IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2013-042

IN RE: 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

APPEAL FROM THE VERMONT PUBLIC SERVICE BOARD
DOCKET No. 7440

BRIEF FOR THE VERMONT PUBLIC SERVICE DEPARTMENT

Geoffrey Commons
Director for Public Advocacy
Aaron Kisicki
VERMONT DEPARTMENT OF PUBLIC SERVICE
112 State Street
Montpelier, VT 05620
Tel: (802) 828-4010
geoff.commons@state.vt.us
aaron.kisicki@state.vt.us

Robert C. Kirsch (admitted *pro hac vice*)
Felicia H. Ellsworth (admitted *pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6000
robert.kirsch@wilmerhale.com
felicia.ellsworth@wilmerhale.com

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Vermont Public Service Board committed clear error in interpreting its prior Orders and Certificates of Public Good to fall outside the scope of 3 V.S.A. § 814(b) because they are not "licenses" for "activities of a continuing nature"……...pp. 8-16

2. Whether the Board abused its discretion in denying Entergy's motion pursuant to Vermont Rule of Civil Procedure 60(b) to amend the Board's prior Orders and Certificate of Public Good where Entergy failed to demonstrate that it was entitled to the extraordinary remedy of Rule 60(b) relief……...…….pp. 16-20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

Entergy repeatedly suggests that the Public Service Board ("Board") has ordered Entergy to cease operating the VY Station pending the Board's final decision on Entergy's application for a new Certificate of Public Good ("CPG"). But the Board has issued no such order—just the opposite. The orders that Entergy appeals expressly do **not** require Entergy to cease operations before the Board issues a final order on Entergy's pending petition for a new CPG. Indeed, only a few months ago, this Court rejected the suggestion that the Board has required Entergy to cease operations. Instead, the two challenged orders conclude that the declaratory relief requested by Entergy—as to the applicability of a provision of administrative law and modification of prior CPGs and Board Orders under Vermont Rule of Civil Procedure 60(b)—is not available to it. The Board orders on appeal are redressable only if they cause some injury to Entergy, and if Entergy can demonstrate that the Board committed clear error or abused its discretion. Entergy has shown neither.

STATEMENT OF THE CASE

A. Docket 6545: Entergy's Purchase Of Vermont Yankee

On September 4, 2001, the Board opened Docket 6545 (the "Sale Docket"), to consider whether to authorize the sale of the Vermont Yankee Nuclear Power Station (the "VY Station") to Entergy. On June 13, 2002, the Board issued an order (the "Sale Order") approving the sale of the VY Station to Entergy and authorizing issuance of a Certificate of Public Good ("CPG") to Entergy to own and operate the VY Station. PC330-333. On the same date, the Board separately issued a CPG to Entergy (the "Sale CPG"). PC345-347. The Sale Order specified that the CPG would expire on March 21, 2012. PC332. A separate provision of that Order required that "[a]bsent issuance of a new Certificate of Public Good or renewal of the Certificate of Public

Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012." *Id.* This second condition recited Entergy's agreement, reflected in a Memorandum of Understanding with the Vermont Public Service Department ("Department") (the "Sale MOU"), that any CPG it received would permit it to operate the VY Station only until March 21, 2012, after which date Entergy would be authorized only to decommission the VY Station, unless it obtained a new CPG before that date. PC3-5. Only after Entergy agreed to that condition did the Department support Entergy's purchase of the VY Station. PC2-3.

B. Docket 7082: Entergy's Construction Of A Dry Fuel Storage Facility

After obtaining the Sale CPG, and after receiving state approval for an "uprate" that allowed Entergy to produce 20% more power (and consequently create more spent nuclear fuel or SNF), Entergy acknowledged that the VY Station would need additional capacity to store spent nuclear fuel before the March 21, 2012 expiration of its federal license and state CPG. Thus, on June 22, 2005, Entergy sought a CPG to construct a dry cask storage facility to store spent nuclear fuel at the VY Station. PC385. The Board opened Docket 7082 (the "Dry Cask Storage Docket") to consider Entergy's request and, on April 26, 2006, the Board granted Entergy the CPG (the "Dry Cask Storage CPG"). In that CPG, and in its order of the same date, the Board specified that "[t]he cumulative total amount of spent nuclear fuel stored at Vermont Yankee is limited to the amount derived from the operation of the facility up to, but not beyond, the end of the current operating license, March 21, 2012," and that "[c]ompliance with the provisions of [the] Certificate of Public Good and the accompanying Order in this Docket shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012." PC470; PC473.

