STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7862

Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificate of Public Good and other approvals required under 30 V.SA. § 231(a) for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent nuclear fuel	)))))))

Order entered: 3/29/2013

ORDER RE: ENTERGY'S MOTIONS FOR JUDICIAL NOTICE AND ADMISSION OF DEPOSITIONS

On February 20, 2013, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy VY" or the "Company") filed a motion seeking to admit into evidence the deposition transcripts of two non-testifying witnesses who authored certain studies variously relied upon by several experts who have testified in this proceeding (the "Deposition Motion"). Additionally, on February 25, 2013, Entergy VY filed a motion requesting that the Vermont Public Service Board ("Board") take judicial notice of certain other documents, or, in the alternative, that all but one of these materials be ruled admissible as non-hearsay admissions by party-opponents (the "Judicial Notice Motion"). In today's Order, we grant the Deposition Motion in the entirety. The Judicial Notice Motion is granted to the extent that the Company asks that we take judicial notice of the "existence" of certain documents; in all other respects that motion is denied.

1. The Deposition Motion

At issue in the Deposition Motion is whether the Board should accept into evidence the deposition transcripts of third-party witnesses Dr. Peter Shanahan and Mr. Chris Yoder, neither

of whom have prefiled direct testimony in this Docket or otherwise have been called to testify during the direct phase of technical hearings. Dr. Shanahan and Mr. Yoder were commissioned by Vermont Natural Resources Council and the Connecticut River Watershed Council (together, "VNRC") to author certain reports which expert witnesses for VNRC and the Vermont Department of Public Service ("Department" or "DPS") have relied upon in this proceeding to support their expert opinion testimony. Specifically, Dr. Shanahan is the co-author of two reports which have been entered into evidence as Exhibit DLD-2 and Exhibit DLD-3, respectively. Mr. Yoder is the author of two other reports which have been admitted into evidence as Exhibit DLD-4 and Exhibit DLD-5, respectively. All of these reports concern the potential effects of the thermal discharges from the Vermont Yankee Nuclear Power Station into the Connecticut River.

The Vermont Supreme Court has held that "[t]rial courts enjoy broad discretion in deciding whether to admit or exclude" the deposition testimony of an absent witness pursuant to Vermont Rule of Civil Procedure 32(a)(3)(E).[1]

The Company maintains that the Board should admit the deposition transcripts of Dr. Shanahan and Mr. Yoder as "substantive evidence" because these individuals are unavailable as witnesses in this case and Entergy VY has been unable to procure their attendance by reasonable means. The Company maintains that, during their depositions, Dr. Shanahan and Mr. Yoder provided "critically relevant testimony concerning the methodologies, assumptions, and material limitations" of the reports they authored. According to Entergy VY, the deposition testimony "bears heavily on both the credibility of the reports themselves" and whether it was reasonable for the VNRC and DPS witnesses to rely on these reports in their direct prefiled testimony.

1. *Boehm v. Willis*, 180 Vt. 615, 618 (2006).

Neither VNRC nor the Department opposes the Deposition Motion.[2] However, the Department does take issue with admitting certain limited portions of the depositions of Dr. Shanahan and Mr. Yoder.

In the case of Mr. Yoder, the Department has identified nine passages of objectionable testimony, citing either one or both of the following grounds for objection: the question "calls for speculation beyond the witness' personal knowledge" under V.R.E. 602 and "lack of foundation" under V.R.E. 703.[3] Having reviewed the deposition answers that Mr. Yoder gave subject to objection, we find the nature and substance of these responses to be much like the testimony that is commonly elicited from expert witnesses testifying live before the Board, notwithstanding whatever technical defects there may have been in the questioning.

In any event, given the impeachment purpose for which the Yoder deposition is being offered, we find any danger of unfair prejudice to be outweighed by the probative value of Mr. Yoder's answers, which reflect on his candor as a witness and illuminate the scope of his expertise. Accordingly, for the foregoing reasons, the Department's objections to the admission of Mr. Yoder's deposition testimony are overruled.

Turning to Dr. Shanahan's deposition, the Department has identified two passages of objectionable testimony.[4] For the most part, Dr. Shanahan is being asked in these passages to confirm certain descriptive details of a document which, according to his deposition testimony, he had never seen before. The Department contends that these questions run afoul of the "best evidence" rule under V.R.E. 1002 and otherwise "inappropriately sought testimony from Dr. Shanahan attesting to the truthfulness of a document . . . that he had never seen before." While we agree with the Department that a written document typically speaks for itself for purposes of

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2. *See Response of the Department of Public Service to Entergy's Motion to Admit Deposition Transcripts of Unavailable Witnesses to Specific Testimony Therein,* dated February 25, 2013, at 1; *Response of VNRC and CRWC to Request for Admission of Deposition Transcripts of Unavailable Witnesses* dated February 25, 2013, at 1. We note that in their responses, both DPS and VNRC question whether Entergy VY has established the "unavailability" of Dr. Shanahan and Mr. Yoder as witnesses for purposes of admitting their depositions pursuant to V.R.C.P. 32 (a)(3)(E). However, in view of the fact that neither the DPS nor VRNC opposes the admission of the depositions, there is no need for us to reach this issue.

