UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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| ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., | ) | Docket No: 1:11-CV-99 |
| Plaintiffs, | ) | |
| v. | ) | |
| PETER SHUMLIN, Governor of the State of Vermont; WILLIAM SORRELL, Attorney General of the State of Vermont; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, members of the Vermont Public Service Board, | ) | |
| Defendants | ) | |

**MEMORANDUM IN SUPPORT OF MOTION OF CONSERVATION LAW AND VERMONT PUBLIC INTEREST RESEARCH GROUP TO INTERVENE AS PARTY DEFENDANTS**

The Conservation Law Foundation and Vermont Public Interest Research Group ("Applicants") hereby move to intervene as party defendants pursuant to Rule 24 of the Federal Rules of Civil Procedure, in support of the Defendants Peter Shumlin, William Sorrell, James Volz, John Burke, and David Coen ("Defendants"). As described below, Applicants satisfy the requirements for both interventions as of right and permissive intervention under Rule 24.

**BACKGROUND**

This case involves a challenge to the authority of the State of Vermont to issue a license for the operation of the Vermont Yankee nuclear power facility in Vernon, Vermont. Plaintiffs own and operate the Vermont Yankee nuclear power facility. Pursuant to Vermont law,

operation of any nuclear power facility in the state requires state approval. 30 V.S.A. § 248; 10 V.S.A. § 1258. Federal law has long recognized the authority of both the states and the federal government regarding the licensing of nuclear power facilities. Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205, 212 (1983); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984); 42 U.S.C. § 2013(d).

Vermont law requires the issuance of a "certificate of public good" before a nuclear facility within the state may be constructed or be allowed to continue operation after expiration of any current certificate of public good. 30 V.S.A. §§ 248, 254. The Plaintiffs' current certificate of public good from the State of Vermont for operation of the facility expires in March 2012. The current certificate of public good was transferred to the Plaintiffs in 2002 as part of the State of Vermont approved sale of the facility to the Plaintiffs from the facility's previous utility owners. Vermont Yankee Nuclear Power Corp., Certificate of Public Good, Docket 6545, (VT PSB, June 13, 2002). The Plaintiffs have sought, but have not obtained, the permission required by Vermont law to operate the facility beyond March 2012. 30 V.S.A. § 248; Petition of Entergy Nuclear Vermont Yankee, LLC, et al , Petition, Docket 7440 (VT PSB, Mar. 3, 2008). Plaintiffs challenge Vermont's clear statutory authority on various grounds, including preemption and commerce clause. Applicants are parties in the Vermont Public Service Board proceedings that Plaintiffs seek to nullify in this action. Petition of Entergy Nuclear Vermont Yankee, LLC, et al, Second Order re: Interventions, Docket 7440 (VT PSB, Sept. 5, 2008)(continued operation past 2012); Investigation into Entergy Nuclear Vermont Yankee, LLC, Order Opening Investigation dated Feb, 25, 2010 and Prehearing Conference Memorandum dated March 18, 2010, Docket No. 7600 (VT PSB) (VT Yankee leak investigation).

Applicants are nonprofit advocacy organizations that have been significantly involved in the statutory and regulatory processes regarding the Vermont Yankee facility for many years. Applicants have been parties in many of the regulatory proceedings in Vermont concerning Vermont Yankee. Applicants actively participated in the legislative review of matters concerning Vermont Yankee. Applicants have significant expertise on the issues presented, and are working on behalf of their members to address responsible protection of our environmental resources affected by use, supply and generation of electric power.

Conservation Law Foundation ("CLF") is a non-profit, member-driven environmental advocacy organization dedicated to protecting the people, environment and communities of New England. CLF has, as part of its long standing sustainable, clean energy campaigns, advocated for a transformation of our energy supply toward greater reliance on clean, renewable energy and energy efficiency. CLF has thousands of members across the Northeast who are users of the natural resources directly affected by the region's energy supply. CLF has been actively involved in the regulatory and legislative processes regarding Vermont Yankee for more than a decade.

