STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8880

Joint petition of NorthStar Decommissioning Holdings, LLC, NorthStar Nuclear Decommissioning Company, LLC, NorthStar Group Services, Inc., LVI Parent Corporation, NorthStar Group Holdings, LLC, Entergy Nuclear Vermont Investment Company, LLC And Entergy Nuclear Operations, Inc., and any Other necessary affiliated entities to transfer Ownership of Entergy Nuclear Vermont Yankee, LLC, and for certain ancillary Approvals, pursuant to 30 V.S.A. sec. 107, 231, and 232	)	**August 30, 2017**

PREFILED TESTIMONY OF
MICHAEL O. HILL
ON BEHALF OF
CONSERVATION LAW FOUNDATION

Mr. Hill's testimony addresses insurance and other risk transfer aspects of Petitioners' plan to transfer liability for restoration and decommissioning at the Vermont Yankee Nuclear Power Station to NorthStar Decommissioning Holdings, LLC. He states that, although properly structured environmental liability transfers can provide significant public benefits in terms of cost and schedule certainty and even reduction – and he has advocated and assisted with many successful liability transfers over the past two decades (in several instances representing or otherwise acting on behalf of the federal government) – Petitioners have not demonstrated that their unprecedented transfer in the context of a nuclear power plant has the contractual, insurance and other risk transfer elements required to ensure that the work would be conducted in a manner that is cost-effective, timely or otherwise protective of the public good.

Problems that federal and state regulators have over the past two decades experienced or otherwise determined to avoid in the context of liability transfers with respect to conventional *(i.e., non-nuclear) pollutants are in some cases plainly (and in others, likely) present in Petitioners' proposal. These problems include: (1) the full release of the Transferor; (2) the absence of evidence that the Transferee is properly incentivized or adequately capitalized; (3) the absence of evidence of adequate insurance or other financial assurance; and (4) the lack of transparency required for regulatory review and oversight.*

Q1. Please state your name, occupation and area of practice.

A1. My name is Michael O. Hill, and I am Principal of Alba Risk Management Services, LLC. As an attorney, insurance broker, corporate officer and environmental trust officer, I have practiced in the relatively new and specialized area of environmental liability transfers – and related areas of environmental insurance and fixed-price contracting – for over 18 years, since virtually the inception of environmental liability transfers in the context of conventional (*i.e.*, non-nuclear) contaminants.

Q2. On whose behalf did you prepare this testimony?

A2. I prepared this testimony on behalf of the Conservation Law Foundation.

Q3. Please describe your company, Alba Risk Management Services, LLC.

A3. Alba Risk Management Services, LLC ("Alba") is a multidisciplinary law firm and insurance brokerage that I founded in 2004, having previously practiced in this area solely as an attorney (as Partner in a large law firm) and then solely as an insurance broker (as Chair of Marsh, Inc.'s Environmental Practice). I am licensed as an attorney and as a surplus lines insurance broker, and Alba is licensed as a law firm and as a surplus lines insurance brokerage, enabling it to help insureds obtain environmental and other forms of surplus lines insurance.

Subject areas of Alba's focus include military base, Superfund, RCRA and other "brownfield" transfers, cleanups and redevelopments, and its clients include public and private entities.

Q4. Please summarize your work experience and educational background.

A4. I began my legal career as a Law Clerk for the Honorable Albert W. Coffrin, Chief Judge of the U.S. District Court for the District of Vermont. I later served as a Trial Attorney at the U.S. Department of Justice ("DOJ"), where I represented the U.S. Environmental Protection Agency ("EPA") in environmental

enforcement actions and received DOJ's awards for Outstanding Service and Special Achievement.

I was later a Partner in a large Washington law firm, where, among other clients and beginning in 1998, I represented, and then joined as a Senior Vice President, TRC Companies, Inc., a large and publicly-traded engineering, remediation and construction management firm that was then a pioneer (and the nation's largest) user of environmental insurance to accomplish environmental liability transfers and guaranteed fixed-price cleanups ("GFPCs"). TRC's GFPCs were an early form of the liability transfer that Petitioners propose here, yet that, to my knowledge (see below at 12-13 & n.7), has never been done in the context of a nuclear plant. TRC's early successes (with its stock price rising more than tenfold between 1998 and 2002) were a major factor in establishing and growing the practice of environmental liability transfers.

I left TRC in 2002 to become National Leader and then Global Chair of Marsh, Inc.'s Environmental Practice, then the world's largest broker of environmental insurance, a critical component of virtually all large environmental liability transfers.

I created Alba in 2004 to offer clients a broader and more efficiently-provided range of risk management options (*e.g.*, GFPCs and environmental insurance) to accomplish transfers, remediation, redevelopment and other goals with respect to contaminated properties. Since Alba's inception, I have provided legal, brokering and/or consulting services to large private and public entities (including the U.S. Air Force) in a "Transferor" role similar to that of ENVY in this matter; and to the nation's largest "brownfield" developer and other developers (and, twice, the Air Force) in "Transferee" roles. I have informally and then formally (as their consultant and/or broker) advised the federal government with respect to environmental liability transfers since 2000.

From 2010 to 2012, and following my nomination by the White House Council on Environmental Quality and the U.S. Treasury Department, I left Alba

on a part-time basis to serve as Chief Operating Officer and General Counsel of the $773M trust created by the U.S. Government, 15 State and Tribal Governments, and the U.S. Bankruptcy Court to remediate and redevelop the 89 Properties left behind in the 2009 General Motors ("GM") bankruptcy, then the largest industrial bankruptcy, largest brownfield project, and largest remediation and redevelopment trust in U.S. history. The GM Trust was also one of the largest environmental liability transfers in U.S. history.

From 2015 to 2016, I served on a part-time basis as Senior Counsel in the law firm of Primmer, Piper, Eggleston & Cramer, PC, establishing its District of Columbia office and working occasionally from its Burlington and Montpelier offices. I returned to Alba full-time in 2016 to devote a greater share of my time to insurance brokering, consulting and related services.

I have on several occasions been engaged to serve as an expert consultant and/or witness in judicial and/or administrative proceedings, addressing issues related to environmental insurance in the context of liability transfers.

I have published and spoken frequently on the subject of environmental liability transfers and related subjects (*e.g.*, GFPCs, environmental insurance and environmental trusts). I serve as an expert commentator for the International Risk Management Institute, and I serve on the Boards of the Chemical Waste Litigation Reporter, the EPA Administrative Law Reporter, and Vermont Law School. A copy of my professional profile is attached as Exhibit CLF-MOH-1, which also includes a list of various of my publications and presentations in this field.

I hold a B.A. from Williams College (1980), where I majored in Political Economy and focused largely on Environmental Studies; I attended Vermont Law School for my first year of law school (1981-82); and I graduated from Yale Law School (1984), where I served as an editor of the Yale Law Journal.

Q5. Have you previously testified before the Vermont Public Utility Commission?

A5. No.

Q6. Are you presenting any exhibits to support your testimony?

A6. Yes. The following Exhibits are included with my testimony:

Exhibit CLF-MOH-1 is my professional profile.

Exhibit CLF-MOH-2 contains highlighted excerpts of Petitioners' written responses to various of CLF's and the State's Discovery Requests, identified below.

Exhibit CLF-MOH-3 contains highlighted excerpts of insurance policies and the parent support agreement that Petitioners provided in response to CLF's and the State's Discovery Requests, identified below.

