

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6545

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 entered: 7/11/2002

ORDER RE MOTIONS TO ALTER OR AMEND, AND TO UNSEAL EXHIBIT

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I. Summary

In this Order, the Vermont Public Service Board ("Board") addresses five motions submitted by parties in this Docket, specifically:

- Motion of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. to Alter or Amend Order;¹
- New England Coalition on Nuclear Pollution ("NECNP") Emergency Motion to Remove Parts of NECNP-35 From Seal;²
- NECNP Motion to Reconsider;³
- NECNP Motion for Additional Time to File Supplemental Motion to Reconsider;⁴ and
- NECNP Supplemental Motion to Reconsider.⁵

On June 21, 2002, Entergy⁶ filed a motion which seeks to alter or amend our Order in this Docket dated June 13, 2002. Because Entergy has not demonstrated error in our Order of June 13, 2002, we deny its motion. We do so, however, with one clarification: our holding that Entergy must return all excess money in the decommissioning fund after completion of decommissioning to ratepayers is limited to contributions (and growth from contributions) made by Vermont ratepayers. To the degree that Entergy contributes to a decommissioning fund for the Vermont Yankee Nuclear Power Station ("Vermont Yankee") in the future, we conclude that Entergy need not return any added contributions that Entergy itself makes (including earnings attributable to those funds) to ratepayers.

1. ("Entergy Motion to Alter"), 6/21/02 as amended by letter of July 1, 2002.

2. ("NECNP Emergency Motion"), 6/27/02.

3. ("NECNP Motion to Reconsider"), 6/27/02. By letter dated June 27, 2002, CAN joined in the NECNP Motion to Reconsider.

4. ("NECNP Motion for Additional Time"), 7/5/02.

5. ("NECNP Supplemental Motion to Reconsider"), 7/5/02. By letter of July 5, 2002, CAN joined in the NECNP Supplemental Motion.

6. The filing was on behalf of Entergy Nuclear Vermont Yankee, LLC ("ENVY") and Entergy Nuclear Operations, Inc. ("ENO," collectively "Entergy," except where otherwise specifically indicated).

In addition to the substance of its Motion to Alter, Entergy suggested modifications to the Certificate of Public Good ("CPG" or "Certificate") issued to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. that would ensure continued Board jurisdiction over those two affiliates after 2012.⁷ No party has opposed this proposal. Below, we conclude that the proposal is reasonable and amend the CPG accordingly.

On June 27, 2002, NECNP filed an Emergency Motion in which it requested that we remove parts of exhibit NECNP-35 from under seal. We conclude that we should not unseal NECNP-35 due to its commercially valuable nature and because a denial of NECNP's request to unseal will not prejudice any party in this Docket.

On June 27, 2002, NECNP filed a Motion to Reconsider, and on the same date CAN joined in NECNP's Motion. On July 5, 2002, NECNP filed a Motion for Additional Time, and a Supplemental Motion to Reconsider. By Letter of July 3, 2002, CAN joined NECNP in this Motion. Below, we conclude that NECNP and CAN are unpersuasive and deny their motions.

Since June 13, 2002, pursuant to Board practice, we have collected and compiled errata to our June 13, 2002, Order. An errata sheet containing these technical production corrections is attached at Appendix A.⁸

II. Entergy's Motion to Alter or Amend

On June 13, 2002, the Board conditionally approved the transactions proposed in this Docket (as amended by a Memorandum of Understanding ("MOU") between the petitioning parties and the Vermont Department of Public Service ("Department")).⁹ We stated that we could find that the proposed transactions promoted the general good only with four conditions.¹⁰ Entergy has asked to amend one of those conditions: the Board's conclusion that any money

7. By letter dated July 1, 2002, Entergy further clarified its proposed changes.

8. One additional issue remains in this Docket. Matters relating to Entergy's Motion to Enforce Protective Order and For Sanctions Against NECNP will be considered at a later date.

9. Order of June 13, 2002. The Petitioning Parties in this docket are Entergy, Vermont Yankee Nuclear Power Corporation ("VYNPC"), Central Vermont Public Service Corporation ("Central Vermont"), and Green Mountain Power Corporation ("Green Mountain").

10. Order of June 13, 2002, at 4-5.

remaining in the decommissioning trust fund *after* completion of decommissioning should be fully returned to ratepayers.

On June 21, 2002, Entergy filed its motion to alter. On June 24, 2002, the Board instructed parties to respond to Entergy's motion by noon of July 1, 2002, and heard oral argument on the motion on July 2, 2002.

Positions of the Parties

In its motion to alter, Entergy asks the Board to:

accept the agreement between the Petitioners and the Department of Public Service as written and allow the 50-50 sharing with ratepayers of the excess remaining in ENVY's decommissioning trust fund after decommissioning is completed after 2022.¹¹

Entergy makes three arguments. First, it argues that being able to keep half of any excess decommissioning funds will not provide incentives for Entergy to inappropriately cut costs during decommissioning.¹² Secondly, Entergy argues that the proceeds remaining after Vermont Yankee is decommissioned represent potential value to Entergy, and that it should not be denied this benefit.¹³ Finally, Entergy argues that the Federal Energy Regulatory Commission ("FERC") by rule has fully "occupied the field" in regard to disposition of excess decommissioning funds and that this Board's condition in regard to such funds is therefore preempted.¹⁴

Green Mountain, Central Vermont, and Vermont Yankee support Entergy's Motion to Alter. The Department also supports Entergy's position, with one exception. The Department emphasizes that the Board's decision to condition its approval of the sale of Vermont Yankee is not preempted by federal law. According to the Department, in exercising its undisputed right to

11. Entergy Motion to Alter at 1.

12. Entergy Motion to Alter at 3-10. Entergy argues that, due to the Nuclear Regulatory Commission's comprehensive framework, additional Board oversight, Department monitoring, a commitment to "greenfield" the Vermont Yankee site, and no record evidence that Entergy will "cut corners," there is no danger that decommissioning will not be completed correctly. *Id*; see also Letter of Vermont Yankee, dated June 25, 2002, at 2.

13. Entergy Motion to Alter at 10-13.

14. Entergy Motion to Alter at 13-18.

approve the sale of Vermont Yankee, the Board has the right to impose conditions on that approval.¹⁵

The Conservation Law Foundation ("CLF"), NECNP, and Citizens Awareness Network ("CAN") oppose Entergy's Motion to Alter.¹⁶ Generally, CLF maintains that Entergy does not meet the applicable standard for reconsideration found in V.R.C.P. 59(e).¹⁷ More specifically, CLF provides three reasons for the Board to deny Entergy's motion. First, CLF notes that, the Board relied upon substantial evidence in the record in concluding that the sharing provision of the MOU creates an incentive for possible cost-cutting during decommissioning. Second, CLF asserts that Entergy's argument that the prospect of surplus funds has real value is out of time and inconsistent with the record and, thus, provides no basis for amending the Board's June 13, 2002, Order. Finally, CLF, like the Department, argues that the Board has the authority to impose conditions on its approval of this sale and that the Board is not preempted in doing so.

NECNP and CAN argue that it is inappropriate under V.R.C.P. 59(e) to re-visit the issue of the value and treatment of excess decommissioning funds. NECNP, like CLF, argues that the record clearly demonstrates that the "value and disposition of a possible trust fund surplus has been an issue in this case from the outset."¹⁸ For reasons similar to those provided by the Department and CLF, NECNP and CAN also urge the Board to reject Entergy's preemption arguments. Finally, CAN argues that the Board ought to:

either strike as irrelevant or grant an evidentiary hearing on the portions of [Entergy's] motion (and supporters' comments) which attempt to introduce

15. Response of the Department of Public Service, July 1, 2002, at 1-2, citing to, *e.g.*, *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,289 (1988).

