay other parties' litigation costs."<sup>3</sup>

On April 6, 2010, the Department filed a letter presenting its comments on whether the Board should delay action until the Attorney General's investigation is complete.

On April 12, 2010, WRC filed a Motion for Reimbursement of Expenses.

On April 13, 2010, NEC and VPIRG jointly filed a Response to Entergy VY's Opposition Memoranda.

On April 19, 2010, NEC filed affidavits in support of its motion for sanctions.

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2. Entergy VY Letter of March 19, 2010, at 2.

3. Entergy VY Letter of April 6, 2010, at 2.

On April 28, 2010, Entergy VY filed a response to the WRC Motion.

### **III. POSITIONS OF THE PARTIES**

#### **The Entergy VY Request to Defer**

Entergy VY requests that we defer action on VPIRG's request for sanctions until after the Attorney General's Office completes its investigation into Entergy VY's submission of incorrect information. Entergy VY contends that dismissal of its petition would be "an extreme sanction" that should not be imposed when Entergy VY has not had an opportunity to respond to characterizations of the veracity of its filings. Entergy VY further maintains that the results of the Attorney General's investigation would help inform the Board's decision of whether to award attorney's fees and costs.

The Department agrees with Entergy VY that the Attorney General's investigation could help inform the Board's determination with respect to the imposition of sanctions or penalties.

NEC opposes Entergy VY's request for deferral. NEC acknowledges that the Board should consider the results of the Attorney General's investigation when it is complete, but asserts that it is not clear whether the Attorney General will conduct a comprehensive investigation. NEC further contends that an indefinite delay is unwarranted, and that the Board should move forward and dismiss Entergy VY's petition.

#### **The VPIRG Motion**

VPIRG requests that the Board (1) dismiss with prejudice Entergy VY's petition, and (2) award VPIRG "past and future staff costs, attorney's fees and costs." In support of its motion, VPIRG relies on Board Rules 2.204(G) and 2.214, V.R.C.P. 15, 26(j), and 37, and the Board's inherent power.

With particular reference to its request for dismissal of the petition, VPIRG also points to the United States Supreme Court's decision in *ABF Freight System, Inc. v. NLRB* for the proposition that "an agency may dismiss an administrative proceeding when the applicant has

submitted false testimony . . . ."<sup>4</sup> VPIRG contends that "[t]his 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."<sup>5</sup>

In its motion, VPIRG asserts that the "materially false information" provided by Entergy VY in Docket 7440 "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."<sup>6</sup> VPIRG requests that Entergy VY be required to reimburse VPIRG:

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.<sup>7</sup>

NEC supports VPIRG's Motion. NEC contends that Entergy VY has submitted false information, and that the Board would be within its authority to dismiss the petition in this Docket.

Entergy VY opposes the VPIRG Motion. Entergy VY asserts that VPIRG, in its dismissal request,

does not address such foundational issues as the specific statement or statements that it alleges are false or misleading, why those statements are in fact and under law false or misleading, the materiality of those statements to the proceeding and the specific impact that those statements had on VPIRG in particular or the proceeding in particular.<sup>8</sup>

Entergy VY contends that, while VPIRG apparently seeks to have the petition dismissed on a finding of perjury, the Board's authority to issue a perjury finding is unclear. Entergy VY claims that VPIRG has failed to satisfy the additional requirements for dismissal as a discovery sanction pursuant to V.R.C.P. 37(b), requirements. Entergy VY maintains that dismissal with prejudice

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4. VPIRG Motion at 2.

5. VPIRG Motion at 3.

6. VPIRG Motion at 5.

7. VPIRG Motion at 5.

8. Entergy VY April 5 Memorandum at 3.

would amount to a final order on the relicensing petition, and as such is barred by 30 V.S.A. § 248(e)(2) until the General Assembly has itself made a decision on the relicensing question.