Q7. Please summarize your testimony.

A7. As reflected in papers that I have published and presentations given (*see* Exhibit CLF-MOH-1), I have long been a vocal advocate of environmental liability transfers, as I believe that – provided they are well structured – they are a proven means to accomplish cleanups with greater cost and schedule certainty (and typically even schedule and cost reduction, even after adding the cost for insurance and other risk transfers),[1] without compromising cleanup quality and while also promoting redevelopment efforts. *Id*.

I have helped government and private clients accomplish liability transfers that collectively today account for thousands of acres remediated and tens of thousands of jobs created.

However, I have seen many environmental liability transfers fail due to structural problems related to flaws in contractual incentives, insurance, and

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[1] *Compare* U.S. Army Environmental Command, *Tracking Performance on the Army's Performance-Based Contracts,* (May 16, 2006) (average costs savings from 42 GFPCs was 21% below government's estimated costs-to-complete), *and* R. Durant, *The Greening of the U.S. Military: Environmental Policy, National Security, and Organizational Change*, at 1 & n.4 (2007) ("average cleanup costs at closing [military] bases are typically 60 percent higher than estimated originally); *see also* EPA Inspector General, *EPA Should Increase Fixed-Price Contracting for Remedial Actions*, Rept. 13-P-0208 (March 28, 2013); N. Kosko *et al*, *Performance-Based Acquisition: A Tool to Reduce Costs and Improve Performance at U.S. Army Environmental Remediation Sites*, ICEM07-7050 (2007).

failures in oversight. These flaws can result in the doubling, tripling or worse of cleanup costs as well as schedule, and result in the public ultimately paying for the cleanup as well as suffering from delays in redevelopment. Some of the structural problems plainly exist in this case, and, from publicly available information,[2] there is inadequate assurance with respect to other and likely problems.

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[2] Petitioners have withheld many documents (*e.g.*, the GFPC and core insurance policies) under claims of confidentiality. The confidentiality that Petitioners demand is appropriately not required in the BRAC model upon which Petitioners otherwise rely (*see*, *e.g.*, *infra* at 11-12). Particularly in the absence of competitive bidding, claims of competitive disadvantage through disclosure are more than outweighed by the harm that non-disclosure agreements ("NDAs") may cause by: (a) potentially causing unwarranted distraction and delay through potential or actual arguments over whether one may have departed from the Petitioner-demanded restrictions; and (b) preventing the public from learning facts that are critical to the transfer (including the Transferee's financial incentives; financial viability; rights under the insurance policies; and other factors).

In its May 5, 2017 Motion for Approval of Special Protocol to Govern Parties' Access to Highly Confidential Document, at 2, Transferee/NSDH states that, "[t]here are three to four companies that could perform the work necessary to decommission Vermont Yankee." I am not aware of any competitive bidding having occurred for this transfer, nor am I aware of any such bidding that is foreseen. Certainly, in the absence of competition – and after a competition has resulted in a winning bid – claims of competitive disadvantage are insufficient to justify an NDA's harmful impacts.

Regarding NSDH's argument that its 900-item breakdown of sub-tasks would impair NSDH's ability to compete at *other* sites, *id*., NSDH could reduce its risk by reducing the number of pay-outs to a far smaller number. The disadvantage to NSDH, of course, would be that it would have to wait longer between payments. While this may cost NSDH something, it would also reduce the risks and the costs to the Trusts and public. Just some of the questions to which this Commission and the public should have clear answers are:

- If there was no competitive bidding for this work, why was there not, and how can the Commission be confident that NSDH's financial, technical and other capabilities and approach offer the best protections that are reasonably available to the public?

- Under the GFPC, when NSDH is paid for a particular milestone that it completes at a cost that is below the budgeted cost, to what extent (and when) can NSDH distribute the profits to its owners or other third parties (v. retaining them to ensure NSDH has sufficient assets to meet later milestones that may go over-budget)? Under the best GFPC models, Transferees are paid only enough to cover their actual costs (and nothing in profit) until reaching final "No Further Action" status with respect to all of the work covered by the guaranteed fixed price.

- To what extent does NSDH have its own assets (and to what extent is it legally obligated to spend those assets) to cover costs that are in excess of the expected budgets?

From mistakes made in the context of two decades of transfers of liabilities for conventional pollutants, the federal government, state governments and others have gained experience. Lessons from these experiences should be considered in the context of the unprecedented, nuclear-related transfer proposed here.

Chief among the experience gained or principles otherwise held by governments in the context of transfers pertaining to conventional pollutants are that:

(I) The entity seeking to transfer environmental liabilities ("Transferor") should not be fully released from its liabilities. Rather, following the Petitioner-cited model mandated by Congress and followed by the military in the context of transferring contaminated properties, the Transferor should remain liable to the government and public in case the Transferee fails for any reason. This model is not only required by statute for all military property transfers, but is also virtually always followed for transfers of non-military properties as well.

To my knowledge, no Transferor has ever been fully released in the context of a nuclear power plant, nor do I believe such a practice should start now. I believe that, were this Commission and the NRC to consult with either the U.S. Environmental Protection Agency ("EPA") or Department of Defense regarding their nearly 20 years of experience with environmental liability transfers, both would advise against approving Petitioners' proposal.

If Transferor believes that the proposed liability transfer is protective of the public, Transferor should be willing to assume at least the same measure of risk that it is asking the public to assume voluntarily. Transferor would likely still benefit from the transfer (*see supra* at 5 & n.1) … just not as much, and the public would not lose protections that may be critical to protection of human health and the environment (as well as to job creation).

(II) The Transferee must have: (A) meaningful contractual incentives (carrots *and* sticks) to complete the work at or below budget, on or ahead of schedule, and with high quality; and (B) sufficient financial assets to perform the work in its entirety irrespective of any delays or other problems with insurance or other third-party support. Absent such assets, Transferee is less likely to "feel (or feel threat of) the sticks" if it does not perform the work on schedule and on budget, and more likely to abandon the project at the point that it appears a loss may be suffered.

(III) The transfer must be supported by clear, integrated, and otherwise robust insurance and other financial assurances, again following models used by, among others, the military in the context of the military's "BRAC" sites (defined below). Petitioners have provided no evidence of Cost Cap or Pollution Legal Liability ("PLL") insurance, both of which are virtually always used for environmental liability transfers of any significant size. Moreover, the general liability policies and other assurance products that Petitioners *have* provided are plainly non-protective due to express pollution exclusions and/or other limitations.

(IV) The liability transfer must be made, and the performance of its objectives monitored, in a transparent manner, including with

advance disclosure of the GFPC, insurance and other core documents (again, following the BRAC model), and with waivers in place to preclude barriers to oversight. As one step in assuring transparency, the State should be expressly identified as a beneficiary of any Trusts used to fund the work, with an express Trustee and Petitioner waiver, at least as to this Commission and the NRC, with respect to any claims of protections that might be used to delay or altogether prevent critical information from reaching these regulators and protectors of the public interest.