16. *See generally* Memorandum of Conservation Law Foundation in Opposition to Entergy Motion to Alter or Amend Order ("CLF Memorandum"), 7/1/02; Memorandum of [NECNP] in Opposition to [Entergy] Motion to Reconsider and in Support of Motion to Remove NECNP Exhibit 35 from Seal ("NECNP Memorandum"), 6/27/02; and [CAN]'s (1) Opposition to [Entergy] Motion to Alter or Amend Order, (2) Motion to Strike Portions of the Motion and Comments Supporting It, and (3) Joining NECNP's Emergency Motion ("CAN's Opposition"), 7/1/02.

17. The appropriate standard for reconsideration is found in V.R.C.P. 59(e). *In re Kostenblatt*, 161 Vt. 292, 302 (1994), citing *Osborn v. Osborn*, 147 Vt. 432, 433, (1986).

18. NECNP at 3. CAN, likewise, maintains that this issue has been "actively litigated." CAN's Opposition at 6.

facts not in evidence before the Board concerning the [Nuclear Regulatory Commission's] decommissioning practices."¹⁹

NECNP and CAN filed additional comments in response to comments upon their Motions for Additional Time and Supplemental Motion to Reconsider by facsimile on July 10, 2002.²⁰

We consider each of Entergy's three arguments, in turn, below, and we deny Entergy's motion to alter or amend our Order of June 13, 2002. We do so with one clarification. We limit our holding in that Order to contributions made by Vermont ratepayers and not to any funds that Entergy may find in the future that it needs to contribute to Vermont Yankee's decommissioning fund (including any earnings on Entergy contributions). To the degree that Entergy contributes revenues to the decommissioning fund between now and the completion of decommissioning of Vermont Yankee, our condition does not apply to those funds or earnings upon them.²¹

Appropriate Incentives

Entergy first argues that the MOU, as currently written, will not "adversely affect the successful decommissioning of the VY Station" Entergy correctly notes that we concluded that Entergy can be expected to "operate Vermont Yankee as well or better than the current owners."²² However, we reached that conclusion on the basis of an *overall* package of requirements and incentives, including full return of *excess* decommissioning funds to ratepayers. Indeed, we recognized that, in spite of the measures in place (including NRC regulations,

19. CAN's Opposition at 1.

20. [NECNP] and [CAN's] Response Pursuant to VRCP 78(b)(1) to Opposition to Their Motion for Additional Time to File Supplemental Motion to Reconsider and to Their Supplemental Motion to Reconsider, 7/10/02.

21. *See also* tr. 7/2/02 at 36 (Entergy Counsel Brown response to inquiry by Chairman Dworkin):

The notion being that what would happen in the end if there is excess decommissioning monies, but Entergy had had to supply additional funding? Frankly, Mr. Chairman, I would say that what you do with this case is going to determine whether Entergy puts additional funding into this trust or segregates it altogether. You're creating an incentive here by requiring a hundred percent to flow back to the ratepayers for Entergy, not to augment that particular trust, but to satisfy its NRC minimum obligations through other vehicles. *Id.*

22. Order of 6/13/02 at 73.

MOU monitoring and inspection provisions, and Entergy's agreement to "greenfield"²³ the Vermont Yankee site), paragraph 3 of the MOU created an undesirable incentive, which we could not approve. In our June 13, 2002, Order, we stated that:

Our primary goal should be to encourage [Entergy] to conduct the most safe and thorough decommissioning possible, without providing any incentive to "cut corners." Fundamentally, we believe it is inconsistent with the general good for there to be any financial incentive for [Entergy] to minimize costs in decommissioning Vermont Yankee. Similarly, we do not wish the potential for profits from such a fund to be a factor in any decision about whether or not to seek renewal of the plant's license.²⁴

Entergy's arguments do not persuade us that our conclusion was wrong. Fundamentally, we see a need to rely upon both Entergy's demonstrated current resources *and* upon future incentives. While we express confidence in Entergy, using historical data and current information, we cannot predict its future actions or specific goals or strategies. Thus, our condition aligns Entergy's financial incentive with our goal of ensuring safe and thorough decommissioning.

Similarly, the long litany of decommissioning standards cited by Entergy is insufficient to persuade us that financial incentives are irrelevant. There will, inevitably and inherently, be a

23. In our June 13, 2002, Order, we found that:

the MOU contains, and ENVY has committed to, no specific "greenfield" standards. However, Paragraph 9 of the MOU provides that ENVY will perform site restoration according to Paragraph 3 of the MOU which provides that "Site restoration shall mean that, once the [Vermont Yankee] site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the site will be restored by removal of all structures and, if appropriate, regrading and reseeding the land." Order of 6/13/02 at 82-83 citing exh. VY-42 at ¶¶3, 9; tr. 4/18/02 at 101-04, 172-89 (Sherman).

The Board concluded that, while the MOU directs Entergy Nuclear Vermont Yankee, LLC, to restore the Vermont Yankee site once it is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the MOU contains no definition of greenfield, nor standards by which to measure that status. *Id.* citing to NECNP Brief at 44; see also MOU at ¶ 9 and ¶ 3.

Given Entergy's testimony, we interpreted the term "restored" within the context of paragraph 3 of the MOU to mean that:

once the Vermont Yankee site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses consistent with the orderly development of the property, the site will be restored by removal of all structures and, if appropriate, regrading and reseeding the land. *Id.* citing to exh. VY-42 at ¶3.

24. Order of 6/13/02 at 38, note 37.

need to make thousands of discretionary engineering decisions in the implementation of the decommissioning process. Our June 13 requirement was, and is, based upon a fundamental belief that it would be inconsistent with the general good for an economic interest in minimizing the cost of those discretionary decisions to be a factor in that process. Even though we expect that Entergy will conduct decommissioning in an appropriate manner and will not cut corners, the MOU, as currently written, creates a potential financial reward for not using that money for decommissioning. This is inconsistent with the general good.

Our Order also stated another reason for our decision. In addition to creating healthy incentives, we also recognized the fundamental equity at issue: "we believe that these funds were collected from ratepayers for a specific purpose and, if not needed for that purpose, should be returned."²⁵ Entergy asserts that, having received electric power in return for their payments, ratepayers have no rights to "any funds, including the decommissioning income held by Vermont Yankee on its behalf." We accept this general principle in regard to overhead costs and assets. However, the asset at issue here was not an aspect of the utility's general overhead; rather, it was separately calculated for a specified purpose independent of the general functions of the utility,

25. Order of 6/13/02 at 152. We also note that the proposed sharing of excess decommissioning fund money may not be consistent with the precise language of Section 7.01 of the existing trust. The text of Section 7.01 of the current trust requires either legislative or regulatory action to create a new trust and the "merger" of the existing trust into a successor trust. In our Order, we noted that it was not clear whether those conditions in the trust document had been met. *Id.* at note 73. Because we relied upon the general good standard, we found it unnecessary to formally rule upon the related technical question of whether the relevant Nuclear Regulatory Commission ("NRC") Order (which allows a "transfer" of the funds into the new trust) is equivalent to the "merger" contemplated under Section 7.01 of the current trust. *Id.* at 152.