As for VPIRG's request for attorney's fees and costs, Entergy VY contends that the request for past fees and costs is unsupported, because VPIRG has not submitted an affidavit or supporting documentation that would demonstrate that the fees or costs were related to specific VPIRG actions taken in response to particular misrepresentations.<sup>9</sup> Entergy VY further claims that even with an affidavit foundational questions will remain concerning what specific actions were taken as a result of specific misrepresentations, and whether those misrepresentations were sanctionable.

Entergy VY likewise opposes VPIRG's request for future fees and costs because, according to Entergy VY, VPIRG has "not provided the Board a specific factual or legal basis on which to determine whether sanctionable conduct has occurred."<sup>10</sup> Entergy VY also repeats its claim that consideration of a reward of fees and costs should await the outcome of the Attorney General's investigation.

The Department states that the Board cannot grant VPIRG's request for dismissal with prejudice, because that would constitute a final order that cannot be issued at this time in light of the plain language of 30 V.S.A. § 248(e)(2).

### The NEC Motion

NEC requests dismissal of Entergy VY's petition with prejudice.<sup>11</sup> NEC contends that "the Board cannot issue a valid decision based on the tarnished record that has been created through ENVY's misrepresentations."<sup>12</sup> NEC requests that the Board dismiss Entergy VY's petition "for lack of completeness, accuracy and candor, and require ENVY to come forward with complete and accurate information should they wish to reapply for a CPG."<sup>13</sup>

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9. VPIRG subsequently filed an affidavit with the VPIRG/NEC April 13 Response.

10. Entergy VY April 5 Memorandum at 9 (footnote omitted).

11. In the joint NEC/VPIRG Response filed April 13, 2010, NEC clarifies that its request is for dismissal with prejudice. NEC/VPIRG Joint Response at 4 n. 2.

12. NEC March 26 Motion at 4.

13. NEC March 26 Motion at 5.

NEC contends that it should be awarded costs based on the Board's precedent from Docket 6860. NEC notes that in Docket 6860 the Board awarded costs to a party that was forced to relitigate issues due to the acts of another party. According to NEC, in the present proceeding it relied on the information that Entergy VY had provided, and because that information was incorrect, NEC will now have to litigate matters a second time. NEC requests that the Board "require ENVY to compensate NEC for the costs and fees that were expended in reliance on the misinformation they provided in Docket 7440, and as necessary moving forward in Dockets 7440 and 7600 to investigate the ramifications of the ongoing leaks at Vermont Yankee and potential other sanctions for ENVY's actions."<sup>14</sup>

NEC requests that, in addition to dismissing the petition and requiring Entergy VY to pay costs, the Board (1) require Entergy VY to provide owner financing for decommissioning, and (2) order the Vermont Yankee plant to remain shut down at the end of the spring 2010 refueling outage. Owner financing for decommissioning is needed, according to NEC, because with "a very shaky and compromised record" the Board cannot be assured that sufficient decommissioning funds will be available at the end of the relicensing period.<sup>15</sup> NEC further requests that the Vermont Yankee plant not be allowed to be brought back online:

unless and until ENVY can provide the Board and the parties with adequate and detailed information specifying the location of all underground pipes, the condition they are in, and a plan to maintain aging underground pipes and to prevent any future leaks at the site. Should the ongoing leaks not be fixed prior to the scheduled shutdown, ENVY should also be ordered to demonstrate that they have found the source of the leaks and have fully repaired the problem, and must also demonstrate that they have a plan, including adequate funding, to address the soil and groundwater contamination resulting from the ongoing leaks prior to resuming operation.<sup>16</sup>

Entergy VY opposes NEC's request for dismissal. Entergy VY maintains that there is no evidence that it has acted in bad faith, so that the petition may not be dismissed due to an alleged failure of the duty of candor. Entergy VY further contends that dismissal as a discovery sanction is unwarranted, because without a formal finding of bad faith, a less drastic sanction must be

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14. NEC March 26 Motion at 9.