In sum, there are significant shortcomings with the proposed plan to transfer liability for restoration (herein, also "remediation") and decommissioning of the Vermont Yankee Nuclear Power Station from what Petitioners describe as Entergy Nuclear Vermont Yankee, LLC ("ENVY") to NorthStar Decommissioning Holdings, LLC ("NSDH").[3]

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[3] Joint Petition, at 1 (December 16, 2016). In any review of this matter, it is important to identify the Transferee accurately – that is, as NSDH specifically – rather than following Petitioners' course of vaguely referencing the Transferee as "NorthStar." Referring to the Transferee as NorthStar seemingly yet inaccurately credits NSDH with the larger assets and the longer and broader experience of a broad family of NorthStar entities. E.g., Dec. 16, 2016 Pre-Filed Testimony of Scott State. at A6 ("NorthStar is the nation's largest remediation and demolition company;" "NorthStar has a full-time workforce of 3,500 employees;" and "NorthStar's revenue in 2015 was over $650 million"); Dec. 16, 2016 Pre-Filed Testimony of Jeffrey Adix ("NorthStar also has a comprehensive general liability policy with a coverage limit of $27 million, and a pollution policy [sic] with a coverage limit of $10 million"); *see also* DPS:NS.2-21, Petitioners' Second Supplemental Response to the Vermont Public Service Department's Second Set of Information Requests (contained within Exhibit CLF-MOH-2) (Petitioners response ignores the State's request for information regarding *NSDH*'s financial assets and instead provides information solely regarding NSGH and NSGS, then refers vaguely to "NorthStar").

Related to the unnecessary complexity regarding which entity is doing what (and when) in this transaction, Petitioners themselves appear to have erred on p. 1 of their Petition, stating that that ENVY alone will be transferred to NorthStar whereas, at least per the same page of the Petition, ENVY *and* ENOI (as Entergy VY) *together* hold the Certificate of Public Good ("CPG").

Whether intended or not, complexity in environmental liability transfer projects have an unfortunate history, *e.g.*, *In Re*. *Tronox,* 503 B.R. 239 (Bankr. Ct., S.D.N.Y. Dec. 12, 2013), and it should be avoided.

In particular, the Commission should be concerned by the proposed full release not only of the Transferor (ENVY) but also of consequent releases of any ENVY parent, affiliate, or other entity that may currently share such liability[4]); by the lack of public information regarding the financial resources of NSDH itself and of information regarding the liability transfer contract and the incentives it carries; by clear flaws in the insurance and other financial assurance tools that *have* been disclosed; by the lack of information concerning other tools that Petitioners have identified by name but not disclosed; and by the lack of transparency that would enable the public to evaluate the proposed transfer and ongoing performance of the work. As discussed below, especially in the context of a liability transfer to a Transferee that is not also operating the facility as an ongoing concern (*e.g.*, another utility), these flaws could well lead to a doubling, tripling or even more of the costs and schedule, and to burdening the public with the costs, the delays, and the lack of redevelopment.

For those reasons and others, Petitioners have not shown that the proposed transfer would promote the public good.

Q8. How is your testimony organized?

A8. My testimony tracks the subjects identified under headings I – IV of my prior answer. In its final pages, my testimony recommends a path forward toward a liability transfer that I believe *could* provide sufficient assurances of its serving the public good by expediting the cleanup and redevelopment while keeping costs at or below budget.

Q9: Please proceed through the above-described Sections I – IV.

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[4] Absent Petitioners' demonstration of facts dispositively exonerating ENVY's parent and other affiliates from liability, see, e.g., U.S. v. Bestfoods, 524 U.S. 51, 55 118 S. Ct. 1876, 1881 (1998) ("corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility"), any release of ENVY would seem to present risks that run even beyond those of the loss of ENVY as a potentially liable party. I am aware of no such facts. Unless the Commission is aware of such facts, then for this additional reason, I believe that any release of Transferee would likely not be in the public's interest.

A9:

I. **The Transferor Should Not Be Fully Released From Its Liabilities**.

As noted, to my knowledge, no regulator (federal or state) has ever fully released a Transferor of liability for contamination at a nuclear power plant. Were this Commission to be the first, Vermont would set a high-risk precedent for other states.

Even in the context of conventional pollutants, to my knowledge, the federal government has only once (in 1998, at the very inception of environmental liability transfers) fully released a Transferor from its liabilities, and state governments have granted such a release only twice. (*See infra* at 12-13 n.7) The circumstances of those cases differ from those here; such a transfer is expressly (even statutorily) proscribed in the context of military sites; and experience gained from at least one of those sites demonstrates the increased risks inherent in such a release.

In discovery, CLF asked Petitioners to admit that the full release sought here – where the NRC and State would not be able to seek coverage for cost overruns from the Transferor (or, for that matter, from "any Entergy entity") – is almost entirely unprecedented in the United States for any site that is contaminated by conventional pollutants, and that it is entirely unprecedented for any nuclear power station. CLF:JP1-48 (contained within Exhibit CLF-MOH-2).

Petitioners denied the request, stating that,

> The Base Closure and Realignment Commission has used the property transfer approach to transfer such sites to the private sector for redevelopment (in some cases as housing units), with the acquirer assuming all liabilities.

Id. (Petitioners' Response to CLF:JP1-48).

The Base Closure and Realignment Commission approach described by Petitioners is commonly referred to as the Base Realignment and Closure

("BRAC") program through which the U.S. Department of Defense is statutorily authorized to transfer contaminated surplus military bases to the private sector. 42 U.S.C. § 9620(h)(3)(C).

Yet, in fact, under unambiguous statutory restrictions that are uniformly applied – and that, as a matter of custom and practice, I have never seen questioned – BRAC transfers do not involve a release of the Transferor.[5] Rather, the Transferor expressly remains liable to regulators. The BRAC model should be followed here with respect to retention of Transferor liability (and, for reasons stated below, the BRAC model should also be followed to address factors covered in Sections II through IV).

Focusing for now on the Section I issue (Transferor Release), although it is true that the BRAC model enables the military to transfer liability *to* a Transferee that then becomes jointly and severally liable for the cleanup, the Transferor remains liable as well.[6] The Transferor and Transferee thus share liability, and regulators can look at least sequentially to *either* entity to perform the cleanup (leaving Transferor with only a contractual right against the Transferee for indemnification).[7]

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[5] 42 U.S.C. § 9620(h)(3)(A)(ii)(II)) (Transferor/military must warrant that "any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States"); 42 U.S.C. § 9620(h)(3)(C)(iv) ("A deferral under this subparagraph shall not increase, diminish, or affect in any manner any rights or obligations of a Federal agency … with respect to a property transferred").

[6] 42 U.S.C. 9607(e)(1) ("No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer *from* the owner or operator of any … facility or *from* any person who may be liable under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.") (emphasis added).

[7] As noted above, to my knowledge, the federal government – which in such matters acts through the U.S. Environmental Protection Agency ("EPA") – has only once in any context (BRAC or otherwise) provided a Transferor with a full release, and that was in 1998 when environmental liability transfers were just beginning, it did not involve a BRAC site and it involved circumstances that are not present here. *U.S. v. Iron Mountain Mines, Inc*., Civ. No. S-91-1167 (E.D. Calif. Dec. 8, 2000). To my knowledge, EPA has never again provided such a release, e.g., *U.S. v. Mattiace Industries*, No. 03-CV-1101, slip op. at 9-10, 34-

The lessons learned and non-Release principles that apply to transfers of conventional pollutants should be applied with at least as much force in the context of transfers of nuclear plants given their generally greater complexity, duration and risks.