C. Proceedings Before The Board And The Federal District Court Relating To Entergy's Petition For An Amended CPG

1. Initial proceedings in Docket 7440

On March 3, 2008, Entergy petitioned the Board seeking a new or amended CPG to operate the VY Station beyond March 21, 2012. PC475. Although the proceedings in Docket 7440 were complete by late 2009, a leak of tritium from underground piping at the VY Station in January 2010 revealed that Entergy had provided inaccurate and misleading information to the Board. PC733. As a result, the Board suspended its consideration of Entergy's petition pending notification from the parties—including Entergy—that they were prepared to correct the record and reopen proceedings. PC733. Although Entergy completed its internal review of the inaccuracies in the record in September of 2010, Entergy never moved to reopen the record or restart the proceedings, instead choosing to seek injunctive relief in federal court against the Board and the State. PC719. It was not until January 31, 2012, after the federal court issued an injunction, that Entergy sought a final decision and order on its petition in Docket 7440. PC716.

2. District Court proceedings

In April 2011, Entergy filed a complaint in the United States District Court for the District of Vermont, seeking a ruling that Vermont Acts 74 and 160, which required legislative approval for operation of and storage of spent nuclear fuel at the VY Station after March 21, 2012, and any other state laws that might prevent Entergy from operating the VY Station, were preempted by the Atomic Energy Act. On January 19, 2012, the district court ruled that Act 160 and part of Act 74 were preempted. The court enjoined the defendants from "bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down after March 21, 2012 *because it failed to obtain legislative approval (under the provisions of Act 160)* for a

Certificate of Public Good for continued operation, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition." *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 243 (D. Vt. 2012) (emphasis added). Importantly, although Entergy sought in the federal litigation to enjoin the State from requiring Entergy to obtain state regulatory approval to continue operating the plant in any circumstances (*i.e.*, even under the pre-Act 160 and -Act 74 requirement that Entergy obtain a CPG from the Board), Entergy acknowledges that the district court injunction is not so broad. Br. at 8. Instead, the injunction only bars the State from taking any action to shut down the VY Station based on the absence of legislative approval under Acts 74 and 160 and reaffirmed the Board's authority to issue or deny a CPG under other provisions of Vermont law. *Entergy Nuclear Vermont Yankee, LLC*, 838 F. Supp. 2d at 243 ("This Court's decision . . . does [not] purport to define or restrict the State's ability to decline to renew a certificate of public good on any ground not preempted or not violative of federal law.").[1]

3. Proceedings in Docket 7440 following the federal litigation

On March 9, 2012, the Board convened a status conference in Docket 7440 to address several issues, including the ability of Entergy to continue operating the VY Station after March 21, 2012 and the ability of Entergy to store spent nuclear fuel generated after March 21, 2012 at the VY Station. PC717. During that status conference, Entergy acknowledged that representations made on behalf of the Department and the Office of the Vermont Attorney General in the district court litigation relating to the operation of 3 V.S.A. § 814(b) had not been made on behalf of the Board, noting "we need clarification with regard to the position of the

[1] The district court's order was appealed by both the State of Vermont and Entergy to the United States Court of Appeals for the Second Circuit, which heard oral argument on January 14, 2013.

Board." SPC4 (11:9-10).[2] On March 13, 2012—a mere eight days before Entergy's CPGs would expire by their explicit terms—Entergy asked the Board to issue a declaratory ruling that, pursuant to 3 V.S.A. § 814(b), Entergy could continue operating the VY Station, and continue storing spent nuclear fuel derived from such operation, after March 21, 2012 while its petition for a new or amended CPG remained pending. PC1.

On March 19, 2012, the Board denied Entergy's request for a declaratory ruling ("March 19 Order"). PC2. The Board first held that "the 'part' of the Docket 6545 CPG that authorizes operation of Vermont Yankee is extended pursuant to Section 814(b)." PC15. However, the Board also found that § 814(b) does not apply to the Sale MOU or Order, both of which reflected Entergy's promise to stop operating the VY Station after March 21, 2012 unless it had received a new CPG from the Board. PC19. The Board noted that, unlike the CPG, the Sale Order was issued to the former owners of the VY Station, not to Entergy; was the approval of a discrete transaction rather than a continuing activity; could be modified only by an appropriate motion or petition in the Sale Docket; and would be rendered partially meaningless by the application of § 814. PC17-19. The Board concluded that its Sale Order is not a "license" to which § 814(b) applies. PC17-18. The Board also found that § 814(b) does not apply to the Dry Cask Storage Order or CPG, pointing out that the Dry Cask Storage CPG concerns "the storage of SNF, not the accumulation of ever-increasing amounts of SNF"; that the Dry Cask Storage CPG limits the amount of SNF that may be stored at Vermont Yankee; and that the Board "lacks the authority

[2] *See also* SPC4 (11:15-21) ("So while the Attorney General and the Department of Public Service have made assertions as to the positions that they take with regard to the permitted continued operation during the pendency of the proceeding, we do not yet have the necessary assurance from the Board.") (Mr. Hemley, counsel for Entergy); SPC17 (65:9-12) ("There has not been a position taken by the Board or on behalf of the Board with respect to the continued ability of the plant to operate after March 21st.") (Mr. Hemley, counsel for Entergy).

under state law to authorize expanded use of the facility for storage of SNF derived from the operation of the facility past March 21, 2012." PC19-25.