Although this conclusion has not changed, we recognize here that the common usage of the term "merger" seems to support our concerns. When one entity is merged into another, the rights and liabilities associated with the initial entities are preserved in the newly-created entity. Black's Law Dictionary 988-89 (6th ed. 1990). The essence of a "merger", in contrast to a "transfer", is that the new (merged) trust would necessarily be responsible for all the obligations of its predecessor trusts. Thus, if a Section 7.01 "merger" occurred, the new trust would not be able to shed the current Trust's Section 7.02 obligation to return any excess funds to ratepayer's following completion of decommissioning. We simply do not see how a "transfer" that fails to preserve this concept can be said to meet the "merger" requirements of Section 7.01 of the current trust. Nothing in New York's law of trusts has been cited to contradict this basic concept. Thus, providing any funds remaining in the decommissioning trust fund after decommissioning to ratepayers comports with the concept of merger referred to in Section 7.01 of the trust document. We note, however, that while this reading of the current trust is consistent with our ruling, that ruling itself rests on the adequate and independent bases outlined above and not on our view of the current Decommissioning Trust's requirements.

separately accounted for, placed in a distinct account, and isolated from VYNPC's own operations. Since this fund was collected for a specified purpose, above and beyond their otherwise necessary payments, to the extent that that impact was unnecessary, excess funds should be returned.

Entergy also argues that, because it is taking risks of exceedences in the projected costs of decommissioning, it is entitled to any excess remaining in the fund after decommissioning is complete.²⁶ We disagree with this argument and the implication that our condition is somehow inequitable because it is asymmetric. As Entergy itself has said, we cannot look at one portion of the sale transaction in isolation, but instead must look to the "transaction as a whole." We did this and concluded that, *as conditioned*, it is in the general good. As with other features of the proposal, each must be weighed against the total value, not in isolation. For example, we rejected intervenors' arguments that the proposal should be rejected because the electricity costs under the first three years of the purchase power agreement are above market and unattractive in comparison to market conditions. Instead, we looked to the purchase and sale agreement *overall* and determined that it would be advantageous to Vermont Yankee sponsors. Thus, we decline Entergy's invitation to consider decommissioning funds in isolation, and we instead consider them as part of the larger transaction before us.

Materiality of Excess Amounts

Entergy also has argued that the potential to obtain proceeds remaining after Vermont Yankee is decommissioned represent potential value to Entergy, and that it should not be denied this benefit of the bargain.²⁷ We find this position inconsistent with the record in this Docket. Nowhere in Entergy's Motion to Alter does it cite to evidentiary record support for its current assertions. Moreover, neither in its motion nor in evidence presented during the course of these proceedings, did Entergy demonstrate that these funds are material.

26. Tr. 7/2/02 at 14-16 (Brown).

27. Entergy Motion to Alter at 10-13.

To the contrary, the record indicates that it is difficult to define either the date or magnitude of receipt of whatever amount may be left after Vermont Yankee has been completely decommissioned. Certainly there is some chance of significant amounts being in the fund in *future* years; however, all evidence suggested that this is likely only *many* years in the future.²⁸ Thus, any calculus of the value of such funds must be discounted *both* by the probability that they may not exist and also by a discount factor to represent the greatly reduced net present value of funds that may not be available for several decades or more.

Testimony sponsored by VYNPC, Entergy's co-Petitioner, made this point. Mr. Cloutier, Vice President of Decommissioning Programs at TLG Services, Inc. (which is now owned by Entergy), was presented as VYNPC's expert on decommissioning. He indicated that the Decommissioning Trust Fund is unlikely to contain excess revenues due to the costs of decommissioning, even if a SAFESTOR alternative were utilized whereby decommissioning can be postponed in order to grow the funds' assets.²⁹ On the basis of this testimony, our Order indicated that "we thus infer that ENVY's assessment of the overall value of this transaction should not be impaired by our ruling on this issue."³⁰ We also noted that Entergy itself presented no "evidence demonstrating that it relied upon excess proceeds in the Decommissioning Trust Fund as adding value to the transaction."³¹

Entergy now suggests that the evidentiary record noted above is "thin" because the issue was not squarely raised until the post-hearing briefing stage.³² We reject this argument. As respondents clearly demonstrated, the use of excess decommissioning funds was an issue

28. Indeed Exhibit VY-25, *General Accounting Office Report to the Hon. Edward J. Markey, House of Representatives, NRC's Assurances of Decommissioning Funding During Utility Restructuring Could be Improved*, December 2001 at 13-14, notes that the NRC may extend the allowed decommissioning period from its current 60 years to as much as 100 years or more after operations cease.

29. Cloutier pf. at 12-13.

30. Order of 6/13/02 at 36.

31. *Id.* citing to tr. 4/4/02 at 136 and 181 (Keuter) (financial projections confidential, but consistent with the above).

32. *See* Entergy Motion to Alter at 10.

repeatedly raised by other parties and addressed in our original scoping order.³³ As noted above, there is direct testimony (including testimony from the Petitioners) demonstrating that the value of such funds is uncertain and far distant. Entergy has not requested an opportunity to supplement the existing record on this point, nor has it presented any compelling rationale for altering our original conclusions about the significance of that record.³⁴

Preemption: Board Authority

Entergy's final argument in support of its Motion to Alter is based upon the doctrine of preemption. Entergy argues that the Board is preempted by FERC rules from ordering the disposition of excess decommissioning funds.³⁵ Entergy states that:

Because the FERC has preempted the field of regulation over decommissioning trust funds collected through wholesale electricity rates, and the decommissioning fund for Vermont Yankee is subject to FERC's exclusive jurisdiction, the Board is barred by the Supremacy Clause in Article VI of the United States Constitution from regulating the disbursement of excess decommissioning funds for Vermont Yankee in a manner other than consistent with ENVY's continuing commitment to the sharing terms of ¶ 3 of the MOU. Thus condition 2 of the Board's Certificate of Public Good is preempted under Federal law and must be removed.³⁶

For the reasons set out below, we find Entergy unpersuasive on this point. Most importantly, the issue before us is whether, and upon what terms, the proposed sale of Vermont Yankee will promote the public good. Entergy does not dispute the fact that this decision lies within our jurisdiction:

33. See Order of 11/5/01 at 3-4. In that Order, the Board found that "with respect to the proposed transfer and operation, the parties may address" numerous issues including:

6. *Identification and consideration of the accounting and financial effects of the transfer on the Vermont sponsors and their ratepayers*, including liability for interim on-site fuel storage, the sponsors' equity investments in Vermont Yankee Nuclear Power Corporation, and *the use of funds received by the Vermont sponsors as a result of the transfer* of their ownership interests *Id.*(emphasis added); see also tr. 4/1/02 at 95-96 (Cloutier).

34. A motion to amend judgment allows the trial court to revise its initial judgment, and to "relieve a party of unjust operation of the record resulting from the court's mistake or inadvertence, but not from a party's own fault or neglect." *In re Kostenblatt*, 161 Vt. 292, 302 (1994), citing *Osborn v. Osborn*, 147 Vt. 432, 433,(1986).

35. Entergy Motion to Alter at 13-18.

36. *Id.* at 18.

Well there is no question that you have the authority, if it's based upon a valid record and based upon the evidence in the record, to reject a proposed application. And I don't quibble with that. You can do that if you found that without certain conditions the deal was not in the public interest, or the public good.³⁷

Clearly, in making *that* decision, the Board has authority to condition a request for a CPG on the basis of a determination that a proposal is or is not in the public good.