As noted, to my knowledge, the full release that is sought by Petitioners has never been granted for any Transferor in the context of the decommissioning or restoration of a nuclear plant. Rather, in what I understand are the only two instances where a liability transfer of any kind was applied, the transfer was expressly limited.[8]

35, and 49 (E.D.N.Y. June 16, 2003) (expressly preserving EPA's right to seek future cleanup costs from Transferors if Transferee is deficient in its performance), and States have done so on only two occasions. *E.g.*, *State of Maine v. U.S. and Settling Nonfederal Defendants*, No. 00-64-B-C (D. Me. May 30, 2000).

In an article that I wrote in 2003 at the request of the National Association of Attorneys General, although I advocated the use of GFPCs and accompanying liability transfers, I stated that, despite the one federal and one (at that point) State full release that had been granted, Transferors should not expect and should not need a complete release from their liabilities. M. Hill, *A Tale of Two Sites: How Insured Fixed-Price Cleanups Expedite Protections, Reduce Costs, And Help The SEC, The EPA, And The Public*, 18 Nat'l. Envtl. Enf't. Jnl. No. 8, at 4, 9 & nn. 7, 9 (Sept. 2003), modified and re-published with permission from article originally published in 45 Chem. Waste Litig. Rptr. 907 (May 2003).

[8] At the first such transfer – the Zion nuclear plant in Illinois – the operating license and liabilities appears to have been merely temporarily transferred to a third-party, and never fully transferred from the Transferor. This limitation may prove to be critical, because by January 2015 concerns arose that the Zion Transferee may run out of funds to complete the work. *Exelon: Company Dismantling Zion Nuclear Plant is Running Out of Money,* (Jan. 9, 2015, Chicago Tribune), http://www.chicagotribune.com/business/ct-zion-plant-111-biz-20150109-story.html.

With respect to the second such transfer – the La Crosse reactor in Wisconsin – my understanding is that the Transferee received merely a "possession-only license for the purpose of storage of nuclear materials and waste and decommissioning activities." The Transferor "will remain the licensed owner of [the reactor] and hold title to and ownership of the real estate … [and] the spent nuclear fuel …." "Transferor will [also] retain financial responsibility for operation, maintenance, and security of the ISFSI and other related costs"). NRC *Cover Letter Transmitting Order Approving Transfer of the License for the LaCrosse Reactor* (May 20, 2016).

I want to make clear that I am not expert in the history of attempted or actual liability transfers in the context of nuclear plants. My hope is to provide in the nuclear context knowledge gained from the nearly two decades of experience with attempted and actual transfers of liability for *conventional* pollutants.

I am aware of no reason why the Commission should in this instance depart from restrictions mandated by Congress in the context of federal facilities for all pollutants, nor any reason why the Commission should go further than the two instances where *limited* transfers were allowed in the nuclear context, and the following sections underscore several additional reasons why the Commission should not so depart.

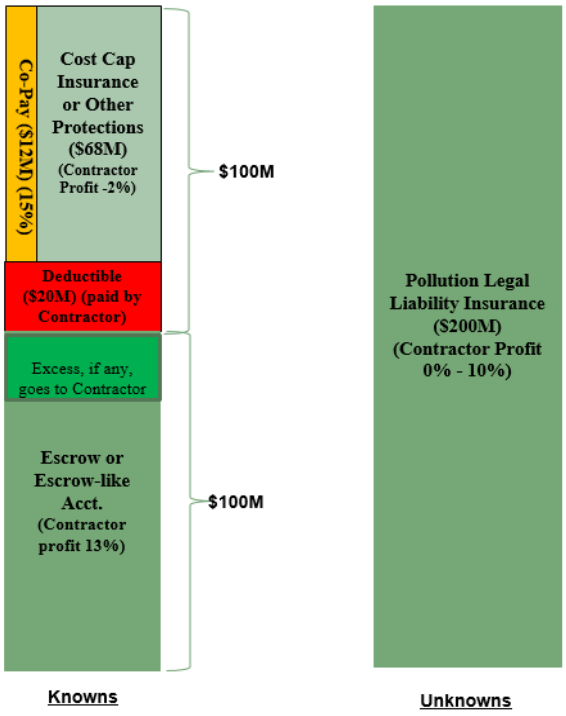
(II) <u>For purposes of assuring appropriate incentives as well as capability, the Transferee must show in advance the guaranteed fixed-price contract as well as sufficient financial assets to meet the liabilities transferred</u>.

In any environmental liability transfer, it is critical that the Transferee have: (A) robust carrot *and* stick contractual incentives that are consistent with the public good; and (B) the financial assets to meet its obligations (and thus to be meaningfully incentivized by the potential "stick").

A. <u>Contractual Incentives</u>.

Although there is some flexibility in this, GFPCs are generally best structured so that the Transferee is given access to the full amount of the agreed fixed price of the cleanup – typically set at a 70% or higher confidence level – receiving that amount in portions as large but measurable milestones are reached, even if the final milestone is reached before the Transferee has incurred costs equal to the full amount of the agreed price (and without any profit received until the Transferee's final obligations have been met in their entirety).

Perhaps the best example of such an incentive system is reflected in the following Figure, using (for purposes of illustration and discussion only) a hypothetical site with an agreed fixed price of $100M.



In the above scenario, the Contractor (which can, but need not, be the same as the Transferee) will receive the full amount of the escrowed $100M even if it completes the cleanup at a lower cost, enabling the Contractor/Transferee to realize a profit far greater than a typical time-and-materials contract, which, for work in the context of conventional environmental cleanups, is typically on the order of 13%. These incentives are the "carrots."

If the costs exceed the expected $100M, the Contractor itself must face significant "sticks," bearing the full cost of the next 20% invoiced (here, $20M), which, assuming a normal profit rate of 13% profit, might cost the Contractor $17.4M, exceeding the $13M in profit earned on the first $100M in work, and thus "breaking even," at about the point that total invoices reach $115.3M.

Under such a model, the Contractor has a 70% chance of making $13M or more (possibly much more) on the project, and chances that, at least in the

conventional context, are on the order of 10-15% of any net loss, with a maximum net loss on the order of 6%.

The above equation applies to work on what are typically described as "Knowns" (described below, at 21 & n.15). In the event that "Unknowns" are encountered (*see id*. at n.16), the work would be largely covered by what's known as a Pollution Legal Liability (or "PLL") insurance policy, discussed in Section III. To discourage a Contractor from purposefully finding Unknowns (or mischaracterizing Knowns as Unknowns), terms for PLL policies are best set where the Contractor makes little to no profit from them.

The above model is provided solely for purposes of illustration. Its purpose is to demonstrate the importance of establishing a set of incentives that drives the Contractor/Transferee every day (from Day 1 and Dollar 1) to complete the cleanup at or below the agreed price, all while adhering to cleanup requirements as they are independently set by environmental regulators.