Vermont Public Interest Group ("VPIRG") works to promote and protect the health of Vermont's environment, people, and locally-based economy, and bring the voice of citizens to public policy debates that shape the future of Vermont. VPIRG currently has over 14,000 active supporters. VPIRG's top priority campaign over the past five years has been to promote an energy future based on local renewable energy resources. VPIRG has been involved in the legislative and regulatory processes regarding Vermont Yankee for decades. Over the past five years more than 3,500 Vermont households have played an active role with VPIRG to ensure that the Vermont Yankee reactor is retired on schedule.

## I. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Applicants satisfy the four-part test for intervention as a matter of right under Rule 24(a). To intervene as of right the applicant must: (1) timely file an application; (2) show an interest in the action; (3) demonstrate that the interest may be impaired by the disposition of the action; and (4) show that the interest is not protected adequately by parties to the action. In re: Bank of New York Derivative litigation, 320 F.3d 291, 300 (2d Cir. 2003) (quoting New York News, Inc. v. Kheel, 972 F.2d 482, 485 (2d Cir. 1992)). In assessing these factors, Rule 24 should be construed liberally in favor of intervention. Turn Key Gaming, Inc. v. Oglala Sioux Tribe, 164 F. 3d 1080, 1081 (8th Cir. 1999), citing U.S. v. Union Electric Co., 64 F. 3d 1152, 1158 (8th Cir. 1995), Stupak- Thrall v. Glickman, 226 F. 3d 467, 472 (6th Cir. 2000). Applicants satisfy this four-part test.

### A. Applicants Have A Significant Interest In The Subject Matter Of This Litigation.

Rule 24(a)(2) requires that an intervenor have an interest that is related "to the property or transaction which is the subject of the action." This prong does not require "specific legal or equitable interest," but rather "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." United States ex rel. Carmona v. Ward, 416 F. Supp. 276, 279 (S.D.N.Y. 1976) (quoting Nuesse v. Camp, 385 F.2d 694,700 (D.C. Cir. 1967)).

#### 1. Applicants Are Directly Involved in the State Regulatory Proceedings at Issue in this Case.

Applicants have a vital interest in licensing of Vermont Yankee by Vermont. Applicants and their members have an interest in the power supply for our region as it affects the environment and communities which are vital parts of their lives and livelihoods. Applicants are

parties, having been granted intervenor status, in the state regulatory proceedings in Vermont that are being challenged in this litigation. Conservation Law Foundation's staff has actively participated in the regulatory proceedings at the Vermont Public Service Board regarding: 1) the sale of the facility; 2) the license for continued operation of the facility; and 3) the investigation into leaks at the facility. In each proceeding Conservation Law Foundation presented expert testimony and legal argument on economics, power supply, reliability and compliance with license requirements. VPIRG staff has also actively participated in the regulatory proceedings at the Vermont Public Service Board regarding: 1) the license for continued operation of the facility; 2) the investigation into leaks at the facility; and 3) one of the proceedings regarding the sale of the facility. The outcome of this litigation, which challenges the validity of these other proceedings, affects the Applicants' legal and economic interests. See Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 840-41(10th Cir. 1996)(individual who successfully sought protection of animal as endangered species has right to intervene in challenge to listing); In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991) (environmental organization that was party to an administrative permitting proceeding entitled to intervene as a matter of right in an action challenging the constitutionality of state regulation); Yniguez v. Arizona, 939 F.2d 727, 733-35 (9th Cir.1991)(sponsor of initiative has right to intervene in litigation challenging law). This litigation will determine whether and how these other proceedings move forward, and whether conditions of a sale, previously approved by the Vermont Public Service Board will be honored. The Applicants expended significant economic and staff resources protecting their interests in these other proceedings. Based on Applicants' active participation as parties in numerous proceedings regarding Vermont Yankee that may be affected by this litigation, Applicants have a legal and economic interest in this litigation. Utahns

for better Transp. v. U.S. Dept. of Transp., 295 F.3d 1111, 1115 (10th Cir. 2002)("The threat of economic injury from the outcome of the litigation undoubtedly gives a petitioner the requisite interest.").