Importantly, the March 19 Order expressly acknowledged that "the District Court's decision serves to enjoin the Board from enforcing orders that would require cessation of operations at Vermont Yankee. Our Order today does not have that effect. Today's Order does not purport nor is [it] intended to require that Entergy VY cease operations at Vermont Yankee." PC26-27. Instead, the Board noted, it was deciding the specific, narrow questions presented to it by Entergy's motion: "What is before the Board, and what this Order addresses, is Entergy VY's motion that we issue declaratory rulings on how certain provisions of Vermont state law apply to continued operation and SNF storage." PC27.

On May 29, 2012, pursuant to Vermont Rule of Civil Procedure 60(b), Entergy moved the Board to modify the Sale Order and the Dry Cask Storage Order and CPG to remove the conditions in those orders and CPGs that memorialized its promise to cease operation of and storage of SNF at the VY Station after March 21, 2012 unless it received a new CPG by that date. PC28-29. In support of its motion, Entergy argued that it was unforeseeable that (1) the Board would rule that § 814(b) does not apply to the Orders and CPG and (2) the Board would not rule on Entergy's CPG petition before March 21, 2012. PC29. In an order issued in the Sale Docket, the Dry Cask Storage Docket, and Docket 7440 on November 29, 2012 (the "November 29 Order"), the Board denied Entergy's motion on the grounds that (1) the March 19 Order was "entirely foreseeable" because it was only enforcing Entergy's "specific commitment to cease operation on March 21, 2012 (absent a new CPG), a commitment which Entergy VY asked the Board to rely upon in approving the transaction"; (2) the Board's could not rule on Entergy's petition before March 21, 2012 as a direct result of Entergy's tactical choices; and (3) "Entergy

VY has not demonstrated a hardship that merits relief under Rule 60(b)." PC39, 46-54. Once again, the Board stressed that "this Order is narrow. We address only Entergy VY's request for relief under Rule 60(b). Because we do not accept Entergy's arguments concerning foreseeability, which were the basis for its motion, we deny the request and do not reach any conclusions concerning the merits of modifying or extending Entergy VY's obligations under existing Orders and CPGs." PC30.

D. Docket 7862: Entergy's Amended Petition For A CPG

After briefing and argument on the scope of further proceedings in Docket 7440, the Board determined that the record in that docket contained inaccurate and outdated material that might taint the Board's ultimate decision. PC720. Entergy had offered a similar assessment of the record in Docket 7440 in the federal District Court proceedings. *Entergy Nuclear Vermont Yankee v. Shumlin*, No. 1:11-cv-99-jgm, Tr. of R. at 674:22-675:6, Sept. 14, 2011, ECF No. 170 ("We think we would have to go back to the Public Service Board with a fresh docket and a fresh start . . . . we would want a chance to make a fresh docket and confine the proceedings to non-nuclear safety issues.") (Ms. Sullivan, counsel for Entergy); *id.* at 678:10 ("the current docket is tainted") (Ms. Sullivan, counsel for Entergy). Likewise, Entergy acknowledged to the Board that opening a new docket would be a safer course than attempting to proceed on the existing record in Docket 7440. *See* SPC14 (53:8-9) ("Entergy did say that the safer course would be to have a new proceeding."). Deciding that it would be more efficient to open a new docket than to attempt to cleanse the record in Docket 7440, on March 29, 2012, the Board ordered Entergy to file an amended petition. PC724. Entergy filed such a petition, which commenced Docket 7862. Proceedings in Docket 7862 are ongoing, with the rebuttal phase technical hearings scheduled to

take place in the final two weeks of June 2013, and final briefing scheduled to conclude in August 2013.

E. Proceedings In This Court Initiated By The New England Coalition

On December 4, 2012, the New England Coalition ("NEC") filed a complaint pursuant to 30 V.S.A. § 15 asking this Court to enjoin Entergy from operating the VY Station until the Board had issued a decision on Entergy's new application for a CPG in Docket 7862. In support of this complaint, NEC argued that Entergy's operation of the VY Station beyond March 21, 2012 violated the Sale Order as interpreted by the Board's March 19 and November 29 Orders. *In re Investigation into General Order No. 45*, 2013 VT 24, ¶ 1, __ Vt. __, __ A.3d __.[3] NEC's complaint was opposed by both the Department and Entergy, and, after briefing and an oral argument, this Court dismissed NEC's complaint, noting that "the Board [has not] issued, an order directing Entergy to cease operating Vermont Yankee on the grounds advanced by NEC here." *Id.* at ¶ 8.[4]

ARGUMENT

I. THE BOARD DID NOT CLEARLY ERR IN DENYING ENTERGY'S MOTION FOR DECLARATORY RELIEF

A. Standard Of Review

This Court employs "a strong presumption that orders issued by the Public Service Board are valid." *Petition of Vermont Elec. Power Producers, Inc.*, 165 Vt. 282, 288, 683 A.2d 716 (1996); *In re Tariff Filing of Village of Lyndonville Elec. Dept.*, 149 Vt. 660, 660, 543 A.2d 1319

[3] In response to NEC's filing, Entergy again sought injunctive relief in the federal district court, which the district court once again denied, noting "the absence of an order requiring the shut down of the plant." SPC49 (*Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, No. 1:11-cv-99-jgm, 2013 WL 121016, at *3 (D. Vt. Jan. 9, 2013)).