Given the importance of the Transferee's incentives, CLF requested a copy of the liability transfer contract through which Transferee has committed to perform the work. CLF:JP.1-4, 1-36 and 1-47 (contained within Exhibit CLF-MOH-2) (seeking contract, including its Petitioner-referenced pay-item disbursement provisions). Petitioners have withheld this information (or at least that part of it through which NSDH assured that it would complete required decommissioning and restoration[9]). Indeed, as to the pay-item disbursements apparently contained within the contract, as late as May 5, Petitioners agreed to

[9] To the best of my knowledge, Petitioners have withheld what they describe as the "Decommissioning Compliance Assurance Agreement" ("DCAA"), which is what Petitioners identify as the contract showing Transferee's commitment to complete the decommissioning and restoration work by the end of 2030. *Id*. (Responses CLF:JP.1-4 and CLF-JP-2-1(a) (confirming that the DCAA was withheld). In addition, Petitioners have provided only a redacted copy of the "Membership Interest Purchase and Sale Agreement," or "MIPA" to which the DCAA was apparently attached. Petitioners' responses to CLF's requests 1-36 and 1-47 indicate that Petitioners withheld the DCAA (and its Pay-Item Disbursement Schedule) on grounds of privilege and trade secret, respectively.

provide them to "non-State government agencies" and their experts only in the offices of NSDH's counsel and only on the condition that no copies or even notes would be made. NorthStar Petitioners' Motion for Approval of Special Protocol to Govern Parties Access to Highly Confidential Documents, at 6 (May 5, 2017). I have been involved in environmental liability transfers for over 18 years and have only once before seen a party even request confidentiality restrictions of this sort. As referenced above (at 6 n.2), I believe that receiving information under such conditions would likely result in more delay and distraction than improvement in decision, and it is not needed to identify the fundamental structural problems of the proposal. Even the seeking of such protections indicated to me a likelihood of distraction and detour (even under a more liberal NDA) that was not justified in the circumstances. For that reason, I declined to review any of the information that is claimed to be confidential. Again, in the BRAC context to which Petitioners have pointed, all contract information (including milestone payments) is made public; I have never seen a potential Transferee disadvantaged because of this mandate; and I do not think departing from that practice is justified here.

In this circumstance, this Commission and the NRC will be required to review core documents (such as the GFPC and insurance) only in the course of closed hearings and without the ability to inform the public about critical aspects of the transfer. Because environmental liability transfer agreements are a very narrow and specialized area of practice, Petitioners' position has placed this Commission, the NRC and the public at a significant disadvantage.

Environmental liability transfers to Transferees receiving liability solely to perform the cleanup (v. operating the plant) are a relatively new and specialized field. The role that environmental insurance plays in them is particularly specialized, and there is little reason for any State, particulalry Vermont, to defer to federal regulators with respect to it. The federal government is not the primary

regulator of insurance (states are[10]); the federal government generally does not even buy insurance;[11] and the State of Vermont has as much if not more expertise with respect to surplus lines and/or other manuscripted forms of insurance than any regulator, state or federal.[12] Additional reason for Vermont not to defer is that the transferred obligations extend beyond nuclear and to conventional pollutants.

B. Financial Assets.

Financial assets are important not only in ensuring the ability to complete the work but also in ensuring that a Transferee has appropriately strong incentives to complete it and have it remain protective over the long-run.

Transferees that are receiving liability not to operate the facility but only to clean it up are motivated (and therefore must be treated) differently than Transferees that will operate the facility (e.g., as a revenue-generating utility). For that reason, the Commission cannot rely on regulatory financial assurance requirements that were designed for operator-to-operator transfers. As has been stated by the State of Vermont and the NRC:

> "The purpose of [the NRC's] financial assurance is to provide a *second* line of defense, if the financial operations of the licensee are insufficient, by themselves, to ensure that sufficient funds are available to carry out decommissioning (63 FR 50465, 50473)."

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[10] *E.g.*, S. Sinder, *Gramm-Leach-Bliley Act and State Regulation of the Business of Insurance – Past, Present and Future?* 5 UNC School of Law, N. Carol. Banking Inst. 49, 50 (2001) ("States have historically functioned as the virtually exclusive regulators of all insurance activities").

[11] *See* U.S. Gov't Accountability Office, GAO-04-261SP, *Principles of Federal Appropriations Law* 4-180 (2004).

[12] *E.g.*, www.vermontcaptive.com ("Vermont is number one in gross written premium, number one in assets under management, and third in active captive insurance companies in the world," and "48 of the Fortune 100 and 18 of the companies that make up the Dow 30 have Vermont captives" (State's website, Homepage as of August 26, 2017).

State of Vermont's Petition for Leave to Intervene, NRC Dkt. No. 50-271-LT-2, at 8 & n.10 (June 13, 2017), *quoting* NRC, Questions and Answers on Decommissioning Financial Assurance, Enclosure 5, at 1 (ADAMS Accession No. ML111950031) (emphasis added).

Moreover, of course, whereas the State must look beyond decommissioning and to restoration, the NRC's financial assurance requirements apply only to decommissioning requirements. *See id*. For that reason and others, the Commission cannot rely on NRC Financial Assurance Requirements alone to determine whether the Transferee will have sufficient resources.

One reason to distinguish a non-operating Transferee from an operating one is that, while a non-operating Transferee may have a significant profit incentive (a "carrot") to complete the cleanup at a cost below the agreed fixed price, it would have far less if any "stick" incentive in the form of needing to spend its own assets to fulfill its promise of completing the work. This is because, once an undercapitalized non-operator Transferee's costs exceed or appear likely to exceed the fixed price of the cleanup, the Transferee has no chance of making profit and is therefore more likely to declare itself bankrupt or otherwise walk away, leaving it to others to complete the work.

Given the importance of Transferee's assets, Petitioners' August 18, 2017 response to the State's recent efforts to obtain Transferee's 2011 – 2016 audited financial statements is particularly important. In their response, Petitioners appear to have ignored completely the State's request with regard to the Transferee itself (NSDH).[13] Instead, and only under confidentiality restrictions to which, for

[13] Exhibit CLF-MOH-2, Joint Petitioners' Second Supplemental Response to the Vermont Public Service Department's Second Set of Information Requests, DPS:NS.2-21 (Aug. 18, 2017) (ignoring without explanation the State's express request for audited financial statements for *NSDH* as well as NSGH, NSGS and LVI Parent Corp., and instead providing information solely concerning NSGH and NSGS, then vaguely referring to "NorthStar's" abilities without identifying *which* NorthStar entity to which the response refers). The lack of response concerning NSDH's assets was not unimportant, as the State had already identified the issue of financial qualifications as important. State's Reply in Support of its Petition

reasons stated above, I have not agreed, Petitioners have provided information only on NorthStar Group Holdings, LLC ("NSGH") and NorthStar Group Services, Inc. ("NSGS"). Except to the extent that NSGH or NSGS will share in the Transferee's liability beyond the limited protections offered by NSGS through the Parent Support Agreement (discussed below), any response providing NSGH or NSGS information in lieu of NSDH's prevents meaningful review of the Transferee's finances.

(III) <u>The transfer must be supported by clear, integrated, and otherwise robust insurance and other financial assurances</u>.

Even assuming that the amounts in the Nuclear Decommissioning Trust ("NDT") and Site Restoration Trust ("SRT") are reasonably anticipated to be sufficient in themselves to accomplish the work with respect to Known contaminants – an issue that I understand from State filings to be unsettled[14] – if the transfer is to follow the model of BRAC sites and other sites, and as discussed below (describing Cost Cap and PLL policies), it should be supported by insurance and other protections up to where the public is assured of the availability of *twice* the amount of funds expected to remediate the Known

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for Leave to Intervene, at 5 n.12 (July 17, 2017) ("[W]e haven't made any conclusions about whether NorthStar is financially … qualified to hold the license.").