Here we expressly found that the transaction promoted the general good only if we adopted four conditions, including the one at issue here. Had we not been able to condition the sale in such a manner as to require return of any excess funds following decommissioning, we would not have approved Petitioners' proposal.³⁸ Today, as in our June 13 Order, conditional approval:

amounts, in essence, to a factual determination that a proposal will promote the general good if certain circumstances occur, and that it will not promote the general good if they do not.³⁹

Our judgment in this case is that one of the features of the overall proposal brought before us was inconsistent with the public good. And, as we have done in prior cases, we determined that the public good would be served only if a suitable change was made to the proposal. Therefore, the full return of excess decommissioning funds (if any) is a necessary condition of our approval. This and the other three conditions that we have imposed are not mere "window-dressing."⁴⁰

37. See tr. 7/2/02 at 19 (Scherman).

38. "The issuance of certificates subject to necessary conditions has been a routine practice of this Board and of all administrative agencies in Vermont in literally thousands of instances for almost a century." Docket 5330, Order of 1/7/91 at 8 citing to *Petition of Burlington Electric Department*, 151 Vt. 543 (recognizing the Board's authority to impose conditions while, at the same time needing to be supported by evidence in the record); see also *In Re Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 358-359 (1992)(finding no error where Board issued certificate with conditions subsequent). As Vermont Petitioners have told us elsewhere, "[f]or quasi-judicial boards, the authority to deny approval of a regulated activity implies the power to grant approval subject to conditions subsequent." *Id.* citing to *Utah Power and Light Co.*, 96 PUR 4th 325, 337; *Niagara Mohawk Power Corp. v. FERC*, 379 F. 2d 153, 158 (D.C. Cir. 1967).

39. See Docket 5330, Order of 1/7/91 at 10.

40. *Id.*

There is, in practice, no legitimate distinction between a CPG and the conditions it contains.⁴¹ If it accepts its Certificate, Entergy will become bound by the terms of that Certificate, including the conditions specifically required by this Board. As Petitioners, including Entergy, have explicitly confirmed in language that we approve and rely upon:

Entergy made clear at the oral argument on July 2 and again by its separate filing that it cannot and will not challenge any provision of the MOU *or the Board's Decision* once the Transactions close.⁴²

Preemption: FERC Rules

We are also unconvinced by Entergy's arguments that we are preempted in this matter by FERC rules. The plain language of those rules appears to require Entergy to return all excess decommissioning funds to ratepayers, as a matter of federal law; certainly it contains no language conflicting with our Order. Nor can we accept Entergy's argument that FERC has pre-empted this entire field; such "field-preemption" is nowhere evident in any FERC citations provided by Entergy. It would conflict with the Supreme Court's holding in *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*,⁴³ and (for the reasons stated above) it is irrelevant to our fundamental jurisdiction over whether to approve the proposed transaction.⁴⁴

Section 35.32(a)(7) of FERC's rule on decommissioning trust funds, in pertinent part, reads:

[i]f the Fund balances exceed the amount actually expended from decommissioning after decommissioning has been completed, *the utility shall*

41. *Id.* at 8-10.

42. Petitioners' Response to NECNP's Supplemental Motions, July 9, 2002, at 11(emphasis added). The fact that Entergy filed its position on these points jointly with other petitioners (and that this is consistent with the Department's position that our Order will be binding upon Entergy) effectively rebuts the claim that there was no "meeting of the minds" among the signatories of the MOU. Thus, this point adequately addresses the arguments made in [NECNP] and [CAN's] Response Pursuant to VRCF 78(b)(1) to Opposition to Their Motion for Additional Time to File Supplemental Motion to Reconsider and to Their Supplemental Motion to Reconsider, filed by facsimile on July 10, 2002.

43. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. at 205 (1983)(reserving to the States the economic analysis of nuclear power plant transactions).

44. We note that any such "field preemption" would also invalidate New Hampshire law requiring returning excess to ratepayers. See N.H. R.S.A. 162-F:21-B,II(C). It would also apply to 50/50 sharing as much as to full return.

*return the excess jurisdictional amount to ratepayers, in a manner the Commission determines.*⁴⁵

When asked during oral argument why federal law would not allow the Board to order excess decommissioning funds to be returned in full to ratepayers, as the section 35.32 directed, Entergy responded:

Well if I could direct you to the actual regulation, what it says is that the disposition shall be done in a manner that the FERC determines. So the FERC clearly has said that while the general policy may be that the excess funds will be returned to ratepayers, it will be decided on a case-by-case basis, using the exact words, in a manner the commission determines.⁴⁶

It is not clear how section 35.32 can be read to yield the conclusion that Entergy urges us to reach. The regulation does *not* say that "the utility shall return the excess jurisdictional amount to ratepayers *if* the Commission so determines." Nor does it say "the utility shall return the excess jurisdictional amount to ratepayers, *to the extent* the Commission determines." Plainly and simply, the regulation, even if it were relevant to our decision, requires a full return, with FERC determining its *manner*, but not its amount which is fully consistent with our decision.

We recognize that FERC controls wholesale rates and, thus, revenues that go into decommissioning funds.⁴⁷ We also acknowledge that the NRC directs the manner in which the funds are to be used to decommission nuclear generating facilities.⁴⁸ However, what is at issue here is the treatment of any excess funds *after* decommissioning, *i.e.*, when a utility no longer

45. Nuclear Plant Decommissioning Trust Fund Guidelines, 18 C.F.R. Part 356 (1995)(emphasis added).

46. Tr. of 7/2/02 at 23-24 (Scherman).

47. See *Maine Yankee Atomic Power Co. v. Maine Public Utilities Com'n*, 581 A.2d 799, 800 (1990) *cert. denied* 501 U.S. 1230 (1991). The Maine Supreme Court has recognized that "[i]n setting forth technical and financial criteria for decommissioning licensed nuclear facilities, the NRC took care to clarify the roles of the state public utility commissions and the FERC. To FERC the NRC ascribes the responsibility for setting rates for the transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce and authorizes the conditions, rates, and charges for interconnections among electric utilities *Id.* at 801.

48. Pursuant to the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, the NRC is statutorily mandated "to protect the radiological health and safety of the public." General Requirements for Decommissioning Nuclear Facilities, 53 Fed.Reg. 24018, 24037 (1988); cited in *Maine Yankee Atomic Power Co. v. Maine Public Utilities Com'n*, 581 A.2d 799, 800 (1990) *cert. denied* 501 U.S. 1230 (1991). Although the NRC is not authorized to regulate rates or to interfere with the decisions of state or federal agencies respecting the economics of nuclear power, the NRC is responsible for promulgating "rules prescribing allowable funding methods for *meeting* decommissioning costs." 53 Fed.Reg. at 24037; (citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 212-13, 217-19 (1983))(emphasis added). In this case the issue is not "meeting" decommissioning costs, but what to do *after* those costs are met.

sells electricity and has surrendered its license under the NRC's license termination rules. Section 35.32 plainly requires a utility to return excess amounts to ratepayers. Given our fundamental conclusions that the proposed transaction could not be approved unless modified in this regard, a conclusion that FERC rules require a return to ratepayers would require denial of the petition, rather than modification of the condition. However, given FERC's cited text on this point, we need only say that we see neither explicit conflict nor field preemption.

Again, we emphasize that our conclusion to impose this condition on the sale of Vermont Yankee, and to decline to amend the condition, as Entergy has requested, is not really dependent on our reading of Federal regulations. Our conclusion has an adequate and independent basis in our determination as to what is necessary and consistent with the general good of the state.⁴⁹

Finally, we stress that Entergy's acceptance of our Order in this case requires acceptance of the conditions that are part of that Order, not merely compliance with the MOU. As described above, for Entergy to operate lawfully it must comply with all the terms of its CPG, even those added by the Board in its June 13, 2002, Order.