[4] This Court further observed, "Nor is it established that Board enforcement of Condition 8, if applied for, would necessarily be covered by the federal injunction enjoining enforcement of Act 160." *In re Investigation into General Order No. 45*, 2013 VT 24, ¶ 8.

(1988) ("On appeal, the presumption in favor of an order of the Public Service Board (Board) is a strong one. This Court must defer to the Board's findings unless they are clearly erroneous, and the burden of proving the Board's findings and order to be clearly erroneous falls on the appealing party.") (internal citations omitted). "Where the [Board's] findings fairly and reasonably support its conclusions of law, [this Court] will uphold the [Board's] decision." *Petition of Vermont Elec. Power Producers, Inc.*, 165 Vt. at 288.

In addition, because the Board's denial of Entergy's motion for declaratory relief rested on the Board's interpretation of the terms and nature of its own prior orders, this Court must afford the Board's ruling even greater deference. *Id*.; *see also Petition of East Georgia Cogeneration Ltd. Partnership*, 158 Vt. 525, 531, 614 A.2d 799 (1992) ("We begin with a strong presumption that orders issued by the Public Service Board are valid. In reviewing those orders, we give great weight to the Board's interpretations of its own regulations.") (internal citations omitted); *Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation and Enforcement*, 620 F.3d 1227, 1239 (10th Cir. 2010) (courts "owe substantial deference to an agency's interpretation of its own order"); *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 78 (2d Cir. 2009) (an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulations") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *AT&T Corp. v. F.C.C.*, 448 F.3d 426, 431 (D.C. Cir. 2008) ("[A]n agency's interpretation of its own orders and rules is entitled to substantial deference."); *Gutkowski v. U.S. Postal Service*, 505 F.3d 1324, 1328 (Fed. Cir. 2007) (same); *U.S. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 446 (9th Cir. 1971) (an agency's interpretation of its own order may be likened to an agency's interpretation of its own regulations).

Entergy's argument that this Court should review the Board's March 19 Order under a *de novo* standard, raised only in a footnote, is both insufficiently presented and without merit. It is insufficiently presented because arguments raised only in a footnote are deemed waived, *see Wilkins v. Lamoille County Mental Health Services, Inc.*, 2005 VT 121, ¶ 15, 179 Vt. 107, 889 A.2d 245, and it is without merit because, contrary to Entergy's assertion (Br. at 12 n.7), the order does not rest on the Board's interpretation of the text of § 814(b). Rather, it rests on the Board's interpretations of which of its Orders and CPGs fell within the ambit of that statute. For example, the Board concluded that § 814(b) does not apply to the Sale Order because (1) the Sale Order "was the approval of a discrete transaction"; (2) the Sale Order was "an approval for the sellers to sell, and in no way constitutes an approval for the purchasers to operate the plant"; (3) Entergy did not seek modification of the Sale Order by appropriate means; and (4) Entergy's "proposed application of Section 814(b) [to the Sale Order] would effectively render meaningless Condition 8 and Condition 3 [of that order]." PC16-19. Once it reached these conclusions about its own prior actions, the Board did not need to interpret the statute. Rather, it simply applied the plain language of § 814(b) to those conclusions. *See, e.g.*, PC18 (noting that "a discrete transaction" is not "continuing activity"); *id.* (noting that § 814(b) requires application for renewal, and that Entergy had not applied for renewal).

Equally meritless is Entergy's half-hearted suggestion in the same footnote that the Board was bound to apply § 814(b) to the Orders and CPGs in question by principles of judicial estoppel. This argument (1) is inadequately presented, *see Wilkins*, 2005 VT 121, ¶ 15; (2) relies (admittedly) on a principle not established in Vermont law (Br. at 12 n.7); and (3) is inexplicable in light of the multiple, unequivocal statements by Entergy's counsel

acknowledging that representations by the Attorney General to the District Court were explicitly **not** made on behalf of the Board (*supra* pp. 4-5 & n. 2).