**2. Applicants Were Directly Involved in the Enactment of Legislation at Issue in this Case**.

Public interest organizations have a sufficient interest to intervene as of right "in actions involving legislation or regulations previously supported by the organization." Commack Self-Service Kosher Meats, Inc. v. Rabbi Schulem Rubin, 170 F.R.D. 93, 102 (E.D.N.Y. 1996) (citing Jones v. Butz, 374 F. Supp. 1284, 1287 (S.D.N.Y. 1974). Where public interest groups "took an active role" in drafting a law they have "a clear interest in the continuing constitutional viability of that law." Herdman v. Town of Angelica, 163 F.R.D. 180, 187 (W.D.N.Y. 1995); see also New York Public Interest Research Group v. Regents of the University of the State of New York, 516 F.2d 350, 352 (2d Cir. 1975) (pharmacists' organization and individual pharmacists had a right to intervene in an action brought by consumers to challenge a statewide regulation prohibiting the advertising of the price of prescription drugs); In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991) (remanding to the District Court with instructions to allow intervention in an action challenging the constitutionality of a governing state regulation to an environmental group that had party status in an administrative permitting proceeding); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (environmental group allowed to intervene as of right in suit challenging designation of conservation area to protect its interest in habitat protection). Recently, Applicants were allowed to intervene in the court proceedings in this court regarding Vermont's rules for automobile emissions. Green Mountain Chrysler Plymouth Dodge Jeep, et

al. v. Torti, Docket No. 02:05-cv-302, Memorandum Opinion and Order at 8-14 (D.Vt., May 3, 2006). The Court allowed Applicants to intervene as of right recognizing their interest in an action challenging administrative rules whose adoption they had supported. Id. at 10.

Applicants participated in the legislative processes that led to the statute providing for review by the Vermont Legislature of nuclear facility requests for permission to operate. The viability of this law and laws providing for review, oversight and licensing of nuclear facilities by the State of Vermont is entirely dependent on the result of this litigation. Thus, the Applicants have demonstrated a significant interest in the subject matter of this action based on their past and ongoing work on these matters.

### 3. Applicants' Members Use and Enjoy the Resources Protected By the Vermont Laws.

The Vermont laws challenged in this proceeding protect the environmental and community resources affected by the generation of electricity in Vermont. The statute providing for review of electric purchases, investments, facilities, and nuclear energy generation requires a determination that the proposed action "will promote the general good of the state." 30 V.S.A. § 248. Specific determinations are needed regarding such matters as:

(1) the orderly development of the region;

(2) the present and future demand for electricity service;

(3) system stability and reliability;

(4) economic costs and benefits;

(5) effects and impacts to the natural environment, public health and safety;

(6) principles for resource selection and least cost planning;

(7) compliance with Vermont's electric energy plan;

(8) impact to outstanding resource waters; and

(9) economical transmission service.

Id. Broadly speaking Vermont law provides for a review of environmental and economic impacts of energy generation within the state. The statutes protect the community and natural resources by providing a means to ensure sound decisions are made regarding electric supply and generation in Vermont. Id.; 10 V.S.A. § 1258. As ratepayers, electric users and residents who live, work and recreate in New England and in the area around the Vermont Yankee facility, Applicants and their members use and enjoy the resources protected by Vermont law regarding licensing of nuclear power facilities.