Entergy and other Petitioners acknowledge this. In Entergy's Memorandum in Opposition to NECNP's Supplemental Motion to Reconsider, Entergy makes the following two statements:

To the extent that the Board's final order imposes conditions upon ENVY that differ from or are in addition to those agreed to in the MOU, ENVY has the option to terminate the MOU upon receipt of the Order.

Contrary to NECNP's claims, it is *not* an option for ENVY to accept the Board Order, close the transaction, and later claim that the MOU has terminated and that the MOU terms it had agreed to are no longer binding.⁵⁰

In a joint filing on July 9, 2002, Petitioners (including Entergy) confirmed that:

Entergy accepts, as do the other Petitioners, that their decision to close under the PSA means that they cannot thereafter use Subparagraph 16(9) to reject enforcement of any provision in the MOU on the ground that certain provisions of the MOU were not approved by the Board (assuming that they close).⁵¹

49. Order of 6/13/02 at 4-5.

50. Entergy Memorandum in Opposition to NECNP's Supplemental Motion to Reconsider, July 9, 2002, at 4.

51. Petitioners Response to NECNP's Supplemental Motions, July 9, 2002, at 9. Petitioners add that "Subparagraph 16(9) is a standard provision in settlements before the Board that reserves the parties' right to litigate in full their positions *during the case* if the Board does not approve the settlement in full." *Id.* (emphasis in the

(continued...)

III. Board Jurisdiction After 2012

In our Order of June 13, 2002, we granted ENVY and ENO a CPG, respectively, to own and operate Vermont Yankee for terms limited to March 21, 2012.⁵² We noted that, implicit in that limited grant is a requirement that, if these companies intend to continue to own and operate Vermont Yankee past that date, they must come to the Public Service Board and once again demonstrate their suitability, including their financial soundness.⁵³

By letter of June 25, 2002, VYNPC noted that ENVY and ENO:

agree to accept a condition that the MOU will not expire on the date that their . . . CPGs expire . . . but will continue to apply until completion of the Station's decommissioning."⁵⁴

VYNPC suggested that, to the extent that there is any question about the Board's jurisdiction over ENVY and ENO, the Board should amend their CPG's to provide that they will continue in force after March 21, 2012, solely for purposes of decommissioning Vermont Yankee, unless the CPGs are amended in the future to allow continued operation.⁵⁵

Entergy filed a letter with the Board on July 1 in which it submitted two corrections to its Motion to Alter or Amend, both of which concern Board jurisdiction over ENVY and ENO beyond March 21, 2012.⁵⁶ In correcting page 2, line seven of its Motion, Entergy stated:

Moreover, ENVY does not believe that the agreement as presently written would adversely affect the successful decommissioning of the VY Station especially as ENVY would support a condition that the terms of the MOU and the commitments in the CPG do not themselves expire in March, 2012 but remain effective until ENVY completes its obligations.⁵⁷

Entergy submitted a second correction:

51. (...continued)
original).

52. Order of 6/13/02 at 130-132.

53. *Id.*

54. VYNPC Letter of June 25, 2002, at 2.

55. *Id.*

56. Entergy Letter of July 1, 2002.

57. *Id.*

ENVY would agree that, despite the Board's language stating that the CPG terminates on March 12, 2012, the terms of the CPG will remain in effect as to post-2012 commitments, providing Board jurisdiction.⁵⁸

The Department indicated its support for these changes to ENVY and ENO's CPG. No other party opposed this recommendation.

We conclude that the proposal is reasonable. Therefore, we hereby amend the Certificate of Public Good issued to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. to read as follows:

IT IS HEREBY CERTIFIED that the Public Service Board ("Board") of the State of Vermont on this date finds and adjudges that the issuance of a Certificate of Public Good ("Certificate") to expire on March 21, 2012, to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., to own and operate, respectively, the Vermont Yankee Nuclear Power Station ("Vermont Yankee") will promote the general good of the State of Vermont. **Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are authorized to own and operate Vermont Yankee beyond March 21, 2012, solely for purposes of decommissioning.**

IV. Exhibit NECNP-35

On June 27, 2002, NECNP filed a motion with the Board in which it requested that we remove parts of exhibit NECNP-35 from under seal.⁵⁹ Exhibit NECNP-35 is a document (entitled *Entergy Corporation Investment Proposal*) that Entergy staff and management presented to its Board of Directors, describing their perceptions of the risks and benefits (to Entergy) of Entergy's anticipated bid for Vermont Yankee. NECNP urges the Board to unseal portions of this exhibit:

which address Entergy's contentions in the Motion to Reconsider – that the Board's Order prejudices Entergy by failing to take into account its "financial assumption[s]," "projections" and "expectations" with respect to the Decommissioning Trust Fund.⁶⁰

58. *Id.* at 2.

59. NECNP Emergency Motion.

60. NECNP Emergency Motion at 1.

NECNP argues that unsealing portions of this exhibit is appropriate because Entergy has argued that the Board's Order of June 13, 2002, "deprives Entergy of a justifiable expectation that it would receive any surplus in the Trust Fund."⁶¹

In response, Entergy argues that NECNP's Emergency Motion is untimely and that NECNP has not demonstrated that the information should be removed from under seal.⁶² According to Entergy, the continued confidentiality of the information and mode of analysis set forth in NECNP-35 remains of real and substantial value, disclosure of which would expose Entergy to a significant loss.⁶³

We conclude that it is not appropriate to unseal NECNP-35 due to the commercial value of the mode-of-analysis contained therein and that denying the request to unseal will not prejudice any party in this Docket.

In this matter, the Board has the power and obligation of a court of record pursuant to 30 V.S.A. § 9. Like a court, we look to Rule 26(c)(7) of the Vermont Rules of Civil Procedure which (like Rule 26(c)(7) of the Federal Rules of Civil Procedure) recognizes a party's right to proprietary treatment of commercially valuable information, to the extent that lesser modes of protection are not adequate.

In our analysis we apply the test recommended by NECNP, *i.e.*, the one adopted in *In re Sealed Documents*.⁶⁴ Accordingly, we make a specific determination that: (1) there exists a substantial threat to privacy (or in this case, commercial) interests; (2) that a showing of harm is demonstrated with specificity as to each document; (3) that secrecy extends no further than is

61. NECNP Memorandum at 6. NECNP contends that without this information, it cannot respond to Entergy's contention that a modification of the terms regarding sharing of excess decommissioning funds materially changes the MOU. *Id.* at 7. As we note in our discussion below, the "open" record allows this issue to be adequately addressed; indeed, NECNP prevails on this issue without release of proprietary information.

62. Memorandum of [ENVY] and [ENO] in Opposition to NECNP Motion to Release Confidential Materials ("Entergy Opposition to NECNP Motion"), 7/5/02.

63. We note that Entergy has argued that NECNP's Emergency Motion is untimely. In our analysis below, we do not consider whether NECNP's motion is out of time, but instead, due to the importance of this proposal, review it on the merits.