B. Entergy's Challenge To The Board's March 19 Order Is Moot

Entergy's challenge to the Board's March 19 Order fails to acknowledge either the nature or the effect of that order, and is moot. "'[A] case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.' An actual controversy must exist at all stages of the case, 'not merely at the time the plaintiff originally filed the complaint.'" *Hunters, Anglers & Trappers Ass'n of Vt., Inc. v. Winooski Valley Park Dist.*, 2006 VT 82, ¶ 15, 181 Vt. 12, 913 A.2d 391 (quoting *Doria v. Univ. of Vt.*, 156 Vt. 114, 117, 589 A.2d 317, 319 (1991)); *see also Chase v. State*, 2008 VT 107, ¶ 11, 184 Vt. 430, 966 A.2d 139 ("In order for this Court to have jurisdiction over an appeal, it must present a live controversy *at all stages of the appeal*, and the parties must have a 'legally cognizable interest in the outcome.'"). Entergy has not presented any facts that would support a conclusion that it has a "legally cognizable interest in the outcome" of this appeal.

As the Board noted, the March 19 Order simply denied Entergy's request for a declaration regarding the applicability of § 814(b) to Entergy's continued operation of and ongoing collection and storage of spent nuclear fuel at the VY Station pending final decision on Entergy's CPG petition. PC27 ("What is before the Board, and what this Order addresses, is Entergy VY's motion that we issue declaratory rulings on how certain provisions of Vermont state law apply to continued operation and SNF storage."). The Board's March 19 Order by its very terms "does not purport nor is [it] intended to require that Entergy VY cease operations at Vermont Yankee." PC27. On the contrary, the Board acknowledged that the District Court's decision in *Entergy v. Shumlin* prohibited it from "enforcing orders that would require cessation

of operations at Vermont Yankee." PC26-27. As Entergy itself recognizes, this Court has already determined that neither the Board's March 19 Order, nor any subsequent Order that the Board has issued, requires Entergy to shut down the VY Station. Br. at 22-23 n. 15; *In re Investigation Into General Order No. 45*, 2013 VT 24, ¶ 8.

Because the Board has not ordered Entergy to shut down the VY Station, Entergy's allegations of hardship—that "the Board's proposed regime of a 'temporary' shutdown of the VY Station" would subject Entergy to "regulatory uncertainty" and "substantial economic hardship," Br. at 21-22—are both inaccurate and irrelevant.[5] Even assuming that a temporary shutdown of the VY Station would result in the undefined hardships that Entergy alleges—a proposition that is by no means undisputed—the Board's March 19 Order does not order a shutdown.

Nor could the March 19 Order result in a shutdown of the VY Station before Entergy's amended CPG application is decided in Docket 7862. The Board expressly noted that it is prohibited by the federal injunction from "enforcing orders that would require cessation of operations at Vermont Yankee" prior to its decision on Entergy's CPG application. PC26-27. If the State's appeal of the district court's injunction is unsuccessful, the injunction will continue to prevent the Board from "enforcing orders that would require cessation of operations at Vermont Yankee" prior to its decision on Entergy's CPG application. PC26-27. If the State's appeal of the federal injunction is successful, Entergy's authorization to operate the VY Station beyond March 21, 2012 will cease pursuant to Acts 74 and 160, rendering irrelevant the Board's decision

[5] These are the only "hardships" that Entergy has alleged on appeal. Entergy explicitly does not argue in this appeal that it has been harmed by the possibility that the Board might "hold the VY Station's operation [after March 21, 2012] against Entergy in deciding Entergy's pending petition for a new CPG." Br. at 22-23 n.15.

concerning which of its orders is subject to § 814(b). In neither scenario, however, is Entergy at risk of being required to shut down the VY Station as a result of the Board's March 19 Order.

Because no ruling by this Court on Entergy's challenge to the Board's March 19 Order could result in the only harm Entergy alleges—immediate shutdown of the VY Station—the challenge is moot. *Montgomery v. 232511 Investments, Ltd.*, 2012 VT 31, ¶ 8, 191 Vt. 624, 49 A.3d 143 (claim that the trial court had erred in interpreting certain contractual provisions was moot because the trial court had also incorporated into its order a settlement that voided the relevant contractual provisions, "[t]hus any ruling by this Court can have no effect on the viability of the disputed [provisions] themselves"). In effect, Entergy is asking this Court to issue an advisory opinion. This Court lacks the constitutional authority to do so. *See Chase*, 2008 VT 107, ¶ 13.

C. The Board's Interpretation Of Its Own Prior Orders Was Not Clearly Erroneous

Even if Entergy had a legally cognizable interest in the outcome of this appeal, the Board did not err in concluding that § 814(b) applies to the Sale CPG, but not to the Sale Order, the Dry Cask Storage Order, and the Dry Cask Storage CPG.[6]

Section 814(b) states:

> When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

[6] Before the Board issued its March 19 Order interpreting its previous Orders and CPGs, the Department had not opposed the application of § 814(b) to the CPGs and Orders in question—and, on the same basis, had argued that Entergy was also required to abide by its other commitments and the obligations that it had willingly agreed to in connection with obtaining Board approval in the proceedings relating to those CPGs and Orders. PC10-11.

