IN THE SUPREME COURT
OF THE
STATE OF VERMONT

SUPREME COURT DOCKET NUMBER 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

APPEALED FROM: PUBLIC SERVICE BOARD
DOCKET NO. 7440

BRIEF OF APPELLEES, CONSERVATION LAW FOUNDATION, INC., NEW ENGLAND COALITION, INC., AND VERMONT PUBLIC INTEREST RESEARCH GROUP

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STATEMENT OF THE ISSUES

1. Whether the Board correctly determined that 3 V.S.A. § 814(b) fails to allow Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Operations, Inc. (Entergy) to operate the Vermont Yankee Nuclear Power Station (Vermont Yankee) for purposes other than decommissioning after March 21, 2012.

2. Whether the Board abused its discretion in denying Entergy's request to amend prior orders to allow continued operation.

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Conservation Law Foundation (CLF), New England Coalition (NEC) and Vermont Public Interest Research Group (VPIRG) Appellees / Intervenors in the this case submit this brief in support of affirmance of the Public Service Board's (Board) March 19, 2012 and November 29, 2012 Orders in Public Service Board Docket Number 7440.

STATEMENT OF THE CASE

By this appeal, Entergy seeks to have this Court condone Entergy's failure to live up to its prior commitments and legal obligations. This case concerns the continued operation of the Vermont Yankee facility beyond the expiration of a certificate of public good (CPG) granted in 2002 and in contravention of the specific terms of agreements made by Entergy, and conditions imposed by the Public Service Board on the authorization of the sale and operation of Vermont Yankee.

In 2002, Entergy purchased the Vermont Yankee facility. That purchase followed a request by Entergy to the Board for a certificate of public good (CPG) allowing Entergy to operate the facility. 30 V.S.A. §§ 231, 248. The CPG granted by the Board in 2002, and which Entergy itself argues remains valid at this time, includes a provision that Entergy is "**authorized to own and operate Vermont Yankee beyond March 21, 2012, solely for purposes of decommissioning.**" (emphasis in original)(PC364). The Board's Order approving the sale of the plant to Entergy similarly includes a condition that Entergy not operate the plant after 2012, when its certificate of public good expires, without first obtaining regulatory approval from the Board. (PC332). The Public Service Board determined that this provision is a "condition, separate from the CPG, that expressly prohibits operation of Vermont Yankee after March 21, 2012." (PC16). The condition pertains to the sale of Vermont Yankee, and not the approval of

Entergy's operation of the plant. (PC16). Because this "prohibition on operation past March 21, 2012, without a new or renewed CPG is a condition of the approval of a discrete transaction – the sale of Vermont Yankee – and not of a continuing activity, 3 V.S.A. § 814(b) does not serve to excuse compliance with that condition." (PC18).

The Board further clarified that in approving the sale of the plant to Entergy, "the Board relied on [the] commitment by Entergy VY that it would not continue to operate the facility if it had not obtained a new or renewed CPG by March 21, 2012." (PC18). By this action, Entergy asks the Court's permission to renege on that deal.

In 2006, the Vermont Legislature passed a law requiring approval of the Legislature before the Public Service Board could issue a new CPG. 30 V.S.A. § 248(e)(2). In 2008 Entergy filed a request for a new certificate of public good from the Board to allow Entergy to operate the Vermont Yankee nuclear facility for an additional twenty years. Hearings concluded in June 2009 and briefs were submitted in August 2009.

Following a decision by the United States District Court in *Entergy Nuclear Vt. Yankee v. Shumlin*, 838 F. Supp. 2d 183 (D. Vt. 2012), which decision is now on appeal before the Second Circuit Court of Appeals, the Vermont Public Service Board declined to grant a certificate of public good to Entergy based on the existing stale record and denied Entergy's request for a declaratory ruling authorizing continued operation after March 21, 2012. (PC716-25).

In April 2012 Entergy filed a new request for a certificate of public good which is now pending before the Board. (PC726-32). The Board closed the docket in the previous case (PC733-37) and Entergy has now appealed the Board's determination in that docket.

STANDARD OF REVIEW

A. Presumption of Validity and Substantial Deference afforded to the Board's Decisions

The Board's decisions regarding the requirements of the CPG it issued and its prior orders are presumed valid and accorded substantial deference on appeal. As this Court has stated:

> On appeal, we presume the reasonableness and validity of a determination made within an administrative agency's expertise, and we require a clear and convincing showing to overcome the presumption. *In re Capital Inv., Inc.,* 150 Vt. 478, 480, 554 A.2d 662, 664 (1988). We will uphold the Board's factual findings unless they are clearly erroneous, and we will not overturn the Board's decision if there is any reasonable basis to support its actions. *Id.* at 480–81, 554 A.2d at 664.