[14] *See*, *e.g.*, State of Vermont's Petition for Leave to Intervene in NRC Proceedings, NRC Dkt. No. 50-271-LT-2, at 3-4 (June 13, 2017). Focusing for now just on the non-radiological contamination, it appears that Petitioners have still not provided the State with a complete non-radiological site investigation and characterization report for the VY Site, creating "significant uncertainty regarding what is required and what it will ultimately cost to clean up non-radiological pollution and complete site restoration. Affidavit of Charles B. Schwer at 2, ¶¶ 8, 12 (June 12, 2017). As stated by Mr. Schwer, "Because the Vermont Yankee site has not been fully investigated and characterized for non-radiological contamination, there is a risk of cost overruns." Id. at 2, ¶ 12.

Per the Affidavit of William Irwin, there appears also to be a significant risk of a shortfall in available funding to fully and safely decommission and radiologically decontaminate the site and manage its spent nuclear fuel, thus placing public health, safety and the environment at risk. Affidavit of William Irwin, at 2, ¶ 7 (June 9, 2017). According to Mr. Irwin, the investigation of and characterization of the site (non-radiological <u>and</u> radiological) has not yet occurred. Id. at 3, ¶ 7(a).

pollutants[15] and another equal amount or more available to address Unknowns.[16] Finally, it is important that the insurance and other assurance remain in place at least as long as the work is expected to continue.

As discussed below in response to CLF's request that Petitioners:

> Identify all resources of NorthStar, including any letters of credit or insurance or other financial instruments that will be available to support the decommissioning and site restoration [be they mere drafts or even terms sheets],

Exhibit CLF-MOH-2 (CLF:JP.1-33), Petitioners have identified virtually no Cost Cap or PLL coverages required for a BRAC or other transfer of liability for conventional pollutants, and the policies Petitioners did produce have express exclusions for conventional and/or nuclear pollutants and fail to protect the public in other respects as well. The only policy Petitioners produced that does cover pollution in any way is a *Contractor's* policy that, as discussed below (at 24-25), covers only those costs that result from the Contractor's errors or other actions.

Cost Cap Insurance. The type of insurance that is most important to an environmental liability transfer of significant size is commonly referred to as "Cost Cap." In a nutshell, Cost Cap insurance covers excess costs to address Known pollutants up to where the costs for Knowns reach to twice the amount estimated at the time that the insurance is purchased (or "2X").

In terms of duration, Cost Cap coverage typically begins at or shortly before the time of liability transfer and remains in effect for years, well past the time expected to complete the cleanup.[17]

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[15] "Known" contaminants are typically (and very roughly) described as those that are, at the time of contracting, known or reasonably expected to be required to be addressed through a pre-existing, government-mandated Scope of Work ("SOW") as well as those that are discovered in the course of executing the SOW even as it may evolve over time.

[16] Unknowns are typically defined to include contaminants that are not known or expected at the time of contracting, and are discovered during the policy period and outside of the course of executing the SOW.

From Petitioners' responses to CLF's discovery requests (and, specifically, in response to CLF:JP.1-33, it appears that Petitioners' propose that the liability transfer be made without the use of any Cost Cap insurance.[18] Such a deficiency would, in my experience, lead federal regulators to reject a liability transfer in the context of a site contaminated with conventional pollutants.

Pollution Legal Liability Insurance. BRAC and other transfers of liability for conventional pollutants are also typically supported by at least an equal amount (*i.e.*, another X, or even 2X) of insurance to cover the cost of addressing Unknowns. Again, this insurance is typically referred to as Pollution Legal Liability (or "PLL"), and its coverage, too, typically begins at or shortly before the time of liability transfer and remains in effect well past the time expected to complete the cleanup. And, again, it appears from their discovery responses (specifically, CLF:JP.1-33), that Petitioners' seek to make the liability transfer without any PLL protection. Such a deficiency would, in my experience, cause federal regulators to reject a proposed liability transfer in the context of a site contaminated with conventional pollutants.

The Importance of Commission Review of Cost Cap, PLL, and any other Surplus Lines Insurance. As discussed more thoroughly in Section IV, as a pre-condition of BRAC transfers, state and federal environmental regulators are given copies of the proposed Cost Cap and PLL policies so they may review the

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[17] Because traditional insurers exited the market for Cost Cap insurance in or around 2011, the Air Force and other entities that have executed liability transfers for conventional pollutants have needed to create and apply "Cost Cap Alternatives") to satisfy regulators' reasonable needs for assurance of cleanup completion. I have assisted the Air Force in two such post-Cost Cap transfers, in 2013 and 2015 (as well as others before 2011, using Cost Cap from traditional insurers). M. Hill, *Insured Fixed-Price Cleanups, Still Possible Even After Commercial Insurers' 2011 Exit from The Cost Cap Market,* 70 Chem. Waste Litig. Rptr. 956 (Oct. 2015).

[18] It is possible that the ANI or NEIL policies that Petitioners did not mention in their discovery responses to CLF (but have vaguely referenced elsewhere) may provide some Cost Cap protections. We cannot tell. As discussed in Section IV, just as those coverages must be shown in advance and made publicly available in the Petitioner-cited BRAC model, they should be provided in advance here. It is my understanding, however, that the ANI and NEIL policies that might cover NSDH's work do not yet even exist.

actual or prospective policy language for adequacy *before* providing their approval for the transfer.

Project-specific, regulatory review of policy language is particularly critical for environmental insurance, because – unlike the vast majority of other insurance (*e.g.*, General Liability, Auto, Homeowners) – environmental insurance is a "surplus lines" product whose textual terms are not subject to regulatory review by State Insurance Commissioners or any other regulator. Among other terms, regulators must be assured that the policies:

- include the governments as Named Insureds;
- are reasonably assignable should the Transferee fail and the work needs to be completed by others;
- cannot be cancelled or even modified without prior regulator consent; and
- do not contain other terms that undercut protections to the public.

Environmental insurance policies are generally quite complex – typically over 50, 100, or even several hundred pages – and each policy must be reviewed to the same degree as any other individual (and customized) contract of similar complexity and significance. In a typical environmental liability transfer, policy negotiation and manuscripting takes months (and multiple drafts), much the same as other contracts of similar magnitude and complexity.

The need for such policy review by regulators is implicitly statutorily mandated at BRAC sites, because BRAC transfers of contaminated properties cannot take place unless the Governor of the host state has determined that the protections are sufficient to assure that the transfer will "not substantially delay any necessary [remediation] at the property." 42 U.S.C. § 9620(h)(3)(C)(i)(IV).

For BRAC properties that are on the National Priorities List ("NPL"), approval is required not only by the Governor but also by the Administrator of the EPA.[19]

The same or greater degree of review must be required in the context of a nuclear plant, where the liabilities sought to be transferred are of at least the same magnitude in terms of anticipated complexity, cost and risks to human health and the environment. Yet, as seen from their response to CLF's discovery requests, it appears that Petitioners have not obtained (much less provided for inspection) either of the above types of policies or similar protections. The policies that Petitioners *have* provided are not adequately protective, for reasons described below:

Contractor Pollution Liability: A policy that Petitioners describe as a $10M "pollution policy"[20] was provided but is inadequate for any of several reasons:

- First, the policy is not a "pollution policy" as people in the field typically apply that term, but is a *Contractors* Pollution Liability ("CPL") policy, essentially covering only those costs that are caused or exacerbated by the Contractor's actions or errors (much the same as a doctor's malpractice policy might cover health care costs that are caused or exacerbated by the doctor's negligence but not those that must be incurred for other reasons).[21]

  A true pollution policy, by contrast – at least as that term is commonly used in the world of environmental liability transfers including but not

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[19] Id. As noted, on behalf of the Air Force, I have negotiated insurance policies for four BRAC transfers of NPL Property (in 2007, 2010, 2013 and 2015), each of which obtained regulatory approval, and the last two of which required us to create a customized alternative to Cost Cap insurance in light of traditional insurers' 2011 exit from the Cost Cap market. The 2015 article that I wrote (*see supra* at 22 n.17) describes those policies and their public benefits.