15. NEC March 26 Motion at 11.

16. NEC March 26 Motion at 12.

considered. As in its response to VPIRG, Entergy VY continues to call for deferral of the motion to dismiss until the completion of the Attorney General's investigation.

Entergy VY opposes NEC's request for past attorney's fees and costs on grounds similar to its opposition to VPIRG's request. Entergy VY contends that NEC's request is not supported by affidavits or other supporting documentation that connect the fees and costs to specific misrepresentations by Entergy VY, and that NEC has not shown how it would have prepared its case differently but for the unspecified misrepresentations by Entergy VY.<sup>17</sup> Entergy VY further claims that even with an affidavit foundational questions will remain concerning what specific actions were taken as a result of specific misrepresentations, and whether those misrepresentations were sanctionable.

Entergy VY opposes NEC's request for future fees and costs because, according to Entergy VY, like VPIRG, NEC has "not provided the Board a specific factual or legal basis on which to determine whether sanctionable conduct has occurred."<sup>18</sup> Entergy VY also reiterates its assertion that the issue of rewarding fees and costs should be deferred until completion of the Attorney General's investigation.

### The WRC Motion

In its motion, WRC requests that, due to impending staff changes and budgetary constraints, "its expenses directly related to participation in this docket be reimbursed by Entergy VY."<sup>19</sup> WRC explains that in developing its budget for the 2010 fiscal year, it "had properly assumed that little or no renewed activity such as technical hearings or significant new testimony lay ahead in Docket No. 7440, and so no resources were allocated for it. . . ."<sup>20</sup> The expenses for which WRC seeks reimbursement include "WRC staff time preparing for and attending Board hearings and related meetings, beginning with the January 27 status conference in Docket No.

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17. NEC subsequently filed supporting affidavits on April 19, 2010.

18. Entergy VY April 5 Memorandum at 9 (footnote omitted).

19. WRC Motion at 1.

20. WRC Motion at 1.

7440; commissioner and staff travel, meal and lodging costs associated with those hearings or meetings; and consulting costs if and as needed."<sup>21</sup>

In response to WRC's motion, Entergy VY contends that it is not the Board's practice to provide funding for the litigation expenses of intervenors, and WRC has failed to cite to a "statutory basis under which the Board can fund intervenors."<sup>22</sup> Entergy VY acknowledges that the Board has discretion to award attorney's fees in certain situations,<sup>23</sup> but maintains that "WRC's brief motion does not establish a basis previously recognized by the Board to order a petitioner to pay attorney's fees and costs."<sup>24</sup> Finally, Entergy VY argues that it would be premature for the Board to consider requiring Entergy VY to pay other parties' litigation costs.

#### **IV. DISCUSSION AND CONCLUSIONS**

##### **Deferral**

We will not defer consideration of the various motions for costs and sanctions. It is possible that the results of the Attorney General's investigation may help inform certain issues related to these motions. However, it is not certain that the investigation will be of any assistance to us, and we have sufficient information to address the motions as presented (as discussed below). Thus we see no sufficient reason to delay ruling on these motions.

##### **Attorney's Fees and Costs**

By law, the Board is vested with "the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction." 30 V.S.A. § 9. We have previously construed this statutory grant of authority to mean that we have the power "to award attorney's fees in litigation that is properly before us in the same manner as a Vermont court

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21. WRC Motion at 1–2.

22. Entergy Response to WRC, Attachment 1 at 1-3.

23. *Id.*

24. Entergy Response to WRC at 1.

would be authorized to award attorney's fees."<sup>25</sup> We have exercised this power sparingly, in recognition of the American Rule, which is followed in Vermont, and which holds that attorney's fees generally are not awarded absent statutory authority or an enforceable contractual agreement.<sup>26</sup> However, as other courts do,<sup>27</sup> it has been our practice to depart on occasion from the American Rule and to award attorney's fees in exceptional circumstances, such as when a discovery sanction is warranted,<sup>28</sup> or 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.<sup>29</sup> With these standards in mind, we consider the various requests for reimbursements of costs in the current proceeding.