In re Odessa Corp., 2006 VT 35 ¶ 7.

A presumption of validity and substantial deference has long been recognized regarding review of Public Service Board decisions. *Petition of Vermont Elec. Power Producers, Inc.,* 165 Vt. 282, 288 (1996) ("In reviewing a PSB order, we employ 'a strong presumption that orders issued by the Public Service Board are valid.'")(quoting *East Georgia Cogeneration Ltd. Partnership,* 158 Vt. 525, 531, 614 A.2d 799, 803 (1992)). As recognized in a prior appeal regarding the Vermont Yankee facility, the deference afforded when the Board is interpreting a statute within its particular expertise requires a "compelling indication of error" for reversal. *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 2003 VT 53, ¶ 5 (citing *In re Verizon New England Inc.,* 173 Vt. 327, 334-35, 795 A.2d 1196, 1202 (2002)). The Board's decisions here are in a case requesting a new certificate of public good pursuant to 30 V.S.A. § 231 and § 248, statues regarding electric generation facilities and companies. These are statutes within the Board's particular expertise and substantial deference is due the Board's interpretation

of those statutes and their requirements.[1] *Vermont Yankee,* 2003 VT 53, ¶ 5*; Vermont Elec. Power,* 165 Vt. at 288.

B. Abuse of Discretion Standard for Rule 60(b) Determinations

An abuse of discretion must be shown to overturn the Board's denial of Entergy's Rule 60(b) request. "A Rule 60(b) motion is addressed to the discretion of the trial court and will not be disturbed on appeal in the absence of abuse of discretion." *Leiter v. Pfundston*, 150 Vt. 593, 596 (1988) (citing *Nobel/Sysco Food Services, Inc. v. Giebel,* 148 Vt. 408, 410, 533 A.2d 1195, 1196 (1987); *Green Mountain Bank v. Magic Mountain Corp.,* 148 Vt. 247, 247-48, 531 A.2d 604, 605 (1987)).

ARGUMENT

The Vermont Public Service Board correctly determined that continued operation of Vermont Yankee pursuant to the expired certificate of public good (CPG) appropriately includes all the conditions of that expired certificate and the Board orders authorizing the sale and operation of Vermont Yankee. The Board also correctly determined that 3 V.S.A. § 814(b) is inapplicable to the condition contained in the Order approving the sale of Vermont Yankee to Entergy that required a new or amended CPG for operations after March 21, 2012. Entergy also waived this claim by failing to preserve it.

The Board appropriately exercised its discretion in refusing to amend portions of its previous orders. These orders were issued years ago, were based on agreements Entergy made, and were not appealed by Entergy. The Board appropriately refused to relieve Entergy of its

[1] Contrary to Entergy's claims in footnote 7 of its Brief, *de novo* review is inappropriate for review of an administrative decision "unless the statute expressly so provides." *Town of Victory v. State*, 2004 VT 110, ¶ 16 (citing *Dep't of Taxes v. Tri-State Indus. Laundries, Inc.,* 138 Vt. 292, 295, 415 A.2d 216, 219 (1980)).

obligations that arose from Entergy's tactical decisions. The Court should affirm the Board's orders and reject Entergy's attempts to avoid its obligations.

I. The Board correctly determined that 3 V.S.A. § 814(b) fails to allow Entergy to operate Vermont Yankee after March 21, 2012.

A. Entergy's Certificate of Public Good does not allow plant operation after March 21, 2012.

The Board correctly rejected Entergy's expansive and unsupported claims that 3 V.S.A. § 814(b) allows continued operation of Vermont Yankee in violation of the Board's Final Order in Docket No. 6545, approving the sale of Vermont Yankee to Entergy, and Entergy's expired certificate of public good (CPG) for operation of the plant. Title 3 V.S.A. § 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.

3 V.S.A. § 814(b). The only effect of this statute is to continue the existing license or approval until a new license or approval is granted. *Id.*

Rather than comply with the conditions of its CPG and Board orders that were not appealed, Entergy instead seeks to ignore Vermont law and expand the application of this simple statute to sanction continued operation regardless of the current license requirements and prior commitments that were incorporated into the Board's Order approving the sale of the plant to Entergy.