[20] Dec. 16, 2016 Prefiled Testimony of Jeffrey Adix, at A7; Petitioners' April 26, 2017 Responses to CLF's Discovery Requests, at A: CLF:JP.1-44.

[21] *See* Bates Page NS-VYNDC 0050080, contained as part of Petitioners' Attachment A.DPS.NS.1-39.2, highlighted excerpts of which are attached hereto within Exhibit CLF-MOH-3. Zurich's formal name for a CPL is "Professional Environmental Consultant's Liability Insurance Policy." *Id*. at 0050076.

limited to BRAC property transfers – refers to a PLL policy or possibly a Cost Cap, and thus applies to a far broader range of pollution-related costs than those that were caused or exacerbated by the Contractor.

- Second, the CPL policy was merely a one-year policy, it expired on July 1, 2017, and thus does not cover any part of the period of the expected cleanup at the VY site. *Id*. at Bates Page NS-VYNDC 0050076. A precondition of transferring environmental liabilities at BRAC and other contaminated properties is the production of a policy that will be effective on the date of transfer and is expected to last in duration well beyond the expected time of the cleanup.

- Third, the CPL policy excludes coverage for claims that are based upon or arise out of pre-existing conditions that are known to any of the insureds and that could reasonably expect to result in a claim. *Id*. at 0050081, at ¶ III.A;

- Fourth, the CPL policy is neither issued in the name of (nor controlled by) the proposed Transferee (NSDH) but in and by NSGS, and access to the Policy's $10M in limits is shared by 25 Additional Named Insureds, none of which is NSDH, and on projects that span far beyond the Vermont Yankee site, if it includes the Vermont Yankee site at all. *Id*. at 0050076 (Declaration Item 1) and 0050113-14 (Endorsement 13).

- Fifth, it is not clear that the CPL Policy covers even the majority of NSDH's services (decommissioning or restoration), but is instead intended primarily to cover services of a consulting nature as opposed to active remediation. *Id*. at 0050109-10 (Endorsement 11).[22]

General Liability. Petitioners have also produced (as Attachment A.DPS.NS.1-38.2) what they have described as a "General Liability" policy. Excerpts are attached within Exhibit CLF-MOH-3 (*e.g*., Bates NS-VYNDC 0049870). This policy, too, provides virtually none of the Cost Cap or PLL protections required at BRAC and other sites that are the subject of environmental liability transfers, and it is inadequate and/or even inapplicable for other reasons as well:

[22] This is not an exhaustive list of the inadequacies of the CPL policy, but identifies the policy's primary shortcomings.

- First, it expressly excludes coverage for claims related to conventional pollutants or hazardous properties related to nuclear and/or radioactive material. *See id*. *at* Bates Pages NS-VYNDC 0049901, 0049937 and 0049949.

- Second, it, too, was merely a one-year policy, it expired on July 1, 2017, and thus does not cover any part of the period of the work. *Id*. at 0049870.

- Third, it, too, is neither issued in the name of (nor controlled by) the proposed Transferee (NSDH) but in and by NorthStar Group Services, Inc., *id*., and its limits are shared by an undisclosed (because "redacted") number of Additional Named Insureds, none of which, as far as can be told from the copy produced, is NSDH. *Id*. at 0049870, 0049982-83.

Excess Liability. The insurance policy that Petitioners identified in their testimony is described as an "Excess Liability" policy is in fact three separate policies.[23] For several reasons, none of the three provides insurance that is adequate (and in some cases may be irrelevant):

- First, all three expressly exclude coverage for claims related to pollutants that are conventional or nuclear in nature.[24]

- Second, none is specific to the Transferee (NSDH) but, rather, are in the name of NSGS or NSGH, entities that, absent circumstances of which I am unaware, are not liable for the work and thus could not claim under the policies.[25]

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[23] Dec. 16, 2016 Testimony of Jeffrey Adix, at A7; *see also* Petitioners' April 26, 2017 Response to CLF's 1st Set of Discovery Requests, at Answer 1-45 (contained within Exhibit CLF-MOH-2). Excerpts of all three Excess policies are contained within Exhibit CLF-MOH-3 and identified as Attachments A.DPS.NS.1-37.3 ($15M Zurich Policy); A.DPS.NS.1-37.4 ($25M Great American Assurance Company Policy); and A.DPS.NS.1-37.5 ($10M AIG Policy).

[24] Exhibit CLF-MOH-3, Zurich Policy (A.DPS.NS.1-37.3) at NS-VYNDC 0049651 - 0049653 (pollution and nuclear exclusions, respectively); Great American Policy (A.DPS.NS.1-37.4), at 0049684 and 0049700 (pollution exclusion) and 0049703 (nuclear exclusion); and AIG Policy (A.DPS.NS.1-37.5), at 0049713 (pollution exclusion).

[25] Exhibit CLF-MOH-3, Zurich Policy (A.DPS.NS.1-37.3) at 0049641; Great American Policy (A.DPS.NS.1-37.4), at 0049677; and AIG Policy (Attachment A.DPS.NS.1-37.5), at 0049709.

- Third, all of the policies were for one year only, and they expired July 1, 2017. *Id*.

$125M Support Agreement. In addition to the identified insurance policies, Petitioners have pointed to a $125M "Support Agreement Between NorthStar Group Services, Inc. and NorthStar Vermont Yankee, LLC," the latter being the name that ENVY is anticipated to take after ENVY has been transferred to NSDH.[26] The Support Agreement would be considered inadequate for a BRAC or other transfer of contaminated property for any of several reasons:

- First, $125M is likely insufficient in amount. As noted above, transfers of contaminated BRAC sites (and other sites) typically have cost overrun protection to where costs are covered up to twice the expected cost of full remediation for Knowns, with another policy of at least an equal amount for Unknowns. According to Petitioners pleadings in the NRC proceedings, assets in the Vermont Yankee NDT had a market value of approximately $562 million as of December 31, 2016.[27] Assuming that this is roughly on the order of a conservatively high estimate of costs required to address the Knowns, $125M would be grossly insufficient to obtain regulatory approval for a liability transfer pertaining to conventional pollutants, where regulators appropriately expect insurance and other protections (e.g., deductibles and co-pays) to cover costs to where the Knowns are twice what was expected at the time of transfer. *See supra* at 15, 21.

- Second, and particularly important for the Commission given its focus on conventional contaminants, it is unclear that the $125M Support Agreement's purpose extends beyond decommissioning (although, in fairness, it does also reference costs required for "maintaining" the site and "protecting the public health and safety.") Further indication that the Agreement's purpose is limited to decommissioning is that the Agreement can be modified by providing notice only to the NRC, without offering similar protections to the State of Vermont. Exhibit CLF-MOH-3,

[26] Joint Petition at 1, and 3 ¶ 2; *see also* Prefiled Testimony of Jeffrey Adix, at A6; and of Scott State, at A23 and A56. A full copy of the unsigned Parent Support Agreement as produced by Petitioners (as Enclosure 6 to JP-SES-SUPP-1), is attached at the end of Exhibit CLF-MOH-3.