64. NECNP argues that the proper analysis is set out in *In re Sealed Documents*, 172 Vt. 152, 772 A.2d 518 (2001). We note that there may be distinctions between civil and criminal proceedings; but we conclude that, even if *In re Sealed Documents* is controlling, its procedures and substance require continued proprietary treatment of exh. NECNP-35.

necessary to preserve the protected interests; and (4) that fact-specific reasons exist as to why the presumption of public access is overcome.⁶⁵

In making our initial determination that resulted in the proposal to redact and limit access to certain attorneys in this case, Entergy indicated that this document had been used in the acquisition process for other nuclear power plants, and that it embodied and demonstrated a methodology that would be used in potential future bids for such plants.⁶⁶ Upon review of an un-redacted copy, the Board's hearing officer reported that NECNP-35 contained specific data concerning possible site acquisitions and information demonstrating a methodology and mode of analysis used to evaluate and prepare for this and future nuclear plant transactions.

In reviewing the specific document, NECNP-35, in its redacted form, based upon NECNP's present motion, we previously found, as a matter of fact, that the hearing officer was correct and that it contains company strategies and practices with a potential for application in the context of other nuclear plant sales. Upon reexamination, we again conclude that this is sufficient reason to overcome the presumption of public access. Release of this information could create substantial competitive harm for Entergy. Thus its release, even as redacted, could not be crafted to allow the continued protection of the information it contains. No substantial portion of the document could be disclosed without revealing overall patterns of analysis and company assumptions and strategy. Although we have considered further redaction, we conclude

65. 772 A.2d at 526-527. The court has noted that a sealed ruling could be used, if necessary, to explain why a document deserves confidential treatment. In this case, no such sealed ruling is necessary because our factual findings about the document can be explained and stated without impairing the commercial value of the document itself.

66. By Order of November 9, 2001, the Board established a process whereby information in this Docket could be designated as confidential and parties could challenge that designation. This required proponents to file document-specific averments in support of a request to keep a document under seal. Order of 11/9/01 at 9. Parties wishing to maintain confidential treatment for documents proffered for inclusion in the evidentiary record had to submit a motion to that effect. *Id.*

In preparation of her testimony, Entergy witness O'Connell was provided Entergy documents including an "Investment Proposal" (now referred to as "NECNP-35"). NECNP moved to compel production of this document and its motion was granted during a discovery conference by a Hearing Officer. Order of 3/29/02 at 2. ENVY sought reconsideration before the full Board, but, prior to receiving a ruling, ENVY proposed a limited disclosure of a redacted version of the document. Access to numbered copies was granted to counsel for NECNP, CAN, CLF, and the Department, to be used in the hearing room only. Tr. 4/2/02 at 7-9. NECNP objected to the redactions. Tr. 4/2/02 at 10-13. After an in-camera review by a hearing officer, the Board accepted the redacted version and the procedure that ENVY proposed.

that there is no way to release this material without creating a significant threat to Entergy's legitimate interests in this area.

Furthermore, to the extent that a balancing test is relevant, we see no harm to the public or other parties: the substantive issues in dispute can be adequately addressed and resolved upon the basis of publicly-available testimony and exhibits, without a need to rely upon the specific financial figures in Exhibit NECNP-35 or the testimony upon it.

For all of these reasons, we decline to grant NECNP's Emergency Motion.

V. NECNP Motions and Supplemental Motions for Reconsideration and Additional Time

On June 28, 2002, NECNP filed a Motion to Reconsider the Board's Order of June 13, 2002.⁶⁷ In support of its motion, NECNP makes three arguments: (1) that the Board mistakenly relied upon the MOU as an enhancement of state authority; (2) the Board incorrectly concluded that Entergy Nuclear Vermont Yankee possesses sufficient financial resources to meet its safety obligations; and (3) that the Board failed to consider findings proposed by NECNP in the Board's ruling as to the applicability in this Docket of the State Comprehensive Energy Plan.

In joining NECNP's Motion, CAN added a fourth argument. CAN argues that Entergy's recent Motion to Alter or Amend is an "admission" that Entergy will use federal preemption arguments to "have its way on whether to submit to the Board's jurisdiction."⁶⁸ CAN contends that, since the Board's Order of June 13, 2002, did not "accurately deal with such an eventuality, [it] is incomplete and fails to meet the Board's responsibilities under the statute when issuing a certificate of public good."⁶⁹

On July 1 and July 8, 2002, VYNPC and the Department, respectively, filed memoranda in opposition to NECNP's Motion to Reconsider.⁷⁰

67. NECNP Motion to Reconsider, 6/27/02 ("NECNP Motion to Reconsider"). By letter dated June 27, 2002, CAN joined in NECNP's Motion to Reconsider.

68. CAN Letter of June 27, 2002.

69. *Id.*

70. Memorandum in Opposition to NECNP Motion to Reconsider ("VYNPC Opposition"), 7/1/02; Department Response to NECNP Motion to Dismiss ("Department Response"), 7/8/02.

On July 5, 2002, NECNP filed a Motion for Additional Time to File Supplemental Motion to Reconsider, and a Supplemental Motion to Reconsider.⁷¹ In its Supplemental Motion, NECNP argues that, due to representations made by Entergy's counsel at oral argument on July 2, 2002, the Board should revise its Order of June 13, 2002, and order a new trial.⁷² We note here that NECNP's argument in its Supplemental Motion is essentially the same as the argument raised by CAN in its Letter of June 27, 2002, in support of NECNP's Motion to Reconsider. We, therefore, address it below in the fourth part of our discussion of NECNP's Motion to Reconsider.

On July 9, 2002, the Department, VYNPC and Entergy filed pleadings in response to NECNP's Supplemental Motion.⁷³ The Department, VYNPC and Entergy urge the Board to reject NECNP's Supplemental Motion.

For the reasons set out below, we find NECNP and CAN to be unpersuasive and deny their motions.

In its Motion to Reconsider, NECNP first argues that the Board mistakenly relied upon the MOU as an enhancement of state authority because the Board's authority cannot be conferred by consent.⁷⁴ NECNP calls this a "manifest error of law."⁷⁵

It appears that NECNP has misconstrued our Order of June 13, 2002. Certainly our authority cannot be conferred by an agreement of a party appearing before us; the Board's

71. NECNP Motion for Additional Time to File Supplemental Motion to Reconsider ("Motion for Additional Time"), and a Supplemental Motion to Reconsider, 7/5/02 ("Supplemental Motion"). By letter of July 3, 2002, CAN joined in NECNP's Supplemental Motion. CAN Letter of July 3, 2002.

72. NECNP Supplemental Motion at 1.

73. [Department] Response to NECNP's Supplemental Motion to Reconsider, July 9, 2002; Petitioners Response to NECNP's Supplemental Motions, July 9, 2002; Memorandum of [ENVY] and [ENO] in Opposition to NECNP Supplemental Motion to Reconsider, July 9, 2002 ("Memorandum in Opposition").

74. NECNP Motion to Reconsider at 2.

75. *Id.*

authority is conferred upon it by statute only.⁷⁶ However, we have not concluded that the MOU expands the Board's authority.

Neither the MOU's statement that the CPG would have a limited term nor Entergy's commitment that it would seek an extension or renewal of its Certificate if it sought to operate after March 21, 2012, altered existing state law – the Board had full authority to limit the term of the Certificate under Section 231, and Entergy could not validly operate under Vermont law after March 21, 2012, without obtaining an extension of its CPG from this Board. Our Order concluded that Entergy's commitment to these MOU terms provided valuable enhancements because they removed possible uncertainty in the future as to whether Entergy could raise legal claims to remove the Board's state law jurisdiction. Through its contractual commitments with the Department in the MOU (which is enforceable by this Board), Entergy has effectively waived any legal claims that the Board is preempted by federal law from exercising its authority.