3 V.S.A. § 814(b). For purposes of § 814(b), "'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." 3 V.S.A. § 801(b)(3).

Contrary to Entergy's position, the Board did not conclude that § 814(b) had been expressly or impliedly overruled by the Orders in the Sale Docket and the Dry Cask Storage Docket—the Board ruled that those orders are not subject to § 814(b) based on its determination that the Orders are not "licenses, certificates, …." within the meaning of § 801(b)(3) and also did not address activities of a continuing nature within the meaning of § 814(b).[7]

As to the Sale Order, the Board concluded that rather than a "permit . . . approval . . . or similar form of permission required by law," § 801(b)(3), the Sale Order was an authorization for the former owners of the VY Station to sell the plant to Entergy and, as a result, was the approval of a discrete transaction rather than an "activity of a continuing nature," as contemplated by § 814(b). PC17-18; *cf. In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 2009 VT 124, ¶ 8 n.4, 187 Vt. 142, 989 A.2d 563 (applying § 814(b) to Entergy's permit for ongoing discharge of heated effluent); *In re J.H.*, 2008 VT 97, ¶ 14, 184 Vt. 293, 958 A.2d 700 (applying § 814(b) to license to teach); SPC38 (*Eastcoast Home Loans, Inc. v. Banking, Ins., Securities and Health Care Authority*, No. 2002-011, 2002 WL 34423553, at *2 (Vt. April 1, 2002)) (applying § 814(b) to license to lend mortgages); *In re Judy Ann's Inc.*, 143 Vt. 228, 232, 464 A.2d 752 (1983) (applying § 814(b) to license to sell liquor). The Board also noted that, even if the Sale Order were a "permit . . . approval . . . or similar form of permission" relating to an

[7] While the Board did not conclude—nor has the Department asserted—that Entergy, having repeatedly agreed to the language in the relevant Orders, CPG, and MOU that could only be read as giving up any rights conferred under § 814(b), is estopped from taking the position that it advances here, this Court is free to draw that conclusion. Entergy has not identified any legal doctrine that would be inconsistent with its decision to trade whatever rights § 814(b) might have conveyed for the favorable Board decision that it sought at that time.

"activity of a continuing nature," the so-called timely renewal protection of § 814(b) would only apply if Entergy had filed for a renewal or modification of that "permit" from the Sale Order, which Entergy had not (and has not) done. PC18; *cf. In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 2009 VT 124, ¶ 8 n.4 ("Entergy filed its application for a new permit."); *In re J.H.*, 2008 VT 97, ¶ 14 ("*Because [licensee] had timely applied to renew her license*, she was also entitled to the benefit of 3 V.S.A. § 814(b)."") (emphasis added). Finally, the Board noted (further explaining why § 814(b) does not apply to the Sale Order) that application of this timely renewal provision to the Sale Order would render meaningless the conditions codifying Entergy's promise to cease operation as of March 21, 2012 unless it received a new CPG. PC18-19. The Board's interpretation of its Order—which it issued and is charged with enforcing—is afforded "great weight" by this Court. *See Petition of Vermont Elec. Power Producers, Inc.*, 165 Vt. at 288; *see also Petition of East Georgia Cogeneration Ltd. Partnership*, 158 Vt. at 531-31; *Gutkowski*, 505 F.3d at 1328; *AT&T Corp.*, 448 F.3d at 431; *Southern Utah Wilderness Alliance*, 620 F.3d at 1239. Entergy's arguments to the contrary are without merit, and do not establish any error, let alone clear error.

As to the Dry Cask Storage Order and CPG, the Board concluded that § 814(b) does not apply because the Dry Cask Storage Order and CPG, which limit the use of the spent nuclear fuel storage facility at the VY Station to store SNF generated before March 21, 2012, authorized a continuing activity—storage of spent nuclear fuel generated before March 21, 2012—that had not expired, and therefore could not be subject to § 814(b)'s timely renewal provisions. PC20; *cf. In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 2009 VT 124, ¶ 8 n.4 ("Entergy's permit expired in 2006."); *In re J.H.*, 2008 VT 97, ¶ 5 (noting that license had expired). The Board also concluded that, because the Dry Cask Storage Order and CPG limit the

amount of spent nuclear fuel that can be stored at the VY Station, application of § 814(b) to the Dry Cask Storage Order and CPG could only serve to maintain that limitation, while Entergy's CPG petition seeks to expand the scope of those orders to allow for storage of additional spent nuclear fuel. PC20; *cf. In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 2009 VT 124, ¶ 8 and n.4 (§ 814(b) maintained Entergy's permit to discharge heated effluent where Entergy only continued to discharge heated effluent); *In re J.H.*, 2008 VT 97, ¶¶ 5-7, 14 (§ 814(b) applied where licensee only sought to maintain same activity). Nowhere does Entergy address or explain how § 814(b)—which is intended to do no more than maintain the status quo—could apply to so substantially modify the terms of these orders.[8] Entergy has failed to not meet its burden of demonstrating that the Board's different conclusion is clearly erroneous.