By Order dated July 11, 2002, the Board amended Entergy's CPG to state: "**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**." (PC364)(emphasis in original). This provision was not challenged by

Entergy to this Court[2], and was not the subject of Entergy's recent claims before the District Court regarding preemption[3]. Any challenge to this provision in Entergy's CPG at this time is barred by the doctrine of claim preclusion. *See i.e. Iannarone v. Limoggio*, 2011 VT 91, ¶ 16.

The Board's July 11, 2002 order further states:

> 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 [sic] 13, 2002, Order. A CPG is not an a 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. 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. If it accepts the CPG, it must abide by all its terms.

(PC373) (footnotes omitted).

The continuation of a license provided for in 3 V.S.A. § 814(b) merely continues the existing approval, including the existing conditions and prohibitions. The provision added to Entergy's CPG on July 11, 2002, limiting Entergy's ability to own and operate the plant after March 21, 2012 only for purposes of decommissioning, is not a CPG condition that can be dismissed or ignored by Entergy. Entergy offers no citation for or explanation justifying changing or eliminating the conditions of the expired CPG. Instead, Entergy ignores the CPG conditions and equates the continuation of an expired CGP pursuant to Section 814(b) with approval to operate absent any conditions that would restrict operation. This is not what the law says and is contrary to any reasonable interpretation of the authority granted by the CPG.

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[2] *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 2003 VT 53.
[3] *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183 (D. Vt. 2012).

B. The Board's rulings are consistent with applicable precedent and the District Court's injunction.

The effect of the United States District Court's injunction in *Entergy Nuclear Vt. Yankee v. Shumlin*, 838 F. Supp. 2d 183 (D. Vt. 2012) does not eliminate Entergy's obligations to comply with the conditions of its CPG and Board orders. The United States District Court's injunction was clear:

> Mindful that relief must be "narrowly tailored to fit specific legal violations," *City of N.Y. v. Mickalis Pawn Shop, LLC,* 645 F.3d 114, 144 (2d Cir.2011), the Court orders, for the reasons described in this opinion, *see* Fed.R.Civ.P. 65(d), the following permanent injunctive relief:
>
> 1. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing Act 160 by 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).

The injunction, which is currently under appeal, bars enforcement or other action to shut down Vermont Yankee because of the failure to obtain legislative approval. *Id.* The United States District Court's ruling limited only the Vermont Legislature's role in approving future operations. *Id.* at 190. The Court specifically left intact the Board's authority as it was in 2008, to issue and condition a CPG on any grounds that are not preempted. *Id.* (the 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, to dictate how a state should choose to allocate its power among the branches of its government, or pass judgment on its choices").

Since the injunction is limited to stopping enforcement for failure to obtain legislative approval, the existing conditions discussed above remain in effect. These conditions were imposed by the Board before the legislative review was added to Vermont law. Entergy cannot now expand the injunction to cover all actions and relieve it of any obligations to comply with conditions that were in effect before the legislative review provisions were added to Vermont law. See *Id.* at 243 (injunction limited to barring enforcement of legislative approval).

The Board itself imposed the conditions on the CPG and in its Orders. They are part of Entergy's authority to operate. "[F]or Entergy to operate lawfully it must comply with all of the terms of its CPG …." (PC362). There is nothing that states these conditions somehow evaporate or cease to exist if the CPG is continued pending consideration of a new approval.

By way of analogy, Entergy's operation of Vermont Yankee with CPG conditions is like someone who has a driver's license that conditions operating a motor vehicle on wearing eyeglasses to correct vision problems. There is no reason that condition evaporates if a driver applies for a new license but has not received it by the time the current license expires. That condition remains in effect. Similarly, all the conditions that are part of Entergy's CPG remain in effect. After March 21, 2012, Entergy is not relieved of its obligations to comply with the precise terms and conditions of its CPG. The Court should affirm the Board's rejection of Entergy's claim that on 3 V.S.A. § 814(b) allows continued operation absent compliance with the express conditions of the certificate of public good.

Further, the Board's orders are consistent with *Pan-Atlantic S.S. Corp. v. Atl. Coast Line R.R. Co.,* 353 U.S. 436 (1957), since the expired permit is continuing in effect and providing a "harmonious" reading of the timely renewal provision with the Board's orders. *Id.* at 440. Unlike the situation in *Pan-Atlantic,* the Board expressly recognized the continued validity of the

expired CPG pending a new decision. The Board's orders continue the effect of the expired CPG with the conditions they impose and give full effect to 3 V.S.A. § 814(b) where it is applicable. Entergy's proposed interpretation would have only portions of the CPG having continuing effect. Entergy cites no authority that a timely-renewal provision allows for only those portions that a Petitioner wishes to comply with to continue in effect while the other portions are eliminated. The Board's orders give full effect to 3 V.S.A. § 814(b) and should be affirmed.