Similarly, the Board did not find that the inspection MOU had altered our state law jurisdiction. Rather, we found increased value for Vermont ratepayers in Entergy's voluntary agreement with the Department to provide greater access to the State Nuclear Engineer. This increased capability for the Department was a significant value and contributed to our ultimate conclusion that the proposed sale of Vermont Yankee would be in the general good. NECNP's argument ignores the fact that we did not assume an expansion of our authority. Thus, there has been no error of law.

Secondly, NECNP argues that the Board committed a "manifest error of fact" by incorrectly concluding that Entergy Nuclear Vermont Yankee, LLC possesses sufficient financial resources to meet its safety obligations.⁷⁷ We do not find this argument persuasive because NECNP has, essentially, ignored the findings that the Board has made with regard to the

76. See Order of 6/13/02 at 125.

Here we affirm the concept set out in the Scoping Order, stressing three points. First, our authority, like the NRC's, is conferred by law. If we did not respect the choice of the elected representatives of the people to give the NRC its power, we would have no right to expect VYNPC or its owners to respond to the authority that lawmakers have given to this Board. Second, despite the limitations on our authority, if we did see the transfer of Vermont Yankee to ENVY as creating a safety risk, we would say so bluntly and clearly in advisory terms even if without legal effect. Third, the record before us persuades us that ENVY should operate the facility at least as safely as the current owners. *Id.*

77. NECNP Motion to Reconsider at 3.

capabilities, both financial and technical, of Entergy Corporation and its agreement to provide explicit guarantees to provide its affiliates in Vermont.

The Board made extensive findings regarding Entergy Corporation, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.'s technical qualifications, business structure, and Entergy Corporation's financial assurances to Entergy Nuclear Vermont Yankee.⁷⁸ The Board found ENVY and ENO to be qualified to purchase, operate and decommission Vermont Yankee.⁷⁹ We also found that ENVY, ENO and their affiliates possess significant technical qualifications and expertise, and they have at their disposal substantial human resources.⁸⁰ We also concluded that Entergy Corporation is capable of providing, and will provide, the financial safeguards enumerated in the MOU. We also found that these safeguards, in the form of Power Purchase Agreement revenues, credit agreements, insurance, and explicit guarantees are sufficient to ensure that ENVY has sufficient capital at its disposal to own, operate and decommission Vermont Yankee.⁸¹ In that Order, the Board concluded that the resources and experience of Entergy Corporation (which are available to its two subsidiaries being certified in this Docket) are greater than those of the current stand-alone owner, VYNPC.⁸²

NECNP's argument disregards these finding and conclusions. NECNP has presented no evidence that these conclusions, based upon extensive record evidence, warrant correction.

Thirdly, NECNP maintains that the Board's ruling failed to consider findings that NECNP had proposed as to the applicability in this Docket of the State Comprehensive Energy Plan

78. *See generally* Order of 6/13/02 at 108-117.

79. *Id.* at 111.

80. *Id.*

81. *Id.* at 113.

82. *See id.* at 151.

Issues of corporate structure, capital resources, and a limited liability were very real at the start of this proceeding. Since then, the Department, in negotiations with Entergy, has successfully addressed these questions. Critically, the proposal before us now presents committed funds that are at least as significant as the available liquidity of companies such as Green Mountain and Central Vermont and — even more importantly — are adequate when measured against funds necessary to ensure safe maintenance and shut down of the plant in the event it ceases to produce power. In other words, the financial assurances that Entergy has agreed to provide ENVY will be sufficient to ensure that ENVY has the resources it needs to operate and to eventually close and decommission Vermont Yankee. In addition, commitments and obligations from Entergy's parent corporation now back the most important commitments proposed for its proposed Vermont subsidiaries. *Id.*; *see also id.* at 6-7, 73, findings and discussion in Section VII at 113-117.

("Plan").⁸³ According to NECNP, the Board, therefore, ought to alter its Order or reopen the evidentiary record on this topic.⁸⁴ Neither proposal is persuasive.

We note that the results of our decision in this Docket are consistent with the proposal regarding Vermont Yankee that are contained in the Plan.⁸⁵ Contrary to the implications of NECNP's arguments, the Plan does not state that all of Vermont Yankee's output should be replaced immediately with renewable resources. Rather, the Plan indicates that Vermont should take steps to replace non-renewable energy supplies with renewable resources, either when demand for electricity increases or "when old power plants are retired."⁸⁶

This language states a preference for increased use of renewable resources, but in no way mandates replacing the large power purchases from Vermont Yankee immediately with renewable resources. Also, we see no statutory duty that requires the Board to follow all recommendations in the State Comprehensive Energy Plan. Finally, we reject NECNP's suggestion that the Order is procedurally defective by not discussing the Comprehensive Energy Plan. The Board need only make findings that are essential to the disposition of the case; it does not have to address every finding request that is submitted.⁸⁷ In our Order of June 13, 2002, we stated that:

All findings and rulings requested by the parties, other than those addressed above, are hereby denied, except that ENVY's Motion of June 7, 2002, [*i.e.*, Motion to Enforce Protective Order and For Sanctions Against NECNP] shall be considered separately.⁸⁸

83. In our June 13, 2002, Order, we recognized that NECNP raised this issue: *The general good, according to NECNP, also requires the Board to reject the waiver of review of prudence and used-and usefulness, and to consider the State Comprehensive Energy Plan, loss of local control over Vermont Yankee, and reasonable alternatives to the proposed sale.* Order of June 13, 2002, at 18 (emphasis added).

84. NECNP Motion at 5.

85. See *Fueling Vermont's Future, Comprehensive Energy Plan and Greenhouse Gas Action Plan*, July 1998, Vol. 1. We note that at page 160 of our June 13, 2002, Order the Board emphasizes consideration of the development and use of renewable resources.

86. See *id.* at 1-4. "Expiration of Vermont Yankee nuclear station's license in 2012 offers a rare opportunity to substantially increase our use of renewables and avoid increasing greenhouse gas emission levels." *Id.*; see also *id.* at sections 4-9 and 4-23.

87. See *Roy v. Mugford*, 161 Vt. 501, 507-11 (1994).

88. Order of 6/13/02 at 160.

We, consequently, conclude that NECNP has presented neither compelling rationale for altering our Order or for supplementing the evidentiary record in this Docket.

The fourth argument submitted by CAN in support of NECNP's Motion to Reconsider (and NECNP's Supplemental Motion), essentially states that because Entergy has argued that the Board is preempted with regard to disposition of the excess decommissioning funds, Entergy cannot be expected to comply with terms of the MOU in which Entergy waived its right to argue federal preemption. We do not agree with this position; it confuses the points made by Entergy during the oral argument before the Board on July 2, 2002.

By virtue of signing the MOU, Entergy waived any argument that it might have had with regard to preemption on matters contained in the MOU. However, Entergy had not (yet) agreed to waive a preemption argument relating to the subsequent Board condition requiring the return of excess decommissioning funds to ratepayers. For NECNP and CAN to confuse the two and to argue that Entergy's Motion to Alter and its statements at oral argument constitute a change in Entergy's position, shows a disregard for both the facts and the explicit statements made by Entergy on July 2, 2002. During oral argument, Entergy indicated that it continued to agree to the terms of the MOU:

As far as what Mr. Dumont's characterization of what co-counsel Scherman said, I can tell you you heard from witness Kansler, Keuter and Wells that Entergy is making commitments to the Board as a condition of getting the CPG that they are seeking here, and it will stand by those commitments where it has made a commitment.⁸⁹

Later in that same hearing, however, Entergy indicated that it did not agree to the additional condition requiring return of all excess decommissioning funds to ratepayers.