II. RULE 60(b) RELIEF IS NOT WARRANTED

Entergy argues in the alternative that, if this Court does not reverse the Board's ruling concerning the applicability of § 814(b), it should reverse the Board's denial of Entergy's Rule 60(b) motion. The specific provision of Rule 60(b) that Entergy raised before the Board, and that it raises before this Court, Rule 60(b)(6), permits a court to "relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment." Vt. R. Civ. P. 60(b). This Court has previously held that "interests of finality necessarily limit when relief is available" under this Rule. *McCleery v. Wally's World, Inc.*, 2007 VT 140, ¶ 10, 183 Vt. 549, 945 A.2d 841 (internal citation omitted).

[8] As Entergy notes, the Board also cited 10 V.S.A. § 6522(c)(2) as precluding it from issuing a CPG to authorize storage of additional spent nuclear fuel at the VY Station, a Vermont statute that Entergy had failed to include in its prayer for permanent injunctive relief from the district court. On the same date as the Board's March 19 Order, the district court issued an injunction pending appeal preventing application of 10 V.S.A. § 6522(c)(2) to require Entergy to cease operations at the VY Station. As noted above, however, the Board's conclusion that § 814(b) did not apply to the Dry Cask Storage Order or CPG was based on multiple factors and not limited to this statutory provision.

More specifically, this Court has held that Rule 60(b)(6) "is intended to accomplish justice *in extraordinary situations*." *Id.* (emphasis added) (internal citation omitted).

Entergy failed to persuade the Board that this was such an "extraordinary situation," and fails to demonstrate in this Court that the Board abused its discretion in denying Entergy relief.[9] On the contrary, because Entergy failed to show that it was facing any unforeseen injustice—or, indeed, any injustice at all—the Board's denial of its Rule 60(b)(6) motion was entirely proper, and certainly not an abuse of discretion.

A. The Board Did Not Commit An Error Of Law

Entergy is incorrect in asserting that the Board committed an error of law by "effectively" viewing its Rule 60(b) motion "as seeking reconsideration of the March 19 Order." *See* Br. at 26. Entergy provides no support for this allegation. Nor could it. According to Entergy, it "sought Rule 60(b) relief because the [March 19] Order was unforeseeable." Br. at 27. To demonstrate that the March 19 Order was not unforeseeable, the Board needed to discuss the March 19 Order, including the reasoning therein. Nowhere in its November 29 Order did the Board discuss the March 19 Order for any reason other than to show that its reasoning and result was foreseeable. *See* PC39-40 ("In Docket 7440, the Board concluded that Section 814(b) did not apply to Condition 8 of the Docket 6545 Order for three reasons. . . . . Entergy VY's motion fails to explain how the Board's ruling on any of these three bases was unforeseeable."); PC47 ("The Board found three reasons that Section 814(b) did not operate to extend the conditions [in the Dry Fuel Storage Order and CPG]. . . . [N]owhere in Entergy VY's motion does it demonstrate why anything in the Board's March 19 Order related to the DFS Order and CPG

[9] Entergy acknowledges that this Court reviews decisions under Rule 60(b)(6) for abuse of discretion. Br. at 23 (citing *Pierce v. Vaughan*, 2012 VT 5, ¶ 9, 191 Vt. 607, 44 A.3d 758).

should not have been reasonably foreseeable."). Even when the Board noted facts in its November 29 Order that it had not expressly relied on in its March 19 Order, it did so to demonstrate the foreseeability of the March 19 Order, and not, as Entergy asserts, to "further . . . justify" that Order. *See* Br. at 26. For example, the Board raised the fact that its "retention of authority to approve operation beyond March 21, 2012 was critical to [its] approval of the sale [of the VY Station to Entergy]," Br. at 26, only in order to "show[] that Entergy VY should have anticipated the Board's rulings and, in the case of the Sale Order, actively sought the deadline whose application it now claims to be surprised about." PC40-41. There is simply no evidence, aside from Entergy's bald assertion, that the Board's denial of Entergy's Rule 60(b) motion sought to bolster its March 19 Order, and therefore no support for Entergy's assertion that the Board committed an error of law in denying that motion.