C. 3 V.S.A. § 814(b) does not apply to the Board condition of the sale of Vermont Yankee to Entergy requiring a new or amended CPG for plant operations after March 21, 2102.

The Board's Order in Docket No. 6545, in which the Board approved the sale of the plant to Entergy, includes the following condition ("Condition 8"):

> 8. Absent **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.

(PC 332)(emphasis added).

The Board ruled that this is a "condition, separate from the CPG, that expressly prohibits operation of Vermont Yankee after March 21, 2012," and pertains to "the Board's [30 V.S.A.] Section 109 approval of the sale of Vermont Yankee… and not the approval of a continuing activity (which is, instead, addressed by the Docket 6545 CPG)." (PC16). The Board determined that because this "prohibition on operation past March 21, 2012, without a new or renewed CPG is a condition of the approval of a discrete transaction – the sale of Vermont Yankee – and not of a continuing activity, 3 V.S.A. § 814(b) does not serve to excuse compliance with that condition." (PC18). The Board's analysis is a sound interpretation of the meaning of the Board's order and the exercise if the Board's authority regulating the sale of a generation facility. This

Court should give deference to its determination. *In re Professional Nurses Service, Inc.,* 164 Vt. 529, 532 (1996) ("[A]bsent a clear and convincing showing to the contrary, decisions made within the expertise of an administrative agencies are presumed to be correct, valid, and reasonable.").[4]

The Board further explained that it "relied on [the] commitment by Entergy VY that it would not continue to operate the facility if it had not obtained a new or renewed CPG by March 21, 2012," and it was this commitment that allowed for the approval of the sale of the plant to Entergy. (PC18). Entergy's argument that this commitment should now be ignored is without merit, and would undermine the process by which the Board balances the public good when approving such sales, by allowing a party to forego its commitments once they become unfavorable. Entergy made commitments that allowed it to purchase the plant, and those commitments should be given the full force and effect that the Board intended when it approved the sale.

Contrary to Entergy's claims, the Board's decisions are not an administrative override of 3 V.S.A. § 814(b). The Board's orders are consistent with 3 V.S.A. § 814(b) and do not limit the application of the statute. The Board's decisions expressly recognized the application of 3 V.S.A. § 814(b) to continue the effect of the expired CPG until a decision is made on the new request; however, the Board accurately determined that Section 814(b) does not apply to the condition of the 6545 Order requiring a new or amended CPG prior to March 21, 2012 for continued operation of the plant. (PC 15-16). In fact, the Board made it clear that it is "difficult to understand how Entergy VY could reach any conclusion but that Condition 8 was a condition of

[4] Even if this Court determines that lesser deference should be afforded the Board's decision as an interpretation of the Vermont Administrative Procedures Act rather than an interpretation of a statute and orders within the Board's expertise, the Board's conclusions are fairly and reasonably supported by the facts and deference is still accorded to the Board's methodology. *Gasoline Marketers of Vt., Inc. v. Agency of Natural Resources,* 169 Vt. 504, 510 (1999).

the sale of Vermont Yankee, which was a discrete transaction (unlike the continuing activity to which Section 814(b) applies)." (PC46-47). The Board's decision was sound, and should be upheld.

D. Entergy waived its claim that 814(b) has any effect on the sale order

Entergy failed to raise the claim that 814(b) has an effect on the operation of the conditions in the Board's Order approving the sale of Vermont Yankee to Entergy and cannot raise them now for the first time on appeal. *In re Denio*, 158 Vt. 230, 236 (1992) (failure to raise claim below forecloses consideration by Vermont Supreme Court); *City of S. Burlington v. Dep't of Corr.*, 171 Vt. 587, 591 (2000)(failure to appeal forecloses collateral attack). V.R.A.P. 28(a)(4) requires that each argument in an Appellant's Brief "shall contain the issues presented" and "how the issues were preserved," as well as citations to "the parts of the record relied on." Entergy's Brief fails to state how this issue was preserved, and fails to cite to any part of the record where it was preserved.