We conclude, first, that we have insufficient information to award attorney's fees and costs as a discovery sanction. The parties seeking reimbursement for fees and costs have not identified particular costs that they incurred as a result of specified failures by Entergy VY of its discovery obligations.

However, we further conclude that reasonable attorney's fees and costs of VPIRG, NEC and WRC subsequent to the disclosure of the leaks, and that were and will be incurred as a result of Entergy VY's provision of incorrect information, should be reimbursed by Entergy VY. Unlike Docket 7600, in which we denied similar requests for costs, in the current Docket there is 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, in this docket. Although we cannot yet determine the extent to which additional proceedings will be required as a result of Entergy VY's failure to provide accurate information regarding underground pipes, it

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25. Docket 6860, *Petition of Vermont Electric Power Company, Inc., and Green Mountain Power Corp. for a certificate of public good authorizing VELCO to construct the Northwest Vermont Reliability Project*, Order of 9/26/06 at 2.

26. *In re Appeal of Gadhue*, 149 Vt. 322, 327 (1988).

27. *Id.*

28. Docket 6812, *Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. Pursuant to 30 V.S.A. Sec. 248 for Certificate of Public Good to modify certain generation facilities*, Order of 10/7/03 at 8.

29. *See, e.g.*, Docket 6860, Order of 9/26/06 at 5-6; Docket 6300, *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station and related transactions*, Order of 12/15/00 at 9-11.

is likely that the parties and the Board will need to revisit a number of significant issues in this proceeding, including but not necessarily limited to decommissioning costs and reliability, all the direct result of Entergy VY's misrepresentations as to the existence of underground piping at Vermont Yankee. The affidavits supplied by NEC show that its staff person, its technical consultant, and its attorney expended a considerable number of hours to address matters in Docket No. 7440 directly related to the Entergy VY misrepresentations. For example, NEC's technical consultant, Raymond Shadis, affirms that between January 7, 2010, (the date on which the existence of the leaks was publicly disclosed) and March 10, 2010, he spent 172 hours on Docket No. 7440 issues related to piping, soil and decommissioning.

The present circumstances are analogous to those in Docket 6860 when the Board awarded attorney's fees to the Town of Charlotte. In Docket 6860, the Petitioner had presented evidence on proposed pole heights in the pre-Certificate of Public Good hearings that was inconsistent with the pole heights that the Petitioner included in its post-Certificate compliance filings, such that the Town of Charlotte was required to relitigate issues that, but for the Petitioner's inaccurate evidence, would have been resolved in the earlier proceedings. The Board concluded that those circumstances amounted to exceptional circumstances that justified an exception to the American Rule. The Board explained:

After several rounds of evidentiary hearings, encompassing 36 days over a ten-month period, the Board issued its final order in January, 2005. Over one year later, in February, 2006, VELCO presented preliminary design plans in the post-certification phase of this Docket that reflected substantially taller poles than it had consistently represented throughout the earlier proceedings. Due to VELCO's actions, Charlotte was required to expend additional time and resources, including \$2,212.50 in attorney's fees, to revisit in the post-certification proceedings pole-height issues that it would have reasonably understood to have been resolved in the earlier proceedings in this Docket. Of significance also is the public nature of the interests that Charlotte was seeking to protect, i.e., the interests of its community. Under these specific circumstances, the exception to the American Rule explained above permits – and the interests of justice require – an award of attorney's fees.<sup>30</sup>

Similarly instructive are the facts presented by *In re Gadhue*, 149 Vt. 322 (1987). *Gadhue* involved a second round of litigation involving the same parties and subject matter. In

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30. Docket 6860, Order of 9/26/06 at 5–6.

the first round of litigation, the plaintiff prevailed in her appeal of a zoning variance that had been granted to the defendant. In the second litigation – which was the case before the Court in *Gadhue* – the plaintiff sought an injunction to compel the defendant to remove a structure he had erected after receiving the improperly issued variance; the plaintiff also sought an award of damages and attorney's fees. The *Gadhue* Court ruled that the plaintiff's request for attorney's fees fell within a recognized exception to the American Rule that allows an award of attorney's fees against a party whose conduct forces another party "to appear twice . . . in order to obtain relief which should have been forthcoming after the first appearance." *Gadhue*, 149 Vt. at 328.