Applicants are actively campaigning to protect the environment and communities from the negative effects of decisions made about power generation and supply. Based on Vermont law, Applicants have advanced their members' interests in advocating against allowing unlawful leaks, uneconomic terms of a facility sale, and shortfalls in the decommissioning fund. The decisions on each of these matters affect the resources protected by the statutes and in which Applicants and their members have an interest. See Green Mountain Chrysler Plymouth Dodge Jeep, et al. v. Torti, at 10 (recognizing Applicants' "members' personal stake in the improvement of local air quality and the problems posed by global warming."); Mausolf v. Babbitt, 85 F.3d 1295, 1302-3 (8th Cir. 1996) (environmental group entitled to intervene as of right to insure the group's conservation interests are adequately represented). Applicants therefore have a significant interest in the subject matter of this action.

**B. Applicants' Interests May Be Impaired As A Result of This Litigation.**

This lawsuit threatens to undo the results of Applicants' advocacy efforts, and allow the continued impacts to communities and natural resources that the Vermont laws seek to prevent. These threats to Applicants' interests are sufficient to meet the third prong of Rule 24(a)'s test

for intervention of right – i.e., that the applicant "demonstrate that the interest may be impaired by the disposition of the action" (emphasis added). Applicants' interests may be legally impaired since the result of this litigation may preclude Applicants from obtaining the legal relief they have sought in the regulatory proceedings regarding Vermont Yankee.

Rule 24(a)(2) does not, however, require that the applicant's interests be legally impaired; rather, it is enough that "the disposition of this action may, as a practical matter, impair or impede" applicant's interests. Herdman, 163 F.R.D. at 188 (quoting United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994)); see also Natural Res. Defense Council v. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978) ("the court is not limited to consequences of a strictly legal nature"); Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001) ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." (citing Fed. R. Civ. P. 24, Advisory Committee Note to 1966 Amendments)).

There is no question that the disposition of this case has the potential to impair Applicants' interests in several respects. First, if the court enjoins operation of Vermont law and Vermont regulatory proceedings in which Applicants are parties, Applicants' advocacy and litigation efforts would be nullified. Applicants' considerable investment in these processes, including countless hours of staff, volunteer and expert time and effort, and considerable financial resources, would be lost. See Herdman, 163 F.R.D. at 189 (finding intervenor's interest would be "unquestionably impaired by a ruling" that the law supported by the applicant for intervention is unconstitutional); Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (finding impairment where action could lead to reversal of earlier administrative process actively supported by applicants for intervention); Sagebrush Rebellion, 713 F.2d at 528 (court held there "can be no serious dispute" regarding impairment of interest

where lawsuit sought to invalidate regulatory measure that intervenor-applicants had supported). Further, Applicants have no other means of guarding against impairment of their interests short of intervention in this suit. See New York Public Interest Research Group, 516 F.2d at 352 (holding that the contention that applicants may protect their interests after an adverse decision in the instant case "ignores the possible stare decisis effect of an adverse decision").

Second, this lawsuit threatens harm to Applicants' interest in protecting the natural and community resources that the laws aim to protect. See, e.g., Mausolf, 85 F.3d at 1302-3 (allowing intervention as of right to insure the group's conservation interests are adequately represented); Sagebrush Rebellion, 713 F.2d at 528 (impairment prong satisfied where "[a]n adverse decision in this Suit would impair the [applicants'] interest" in habitat preservation). The challenged Vermont laws provide for protection of community and natural resources by requiring a determination that the reviewed actions "will promote the general good of the state." 30 V.S.A. § 248. The possible invalidation of these laws impairs Applicants' interest in those resources within the meaning of Rule 24(a).

**C. Applicants' Interests Are Not Adequately Represented by Defendants**

Defendants will not adequately represent the Applicants' interests. The United States Supreme Court has stated that F.R.C.P 24(a) requires only a minimal showing of inadequate representation. Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972). The State's duties could dictate different approaches to the litigation so that its representation of the members' interests would be inadequate. Id. Courts have allowed intervention where a party is a government entity when a private party has challenged the validity of a government regulation. In Green Mountain Chrysler Plymouth Dodge Jeep, the Vermont District Court determined the State may not adequately represent Applciants' interests. The court stated:

> Currently the State and Applicants appear to share objectives, but the possibility exists that their interests may significantly differ when it comes to weighing environmental issues, industry interests and budgetary concerns in defending this lawsuit. Applicants have made a sufficiently strong showing that the State may not adequately represent their interests.