This claim is not included in Entergy's request for a declaratory ruling. (PC9-10, 16). Not only did Entergy fail to make this argument, the Board explicitly ruled that Entergy failed to provide *any* argument why 3 V.S.A. § 814(b) would apply to a sale order under 30 V.S.A. § 109. (PC16 n. 38). The Board invited Entergy to brief this question, and Entergy chose not to. To the extent Entergy raised this issue, it did so only in a motion in Board docket 6545. (PC30-31). Entergy has not filed an appeal in Docket 6545 and expressly did not ask the Board to reconsider its March 19, 2012 ruling in its later request. (Appellants' Brief at 27).

By refraining from responding to the Board's request, and then articulating its disagreement with the Board's ruling only in a pleading filed in a different docket, and then on appeal arguing that the Board should have accepted the position that Entergy never raised in the

first case, Entergy waived its objection. *In re Burlington Electric Department*, 141 Vt. 540, 546-547 (1982) (City of Winooski waived claim that Public Service Board acted without a quorum. City remained silent until the end of the proceedings instead of objecting at the time the issue arose.).

II. The Board did not abuse its discretion in denying Entergy's request to amend prior orders to allow continued operation.

The Board appropriately denied Entergy's request for relief from judgment pursuant to V.R.C.P. 60(b). The Board did not abuse its discretion in denying Entergy's request. Entergy failed to demonstrate it was entitled to any relief. Entergy suffers no harm and presents no equitable claim for relief.

A. Entergy has not demonstrated an abuse of discretion

The Board did not abuse its discretion in denying Entergy's request. This Court has long held that a V.R.C.P. 60(b) is "addressed to the discretion of the trial court and is not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abused." *Zinn v. Tobin Packing Co., Inc.*, 140 Vt. 410, 414 (1981) (citing *Waitt v. Waitt*, 137 Vt. 374, 375, 406 A.2d 395, 396 (1979); *Kotz v. Kotz*, 134 Vt. 36, 40, 349 A.2d 882, 885 (1975)). Entergy has failed to show any abuse of discretion in refusing to amend prior Board orders.

B. The relief requested is not available pursuant to Rule 60(b)

Entergy is not entitled to relief pursuant to V.R.C.P. 60(b) simply to alter portions of favorable decisions from years past. Entergy sought and obtained permission from the Board to operate Vermont Yankee and store spent fuel at the site. (PC330-

33). It voluntarily agreed to conditions imposing obligations on Entergy and on which the Board relied to grant the relief Entergy sought. (PC373). Years later, Entergy is now unhappy with its tactical decisions.

As a general rule, 60(b) "does not operate to protect a party from tactical decisions which in retrospect may seem ill advised." *Okemo Mountain, Inc. v. Okemo Trailside Condos., Inc.,* 139 Vt. 433, 436 (1981) (referring to Rule 60(b)(1) which requires relief be sought within one year of judgment). Similarly, Rule 60(b) does not provide relief from "the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise." *Fed.'s Inc. v. Edmonton Inv. Co.,* 555 F.2d 577, 583 (6th Cir. 1977). Rule 60(b) "may not be used to relieve a party from free, calculated, and deliberate choices he has made." *Mathieu Enterprises, Inc. v. Patsy's Companies*, 2009 VT 69, ¶ 17 (quoting *Sandgate Sch. Dist. v. Cate*, 2005 VT 88, ¶ 7); *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.,* 149 Vt. 365, 368 (1988); *Estate of Emilo v. St. Pierre,* 146 Vt. 421, 423-24 (1985).

Where a party voluntarily accepts a previous decision, its burden in obtaining relief under Rule 60 is "even more formidable than if it had litigated the claim and lost." *Schultz v. Commerce First Fin.,* 24 F.3d 1023, 1024 (8th Cir. 1994) (quoting *United States v. Fort Smith,* 760 F.2d 231, 234 (8th Cir.1985). A voluntary agreement cannot be avoided "simply because the agreement ultimately proves to be disadvantageous." *Worthy v. McKesson*, 756 F. 2d 1370, 1373 (8th Cir. 1985).

The Board's orders and the CPG are based on and give effect to agreements Entergy voluntarily made. (PC303, 329-30, 372-73). Relief pursuant to Rule 60 is not available to alter the Board's orders in a manner that simply conforms to what Entergy now wants. Relief pursuant to Rule 60(b) is relief from judgment and is not available simply to modify or amend prior

orders. Compare V.R.C.P 59 (“amendment of judgments”) with V.R.C.P. 60 (“relief from judgment”). The relief Entergy requests is not available pursuant to V.R.C.P. 60(b).