The Court wrote:

While certainly, there is no suggestion that plaintiff would be entitled to litigation expenses incurred during her initial appeal which culminated in this Court's decision in *Gadhue v. Marcotte*, the exception to the American Rule takes form during the second round of litigation in this case. Due to the acts of the defendant, plaintiff was drawn into litigation beyond the point that should have been the natural culmination of her appeal.

*Gadhue* at 329.

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 culmination" as a result of Entergy VY's provision of incorrect information concerning underground piping. Consequently, we find that under these circumstances an award of attorney's fees and costs is justified. Entergy VY shall reimburse VPIRG, NEC, and the WRC for their 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.

We do not at this time determine a specific dollar amount of fees and costs to be awarded, for two reasons. First, those fees and costs are likely to be ongoing, and we cannot determine at this point with any precision the nature and extent of additional proceedings in this Docket. Accordingly, we invite the parties to file proposals for how such ongoing costs should be fairly determined, recognizing that our award of fees and costs is neither so broad as to require reimbursement for unlimited expenditures nor so narrow as to constrain the parties from following reasonable litigation practices. The parties are encouraged to seek to reach an

agreement on such a proposal. Parties' proposals for determination of these ongoing costs shall be filed by June 28, 2010. Responses shall be filed by July 9, 2010.

Second, both NEC and VPIRG have calculated their costs using standard billing rates, rather than costs actually incurred. We request that Entergy VY seek to reach agreement with NEC, VPIRG, and the WRC on the rates at which personnel are to be reimbursed. If the parties cannot reach an agreement, we will solicit additional filings on the issue of appropriate rates for such reimbursement. Entergy VY, NEC, VPIRG and WRC shall file, by June 28, 2010, a report on the status of their efforts to reach agreement.

### Dismissal

Both VPIRG and NEC have moved for dismissal of Entergy VY's petition with prejudice. Vermont statute provides that:

No nuclear energy generating plant within this state may be operated beyond the date permitted in any certificate of public good granted pursuant to this title, including any certificate in force as of January 1, 2006, unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section. If the general assembly has not acted under this subsection by July 1, 2008, the board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, *but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation.*

30 V.S.A. § 248(e)(2) (emphasis added).

Section 248(e)(2) thus establishes an absolute bar against the Board issuing a final order, absent affirmative action by the general assembly. As of this date, the general assembly has not issued the approval and affirmative determination that Section 248(e)(2) requires as a precondition for a final Board order; to the contrary, this past session the Senate voted down a bill (S.289) that would have provided the required legislative approval and affirmative determination. Thus, we cannot issue a final order on Entergy VY's petition in this Docket. Because dismissal of Entergy VY's petition with prejudice would constitute a final order in this proceeding, we are barred by 30 V.S.A. § 248(e)(2) from dismissing the petition with prejudice. Since we lack the authority to grant VPIRG's and NEC's motions to dismiss, we must deny them.

### Other Sanctions

We deny NEC's additional requests that we require Entergy VY to provide owner financing for decommissioning, and that we order the Vermont Yankee plant to remain shut down at the end of the spring 2010 refueling outage.<sup>31</sup> NEC's motion does not explain how the decommissioning financing is somehow justified in light of Entergy VY's provision of incorrect information. Instead, NEC's arguments, as presented, bear no relationship to the misinformation.