B. Entergy Has Not Suffered, And Will Not Suffer, Any Hardship Or Injustice

"[R]elief from judgment under V.R.C.P. 60(b)(6) is, by its very nature, invoked to prevent *hardship or injustice*." *Pierce*, 2012 VT 5, ¶ 9 (emphasis added) (internal citation omitted). Contrary to Entergy's assertion, there is no hardship or injustice to prevent in this case. According to Entergy, "if the March 19 Order is upheld and the November 29 Order denying Rule 60(b) relief is also upheld, Entergy will suffer certain hardship from both regulatory uncertainty and economic harm during any 'temporary' shutdown period." Br. at 26. However, as discussed above, *see supra* p. 12, even assuming that a "temporary shutdown period" would cause Entergy the hardships it alleges, the Board has ordered no such shutdown, nor has it indicated that it will order a shutdown of the VY Station before Entergy's pending petition for a CPG in Docket 7862 is decided. Nor can Entergy seriously suggest that it will suffer hardship from uncertainty in its business decision-making unless this Court rules that state law will permit

it to operate the VY Station until it receives a final ruling on its CPG petition. Until Entergy receives a final ruling on its CPG in Docket 7862, it will not know whether it will be able to operate the VY Station in the long run. No order by this Court concerning the applicability or non-applicability of § 814(b) can change that. *See* SPC41 (*Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, No. 1:11-cv-99-jgm, 2011 WL 2811317, at *3 (D. Vt. July 18, 2011)) (order denying preliminary injunction) ("Only a final decision on the merits could actually resolve or even ameliorate the uncertainties and dilemmas Entergy faces in making investment decisions . . . ."). Therefore, Entergy was not entitled to Rule 60(b)(6) relief, and the Board did not abuse its substantial discretion in denying Entergy's motion. *See Olde & Co., Inc. v. Boudreau*, 150 Vt. 321, 324, 552 A.2d 793 (1988) (affirming trial court's denial of Rule 60(b) motion where movant "related neither hardship nor injustice in its motion below").

C. There Is No Unforeseen Injustice That Warrants 60(b) Relief

Nor is Entergy entitled to Rule 60(b)(6) relief on the grounds that such relief is necessary to "remedy unforeseen injustices not addressed by the other subsections of Rule 60." Br. at 24 (quoting *Rastelli Bros. v. Netherlands Ins. Co.*, 68 F. Supp. 2d 451, 453 (D.N.J. 1999)). In advocating for relief under this standard, Entergy focuses entirely on whether the March 19 Order and the Board's failure to render a decision on Entergy's petition before March 21, 2012 were *foreseeable*. But to prevail under Rule 60(b)(6) Entergy must demonstrate, not just that the orders are unforeseeable, but also that they have worked some *injustice*. *Rastelli Bros.*, 68 F. Supp. 2d at 453. And as discussed *supra* pp. 18-19, Entergy cannot demonstrate any such injustice.

Rule 60(b)(6) is not intended to permit parties to rewrite history by changing every order with which they become disenchanted due to unforeseen intervening events. *Olde & Co.*, 150

Vt. at 324 ("Plaintiff's apparent belief that Rule 60(b)(6) offers an open invitation to reconsider matters concluded at trial, subject only to the court's discretion, is misplaced."). If parties were permitted to use Rule 60(b)(6) as Entergy seeks to here, Rule 60(b)(6) would no longer be an "extraordinary" remedy, but instead would undermine the "interests of finality" that currently limit the rule's applicability. *See McCleery*, 2007 VT 140, ¶ 10.

Entergy has failed to identify any injustice in this case, unforeseen or otherwise. Aside from a single circular and conclusory statement (Br. at 26 ("The extraordinary circumstances present here warrant Rule 60(b) relief to prevent a grave injustice.")), Entergy offers no example of what injustice it will suffer if the Board's denial of its Rule 60(b)(6) motion is upheld. Entergy again vaguely contends that it will suffer "hardships" if forced to shut down while its CPG petition is pending. As discussed *supra* (pp. 12, 18-19), however, because the Board has never ordered Entergy to shut down the VY Station, those hardships are hypothetical at most. Because Entergy has failed to identify any unforeseen injustices that the Board or this Court could remedy, the Board did not abuse its discretion in denying Entergy's Rule 60(b)(6) motion. *See In re Town Highway No. 20*, 2012 VT 17, ¶¶ 79-80, 191 Vt. 231, 45 A.3d 54 (affirming denial of Rule 60(b) motion and noting that movant "has failed to show that any cognizable hardship will be visited on it as a result of the trial court's decision").

CONCLUSION

This Court should dismiss Entergy's appeal as moot or, in the alternative, affirm the Board's March 19 Order and the Board's November 29 Order.

Respectfully submitted,

Geoffrey Commons
Director for Public Advocacy
Aaron Kisicki
VERMONT DEPARTMENT OF PUBLIC SERVICE
112 State Street
Montpelier, VT 05620
Tel: (802) 828-4010
geoff.commons@state.vt.us
aaron.kisicki@state.vt.us

Robert C. Kirsch (admitted *pro hac vice*)
Felicia H. Ellsworth (admitted *pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6000
robert.kirsch@wilmerhale.com
felicia.ellsworth@wilmerhale.com

May 20, 2013