In this case, we did not make a commitment to return a hundred percent of the excess to ratepayers, so I see a clear distinction between where the company has come forward and said we will accept a condition as part -- as a consideration for the CPG that we are getting here.⁹⁰

Therefore, with regard to the terms of the MOU, the Board has no question as to Entergy's position. Entergy signed the MOU, testified as to Entergy's intent to support its terms, and at oral argument on July 2, 2002, reiterated its commitment to the MOU.

⁸⁹. Tr. 7/2/02 at 59 (Brown).

⁹⁰. *Id.*

We recognize Entergy's opposition to the condition requiring it to return excess decommissioning fund dollars to ratepayers as distinct from Entergy's support of the MOU. We also note that the condition is now a part of Entergy's CPG. If Entergy expects to operate lawfully under its CPG, then it must comply with all its terms, including those that were added by the Board in its July 13, 2002, Order. A CPG is not an à la carte menu. As discussed above, Entergy will be bound by each and every one of the conditions of its CPG. In practice, there is no legitimate distinction between a CPG and the conditions it contains.⁹¹ As Entergy recognized in its Memorandum in Opposition, if Entergy does not agree with the terms of its CPG, then it is free to walk away from this deal.⁹² If it accepts the CPG, it must abide by all its terms. Entergy recognized this explicitly during oral argument:

[I]f Entergy violates any conditions of the CPG or the MOU, [the Board and Department] have recourse against the company. You have the right to haul us in and take away the CPG if it's significant enough.⁹³

By virtue of accepting this CPG, Entergy waives any argument that it might have with regard to federal preemption of the Board's Order concerning the return of excess decommissioning funds.

One final point should be noted: NECNP characterizes the Board's June 13, 2002, Order as "relying" upon "future Board jurisdiction over the trust fund and over other funds" that affect or are affected by wholesale rates.⁹⁴ Strictly speaking, the Board's Order does not *rely* upon its future jurisdiction. Instead, the Board concludes now that the sale of Vermont Yankee is in the best interest of ratepayers only if those ratepayers will receive back any excess decommissioning funds they contributed (including interest thereon). Vermont law requires Entergy, as a recipient

91. See Docket 5330, Order of 1/7/91.

92. Memorandum in Opposition at 4. "To the extent that the Board's final order imposes conditions upon ENVY that differ from or are in addition to those agreed to in the MOU, ENVY has the option to terminate the MOU upon receipt of the Order." *Id.*

93. Tr. 7/2/02 at 59 (Brown).

94. Supplemental Motion at 2. NECNP's argument includes other terms to which, NECNP indicates, Entergy has not agreed, *e.g.*, return to ratepayers of Nuclear Electric Insurance Limited disbursements, excess funds in the Spent Fuel Disposal Trust, or claims related to the Department of Energy's defaults under the DOE Standard Contract. However, because these are only potential refunds to VYNPC, and not Entergy, these refunds are not relevant to the question of Entergy's agreement. We note also that the Decommissioning Trust Funds are not "wholesale rates", and that disposition of them, if excess, will not affect wholesale rates. The simple fact that they will be affected by wholesale rates does not distinguish them from the myriad of consumer values affected by such rates.

of a CPG, to comply with the Order granting that Certificate. Entergy has expressly recognized that, if it accepts that Certificate, it will be bound by the terms of the accompanying Order. If it comes to the Board's attention that a company is in violation of the terms of its CPG then, as NECNP has recognized, "the Board may impose sanctions which are within its authority."⁹⁵

In conclusion, NECNP and CAN have not demonstrated a manifest error of law or fact, and therefore, we deny their Motion and Supplemental Motion to Reconsider.

VI. Conclusion

In conclusion, Entergy has not demonstrated error in our Order of June 13, 2002; thus, we deny its Motion to Alter. However, to the degree that Entergy contributes to a decommissioning fund for Vermont Yankee in the future, it need not distribute any added contributions it makes (including earnings attributable to those contributions) to ratepayers. To ensure Board jurisdiction until Vermont Yankee is decommissioned, ENVY and ENO's CPG is amended to reflect the Board's jurisdiction beyond March 21, 2012. Due to its commercially-valuable nature and the small likelihood of any prejudice to parties in this Docket, we conclude that it is not necessary to unseal NECNP-35. We grant NECNP's motion to file a supplemental motion to reconsider, but are ultimately not persuaded by NECNP and CAN's motion and supplemental motion to reconsider. We, therefore, deny them.

SO ORDERED.

95. Supplemental Motion at 3, citing to 30 V.S.A. § 30.

Dated at Montpelier, Vermont, this 11th day of July, 2002.

s/Michael H. Dworkin)	PUBLIC SERVICE
)	
)	
s/David C. Coen)	
)	
)	
s/John D. Burke)	BOARD
)	
)	OF VERMONT

OFFICE OF THE CLERK

FILED: July 11, 2002

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: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

Appendix A – Errata –Order of June 13, 2002

1. On page 5, replace "Paragraph 16" with "Paragraph 15."
2. On page 9, second line, replace "high price markets" with "high market prices."
3. In finding 15 on page 26, delete the word "would" after the word "ratepayers."
4. On page 27 at finding 21, replace the number "104" with "103."
5. In footnote 43 on page 29, delete "so)" after the word "do."
6. On page 30, middle paragraph, last sentence, delete the word "cost" before the word "recovery."
7. On page 31, first full paragraph, replace the words "Entergy will shutdown Vermont Yankee" with "Vermont Yankee will shutdown;" and place the clause "other than business insurance . . . unplanned outage" in parentheses.
8. On page 36, footnote 66, amend citation 18 CFR § 33.32(a)(6),(7) to 18 CFR § 35.32(a)(6),(7).
9. On page 40, at finding 45, change "KWh" to "MWh," and change the citation "Exh. GMP-NRB-12" to "Exh. GMP-NRB-8."
10. On page 41, at finding 52, "(1) the Department's April 2000 forecast (referred to here as DPS 2002)" should read "(1) the Department's April 2000 forecast (referred to here as DPS 2000)".
11. On page 45, first sentence, change "Vermont Yankee" to "VYNPC."
12. On page 48, in the last sentence, replace "During this period" with "In the significant period, from 2002-2005,".
13. On page 52, replace "better. Unless . . ." with "better; unless . . .".
14. On page 53, in the sentence following the indented quotation, change the word "provide" to "provides." In the sentence preceding footnote 94, change the word "effort" to "effect." In the following paragraph, replace the word "shield" with "shields."
15. On page 55, in the middle paragraph, change the word "range" to "ranges."
16. On page 73, in the first full paragraph, ". . . Entergy would operate Vermont Yankee . . ." should read ". . . Entergy should operate Vermont Yankee . . ." In footnote 146, replace "See Finding 176" with "See Finding 183."
17. On page 146, in the first full paragraph, replace "front-end loaded; if viewed alone" with "front-end loaded, if viewed alone;". Also, the last bullet should read "*With the AmerGen Power Purchase Agreement, Green Mountain and Central Vermont would have been committed to purchasing more than 75 percent of their energy needs from long-term, fixed-price arrangements.*"
18. On page 149, second line, replace "it's" with "its".
19. On page 156, in the last bullet, replace "Paragraph 16" with "Paragraph 15."
20. In paragraph 12 on page 159, for consistency with the attached Certificate of Public Good, Order . . ."