NEC's request to require the Vermont Yankee station to remain shut down seeks injunctive relief, but does not comply with the procedural requirements of Board Rule 2.406 for seeking an injunction.<sup>32</sup> Rule 2.406(D) requires:

Particular requirement for preliminary injunctions; further proceedings after issuance. An application for a preliminary injunction, unless made in consequence of an application for a temporary restraining order as provided above, shall be made by motion in connection with a petition for a permanent injunction. No preliminary injunction may issue unless the petitioner establishes that the irreparable injury which will be caused to it if a preliminary injunction is denied, discounted by the probability that the respondent will prevail in the proceedings on the permanent injunction, will be greater than any injury which the granting of the preliminary injunction will cause to the respondent. If a preliminary injunction is issued, the Board shall schedule such further proceedings as may be required for the permanent injunction; and the preliminary injunction shall continue in force until a decision is rendered on such permanent injunction unless it is dissolved by its own terms or by further order of the Board. Unless the Board otherwise orders, the record made in connection with the preliminary injunction shall also constitute part of the record in the proceedings on the permanent injunction.

In determining whether to grant a request for a preliminary injunction, the Board has established the following criteria to be considered:

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31. NEC's Motion, which it filed jointly in both the current Docket and Docket 7600, does not specify in which docket it seeks these sanctions. As we noted in our Order of April 19, 2010, in Docket 7600, "the parties should clearly distinguish in their filings between Docket 7440 and Docket 7600 by using only one docket caption to identify the proceeding in which they intend to make a formal filing of record." Docket 7600, Order of 4/19/10 at 3 n. 5.

32. Furthermore, NEC's request is, in effect, no different from requiring that the plant be shut down due to the leaks, but NEC does not address the unresolved issue of the Board's authority to order the plant to shut down (or remain shut down). The issues of the Board's authority to order such action, as well as whether sufficient cause exists for such action (assuming the Board has the necessary authority), are issues that the Board has previously ruled will not be addressed in the current docket, but instead in the separate proceeding (Docket 7600) that the Board opened to consider those and related issues. *See* Docket 7440, Order of 2/25/10.

- (1) the likelihood of success on the merits;
- (2) whether the party seeking relief will suffer irreparable injury if the relief is not granted;
- (3) whether the issuance of an injunction will substantially harm other parties; and
- (4) the location of the best interests of the public.<sup>33</sup>

NEC has not presented a petition for a permanent injunction, nor has it addressed the requisite criteria for issuance of a preliminary injunction. We therefore deny its request to order Vermont Yankee to remain shut down.

#### Reopening the Record

Finally, we note that in their April 13 Response, NEC and VPIRG point to NEC's January 19, 2010, letter in which NEC requested "that the record in Docket No. 7440 be reopened . . . ." <sup>34</sup> In their April 13 Response, NEC and VPIRG "reiterate the need for the record to be reopened in this matter."

NEC and VPIRG have not presented a formal motion to reopen the record. A collateral statement in NEC's January 19 letter, which was presented as a "response to the Department of Public Service's letter dated January 14, 2010," <sup>35</sup> does not constitute a properly filed and supported motion for reopening the record.

Therefore, we do not at this time reopen the record. We recognize that, if this Docket is to move forward, it is highly likely that the evidentiary record will need to be reopened. We will not do so, however, in the absence of a proper motion, a stipulation among all parties, or a determination that we should, ourselves, *sua sponte* reopen the record.

**SO ORDERED.**

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33. See e.g., Docket No. 5630, *Investigation of Vermont Electric Cooperative*, Order of 9/10/93 at 4.

34. NEC January 19, 2010, letter at 2–3.

35. NEC January 19, 2010, letter at 1.

Dated at Montpelier, Vermont, this 4<sup>th</sup> day of June, 2010.

James Volz	)	
	)	PUBLIC SERVICE
	)	
David C. Coen	)	BOARD
	)	
	)	OF VERMONT
John D. Burke	)	

OFFICE OF THE CLERK

FILED: June 4, 2010

ATTEST: s/ Susan M. Hudson  
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*