Green Mountain Chrysler Plymouth Dodge Jeep, et al. v. Torti, at 12-13.

In New York Public Interest Research Group intervenors were allowed to join the State defendants in defending the validity of a regulation, given the likelihood that they would make a more vigorous presentation on certain issues in the case in light of their own perspectives and interests. New York Public Interest Research Group, 516 F.2d at 352; see also Sagebrush Rebellion, 713 F.2d at 528. In Herdman, *supra*, the court stated that where parties moved to intervene on the side of a government entity defending the legality of its actions or the validity of its laws or regulations, it should examine both "(1) whether the government entity has demonstrated the motivation to litigate vigorously and to present all colorable contentions, and (2) the capacity of that entity to defend its own interests and those of the prospective intervenor." Herdman, 163 F.R.D. at 190. Both courts declined to impose a higher burden of showing inadequacy of representation by the governmental entity.

A number of courts have found that government does not adequately represent the unique interests of nonprofit organizations under Rule 24(a) because the government must represent the perspective of all of its citizens. See Trbovich, 404 U.S. at 538-39 (finding intervention appropriate because government's duty to represent both broad interests of the public and narrower interests of proposed intervenor were "related, but not identical"); Sierra Club v. Espy, 18 F.3d 1202, 1208 (5th Cir. 1994) (permitting timber industry to intervene in case brought against government by environmental groups because "[t]he government must represent the broad public interest, not just the economic concerns of the timber industry"); Mausolf, 85 F.3d at 1302-3(same). In this case, the State must weigh environmental and impacts of energy supply

interests of its citizens with industry interests, budgetary concerns, consumer and utility interests. This case may have implications beyond Vermont, yet the State must necessarily represent only Vermont's interests. Conservation Law Foundation is a regional, New England-wide organization and represents members in other New England states near the Vermont Yankee facility. The interests of these people are not represented by the State of Vermont. The Applicants have demonstrated that its interests will not be adequately represented by the State defendants.

**D. This Motion To Intervene Is Timely.**

Whether a motion to intervene is timely depends primarily on (1) how long the applicant had notice of the interest before making the motion to intervene; (2) the prejudice to the other parties; (3) prejudice to the applicants if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness. Pitney Bowes, Inc., 25 F.3d at 70. The Applicants are requesting to intervene at the earliest possible stage after receiving notice of this litigation. The complaint was filed on April 18, 2011; Defendants have not filed an answer; no substantive motions or responses have been filed by Defendants. Thus, the proposed intervention will not prejudice the other parties, nor will it cause any delay in the proceedings. See, e.g., Herdman, 163 F.R.D. at 185 (motion to intervene was timely when it was filed ten weeks after the original action was filed and no dates for oral argument had been set); 7C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1916 & N.13 (2d ed. 1986) (application for intervention made before parties have joined the issues in the pleadings is "clearly timely"). Moreover, the applicants have demonstrated above their clear interests in this proceeding and the potential prejudice to those interests if not allowed to intervene. Accordingly, the motion to intervene is timely.

## II. ALTERNATIVELY, THIS COURT SHOULD GRANT APPLICANTS PERMISSIVE INTERVENTION.

In addition to satisfying all the requirements for intervention as of right, applicants' direct involvement in the state regulatory proceedings at issue in this case qualify applicants under the less rigorous standard for permissive intervention set forth in Rule 24(b)(1)(B) and (b)(3).

### A. Applicants' Claims in the State Regulatory Proceedings at Issue in this Case Share Common Questions of Law and Fact with the Main Action in this Court.