C. The Board’s actions were forseeable

The Board correctly exercised its discretion in denying Entergy’s request because the Board’s orders were the forseeable outcomes of Entergy’s prior agreements. At its core, the Board’s order simply confirmed the terms that Entergy previously agreed to: that Entergy would not operate Vermont Yankee after March 21, 2012 unless application for renewal is made and granted. (PC41). As recognized by the Board, Entergy should not be surprised that the Board would expect Entergy to meet the express terms of the Board’s orders and Entergy’s prior agreements. (PC40-48). The approval of the sale to Entergy in 2002 hinged on the terms of the memorandum of understanding that expressly precluded operation after March 21, 2012. (PC182, 329-30, 372-73). This was a term Entergy was well aware of and encouraged the Board to rely on in granting approval.

D. Entergy’s actions precluded relief

Entergy’s own actions precluded relief under V.R.C.P. 60(b). “To justify relief under subsection (6), a party must show ‘extraordinary circumstances’ suggesting that the party is faultless in the delay.” *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 393 (1993)(quoting *Liljeberg v. Health Svcs. Acquisition Corp.,* 486 U.S. 847, 863 (1988)). Entergy was not faultless. Entergy chose not to appeal any of the prior decisions and further failed to seek any modification earlier, including at the time it brought its action in Federal Court, or at the time the Vermont Legislature voted not to authorize continued operation. Entergy has been well represented throughout all of the Board’s proceedings. If Entergy made a poor choice, it did so on its own and is not entitled to relief now, more than six years later.

In *Callahan v. Callahan*, 2008 VT 94, ¶ 10 the Supreme Court of Vermont affirmed that a 6.5 year delay between the entry of a final order and a Rule 60(b) motion was unreasonable where the party seeking relief had numerous opportunities to read, understand and discuss the terms of the agreement with counsel before consenting to it. *Id.* The Board appropriately refused to relieve Entergy from obligations that resulted from Entergy's own actions when it was represented by counsel and failed to challenge in a timely manner.

E. Entergy suffers no harm and presents no equitable claim for relief.

Entergy fails to identify any harm it suffers as a result of the conditions it sought to alter. At best, Entergy speculates that some harm may result. Entergy first claims hardship from "regulatory uncertainty" that Entergy itself created. To the extent any uncertainty exists, it arises from the conditions Entergy itself agreed to and now seeks to eliminate. Second, Entergy speculates about possible harm from a possible temporary shut down. The Board took no evidence on this and made no findings about any economic impact of a shut down. The Supreme Court cannot on appeal make factual findings. *Cooley Corp. v. Champlain Valley Union High Sch. Dist. No. 15*, 144 Vt. 341, 344 (1984); *Mayer v. Mayer*, 144 Vt. 214, 216 (1984). Since no findings were made by the Board on this matter, any harm suggested by Entergy is speculative and beyond the scope of this appeal. *Mayer,* 144 Vt. at 215. Similarly, any temporary shut down is speculative. Entergy has itself chosen not to comply with its prior commitments and the Board's orders. It has not yet shut down. Any claim of hardship from a shut down that has not happened and has not been shown to be imminent is speculative. Relief is not available for speculative harm. *United States v. Persico*, 242 F.3d 369, 2000 WL 1775518 at *2 (2d Cir. 2000)(speculative harm precludes *coram nobis* relief); *In re Duckman*, 2006 VT 23, ¶ 16 (refusing contempt relief for speculative harms). Entergy fails to show that it cannot do

something it wants to do, or is otherwise entitled to do, because of the Board's previous orders or the CPG.

Failing to demonstrate harm, Entergy is not entitled to relief, and the Board did not abuse its discretion in denying relief. The Court should "avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, … issues that time may make easier or less controversial." *Simmonds v. I.N.S.*, 326 F.3d 351, 357 (2d Cir. 2003). A request is not ripe where an appeal is pending that casts doubt on need for relief. *Stowe Highlands v. Stowe Club Owners Ass'n, Inc.*, 2005-406, 2006 WL 5849652, at *2 (Vt. June 2006). Here there is both an appeal pending at the Second Circuit Court of Appeals and there is an ongoing proceeding at the Vermont Public Service Board that will determine if Entergy should be awarded a new CPG. Either proceeding will likely determine without speculation whether the Vermont Yankee facility will be shut down before a final determination will be made in this appeal.

CONCLUSION

For the foregoing reasons, the Vermont Public Service Board's March 19, 2012 and November 29, 2012 orders in Public Service Board Docket 7440 should be affirmed.

Dated at Montpelier, Vermont, this 20th day of May, 2013.

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