[27] Applicants' Answer Opposing June 13, 2017 State of Vermont's Petition for Leave to Intervene, at 33 (July 10, 2017).

Support Agreement at 2, ¶ 4 (produced as Enclosure 6 to JP-SES-SUPP-1).

- Third, the Agreement states that, except for certain protections provided therein to the NRC, the Agreement is not intended for the benefit of any person other than the parties to the Agreement (which do not include the State of Vermont).

- Finally, the Support Agreement is not signed and thus does not reflect a binding commitment. Again, looking at BRAC and other sites, contractual commitments of this sort are typically provided to regulators in a form that reflects binding commitments. While the commitments may be contingent upon the actual transfer of the property, the commitment is in effect immediately upon transfer.

Letter of Credit. In December 16, 2016 Prefiled Testimony filed on behalf of Petitioners, Scott State, CEO of NorthStar Group Services, Inc., Petitioners stated that "NorthStar VY will obtain a contingent letter of credit in the amount of $25 million, payable to a secondary decommissioning compliance trust to be formed …." (Testimony of S. State, at A23). The identified letter of credit ("LOC") should not be relied upon, for several reasons:

- First, given Mr. State's description of the LOC as payable to a *decommissioning* compliance trust, then (similar to the $125M Support Agreement), one cannot know whether the LOC assets may be used for restoration.

- Second, the LOC was withheld under claim of privilege or other protection. As set forth below, and again using Petitioners' analogy, were this a BRAC transfer, the LOC would need to be produced in a form upon which regulators and the public can rely.

Bonds**.** In pre-filed testimony filed on behalf of Petitioners, NSGS Vice President and Chief Financial Officer Jeffrey Adix testified that "NorthStar" has obtained "more than $250 million in performance bonds since 2014 to provide additional assurance of project completion when required." December 16, 2016 Prefiled Testimony of J. Adix at A7. Similarly, NSGS

Chief Executive Officer Scott State stated in his Prefiled Testimony that "NorthStar" "commits to provide, and will require its teaming partners to provide, appropriate performance bonds (or insurance, where appropriate) issued by Treasury-rated surety companies to guarantee the performance of the tasks." State Testimony at A56.

As stated above (at 9 n.3), Petitioners' use of the term "NorthStar" in this manner is virtually meaningless, and cannot be relied upon.

Further, despite CLF's Discovery Request 33 for all "letters of credit or insurance or other financial instruments that will be available to support the decommissioning and site restoration [be they mere drafts or even term sheets]," Petitioners provided no such bonds or even drafts or term sheets, thus preventing public review of them.

(IV) <u>The liability transfer must be made, and the performance of its objectives monitored, in a more transparent manner</u>.

Information sufficient to establish each of the above factors should be provided to this Commission, the NRC and the public, so that each is assured that the proposed liability transfer will in fact result in decommissioning and remediation that is on budget, on time, and otherwise done in a manner most likely to result in redevelopment and associated job growth. To date, Petitioners have withheld almost all such information, even final two-party contracts, claiming privilege or other reasons (*e.g.*, that it would hurt Transferee's competitive position).

Although Petitioners' competitiveness argument is not completely without merit, as noted above, in my nearly 20 years of experience in this field, I have never seen such "pirating" of others' data ever tried (much less ever have any effect). More importantly, any such risk to Petitioners is more than outweighed by the public's need to know that they will not be saddled with the remaining decommissioning and restoration costs or with a long-

shuttered facility preventing redevelopment, and by the public interest in avoiding distraction and delay. *See supra* at 6 n.2.

Again turning to the BRAC process as a model, GFPC contracts (including Milestone payments within the contracts) are provided not only to regulators (*e.g.*, the Governor of the hosting state; the Administrator of the EPA) but also to the local City, County or other governmental entity, so the amounts set forth within the individual Milestones can be reviewed for reasonableness. This is true even where, as here, the Transferor and Transferee have opted to break down the costs into well over 100 milestone payments.[28]

In addition to receiving the above information in advance, this Commission and the NRC should be assured of access by them to relevant information as the work takes place, through the time of completion. This Commission and the NRC should not only be expressly identified as beneficiaries (or entities acting on behalf of beneficiaries) of the NDT, SRT and any other trust of similar vehicles used to hold or support decommissioning or restoration funds, but it should also be stated expressly that, as beneficiaries or representatives thereof, this Commission and the NRC will have access to all relevant information related to the progress of the work, even information that is arguably privileged or otherwise protected.

Such access is normally granted to beneficiaries. *See U.S. v. Jicarilla Apache Nation,* 564 U.S. 162, 165, 131 S. Ct. 2313, 2318 (2011) ("The common law … has recognized an exception to the [attorney-client] privilege when a trustee obtains legal advice related to the exercise of fiduciary duties. In such cases, courts have held, the trustee cannot withhold

[28] As discussed *supra* at 6 n.2, Petitioners could mitigate any perceived threat to their competitive data by reducing the number of payments, thus providing less detail to third parties. If, for example, ten Milestones were coalesced into one larger Milestone, Petitioners' risk of sharing competitive detail would be reduced.

attorney-client communications from the beneficiary of the trust."); U.S. Department of Justice's Petition for Certiorari in *Jicarilla*, at 21 ("A common-law fiduciary is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person."). That said, in the same case where the Department of Justice and Supreme Court noted the general exception to the attorney-client privilege, the government argued and the Court held that the exception did not apply in the context of that trust, thus enabling the federal government, despite its Trustee status, to withhold information from the beneficiary itself (the Jicarilla Apache Nation).

Given that precedent, this Commission should condition any issuance of a CPG on Petitioners' and any required Trustees' express agreement that the Commission and other regulators will be given access to all relevant information and that arguments of privilege or other protections will not apply to prevent or even to delay such access.[29]

Q10. Do you believe that the proposed transfer should not take place?

A.10 It should not take place as proposed. As noted, I have long (since 1998) been an advocate of liability transfers in the context of environmental cleanups, and I continue to be. When structured well, such transfers are far more likely to promote the public good than would a conventional (*e.g.*, time-and-materials) approach to cleanup contracting. That said, when structured poorly, liability transfers are very much worse for the public, capable of doubling or even tripling the costs and time required for completion.

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[29] Although there may be circumstances where the need for protections outweighs the need for *public* access to information, any argument that Petitioners might make to prevent or delay providing information to this Commission and the NRC would almost certainly be outweighed by the need for these regulators to review the information.

Perhaps the most essential component of a liability transfer is that the Transferor remain liable to regulators in the event of Transferee failure. That said, the factors described in Sections II-IV are also very important: It is essential, for example, that the Transferee demonstrate that it is (and will remain) both technically and financially able to complete the work, and that it is properly incentivized (with clear and otherwise robust "carrots" and "sticks" throughout the period of the work). It is important that the work be supported by clear, robust and independently-provided insurance and other financial assurance tools. And, finally, it is critical that transparency with respect to the transfer documents at least as great as that provided in BRAC transfers be provided to regulators and the public in advance of the transfer, and that, on an ongoing basis with respect to work progress, regulators be given access to documents as (or equivalent to) trust beneficiaries unfettered by claims of privilege or other protections.

Q11. Does that conclude your testimony at this time?

A11. Yes.