Under Rule 24(b)(1)(B) "anyone" may intervene who "has a claim or defense that shares with the main action a common question of law or fact." Adhering to the plain language of the rule, Courts have recognized that the "claim or defense" sharing a common question of law or fact may either be one that the applicant seeks to press in the pending federal court litigation or in litigation in a separate jurisdiction. E.E.O.C. v. National Children's Center, Inc. 146 F.3d 1042, 1048 (D.C. Cir. 1998) (holding that applicant satisfied "common question" requirement where applicant's suit in state superior court raised numerous factual issues that were also being explored in the federal action).[1] Here, applicants satisfy the rule's commonality requirement by seeking to defend Vermont's authority to enact and enforce the regulatory regime challenged in the main action and by seeking to ensure consistent adjudication of legal and factual issues common to the main action and the underlying state proceedings.

The central legal question in the main action is the validity of Vermont's laws and authority over the Vermont Yankee nuclear power facility. These same issues have been raised

[1] Accord United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990) (affirming district court's grant of permissive intervention based on finding that interpretation of insurance policies was a common issue shared between federal court litigation and other lawsuits being prosecuted by applicants for intervention); In re Linerboard Antitrust Litigation, 333 F. Supp. 2d 333, 339 (E.D.Pa. 2004)("Courts have regularly held this requirement satisfied if the movant raises a common question in a suit in another jurisdiction."); Sunbelt Veterinary Supply, Inc. v. International Business Systems United States, Inc., 200 F.R.D. 463, 466 (M.D. Ala. 2001) ("It is clear that the proposed Intervenors' claims and counterclaims in the IBS lawsuits share common questions of law and fact with the underlying action. Accordingly, this court also finds that the commonality requirement of Rule 24(b) has been satisfied.").

and argued by Plaintiffs and addressed by Applicants in the state regulatory proceedings in which the Applicants are parties. As identical questions of law and fact are presented in both this case and the state proceedings, Applicants satisfy the commonality requirement of Rule 24(b)(1)(B).

### B. Applicants' Intervention Will Not Unduly Delay or Prejudice Adjudication in this Court

Rule 24(b)(3) requires the Court to consider whether intervention will unduly delay or prejudice adjudication of the rights of the original parties. Unlike intervention as of right under Rule 24(a)(2), however, permissive intervention is not expressly conditioned upon inadequate representation of the applicant by existing parties. Rather, the Second Circuit Court of Appeals recognizes it as one of several discretionary factors for the district court to consider. U.S. Postal Service v. Brennan, 579 F.2d 188, 191-192 (2d Cir. 1978). Other factors include whether the applicant will benefit by the intervention, the nature and extent of the applicant's interests, and whether the party seeking intervention will significantly contribute to the full development of factual issues and to the just and equitable adjudication of legal questions presented. Id. Like intervention of right, permissive intervention is to be granted liberally. Washington State Bldg. and Const. Trades Council, 684 F.2d 627, 630 (9th Cir. 1982)("Rule 24 has traditionally received a liberal construction in favor of applicants for intervention.").

Applicants meet the prerequisites for permissive intervention. As described above, this application is timely and will not prejudice the rights of the existing parties. Additionally, the nature and extent of Applicants' demonstrated interests, and the interests and issues that likely will not be adequately represented by other parties are set forth above. Applicants also have demonstrated they can contribute to the full development of factual and legal issues that may be presented in this case. Applicants will abide by the existing schedule and will coordinate with the Defendants for presentation during any hearings, and will not cause any delay.

Finally, the Court's jurisdiction over the present case is based on the federal question

raised by the Plaintiffs' complaint, and this Court has supplemental jurisdiction over Applicants pursuant to 28 U.S.C. 1367(a), which provides such jurisdiction for "the intervention of additional parties." Accordingly, the Applicants should be granted permission to intervene under Rule 24(b)(2) if intervention as of right is denied.

## CONCLUSION

For the foregoing reasons, the Court should grant Applicants' motion for intervention as of right or, in the alternative, permissive intervention.

Respectfully submitted,

Date: May 13, 2011

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