3. DPS Deposition Reply at 3-5 (Yoder Dep. 19:11-20; 24:8-12; 54:8-14; 87:10-17; 88:2-11; 88:12-16; 88:17-19).

4. DPS Deposition Reply at 6-7 (Shanahan Dep. 15:20-16:5; 40:1-41:24).

establishing its content, our review of the deposition transcript persuades us that the examining attorney was simply familiarizing the witness with the document in order to establish a framework for subsequent questioning. Witness statements confirming the content of a document that is independently verifiable by reference to the document itself do not constitute "testimony" in any meaningful sense. Accordingly, we overrule both of these objections.

The Department's remaining objections — "lack of foundation" under V.R.E. 703 and "calls for speculation beyond the witness' personal knowledge" under V.R.E. 602 — are overruled for the reasons discussed above in relation to Mr. Yoder's deposition. Again, in light of the impeachment purpose for offering the Shanahan deposition into evidence, any danger of unfair prejudice is outweighed by the probative value of admitting Dr. Shanahan's answers as indicative of his candor as a witness and the scope of his expertise.

2. Judicial Notice Motion

At issue in the Judicial Notice Motion is Entergy VY's request that the Board "take official notice of and admit" into evidence seventeen documents consisting of legal briefs, excerpts from hearing transcripts and prefiled testimony in various prior Board cases, as well as hearing transcripts and prefiled testimony from a proceeding before the Vermont Environmental Court.[5]

Positions of the parties

Entergy VY

The Company asserts that the Board "should allow the admission of facts offered by the Vermont Department of Public Service, the Conservation Law Foundation and the Vermont Agency of Natural Resources in previous proceedings to become evidence in the present docket." According to Entergy VY, it is appropriate for the Board to take judicial notice of the "existence" of the pleadings and prior testimony that are the subject of the Judicial Notice Motion, as all of these materials "are part of the official record in Docket No. 6545, Docket No. 7082, Docket No. 7440, Docket 7600, Docket 7815, and the matter of *In re Entergy Nuclear Vermont Yankee*

5. These documents are attached to the Judicial Notice Motion as Exhibits A through Q. In this Order, we refer to these documents collectively as the "JNM Exhibits," with the additional identifiers "A" through "Q" as warranted.

Amended Discharge Permit, Docket No. 89-4-06 Vtec." In the alternative, the Company argues that the Board should admit all but one of these documents as "non-hearsay" statements of party-opponents pursuant to V.R.E. 801(d)(2)(A).

Finally, Entergy VY contends that the admission of the prior testimony and pleadings from Docket 7440 is not barred by the Board's Order in Docket 7440 of March 29, 2012, and that this information "will be helpful to the Board" in assessing whether the general good of the state will be served by "granting Entergy VY's petition for amendment of its Certificate of Public Good . . . ."

DPS

The Department takes the position that "it is clear that Entergy's motion seeks to admit the content of this prior testimony — as opposed to the fact that the testimony occurred — under the guise of official notice."[6] Thus, the Department opposes the Judicial Notice Motion because the proffered documents relate to issues of fact and law which are "hotly contested" in this proceeding and therefore "simply are not suitable for official notice." The Department further contends that the Board should reject the Company's attempt to use the mechanism of judicial notice to admit the statements of party-opponents into evidence. According to the Department, Entergy VY "must seek to admit these statements through proper channels — either in prefiled testimony or in cross-examination of a witness of the relevant party during a technical hearing."[7]

Discussion

A. The Judicial Notice Request

The practice of taking judicial notice is founded on the assumption that certain matters are not controversial and therefore need not be established for legal purposes by presenting contested evidence to a trier of fact. The purpose is "to save the time and trouble that it would take to present evidence of matters, the truth of which no one can legitimately challenge."[8]

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6. *Response of the Department of Public Service to Entergy's Motion for Official Notice and Proffer of Party Admission,* dated March 1, 2013, at 1 ("DPS Judicial Notice Reply").

7. DPS Judicial Notice Reply at 8.

8. Jack H. Friedenthal, Mary Kay Kane, Arthur R. Miller, Civil Procedure § 5.22 (2nd ed. 1993).

Accordingly, when a matter is judicially noticed, it is accepted as true without formal evidentiary proof.[9]

Our consideration of the Judicial Notice Motion begins with a review of the legal framework applicable to such evidentiary questions in Board cases. In proceedings before the Board, Vermont law provides as follows:

> Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.[10]

In applying Section 810(4), the Vermont Supreme Court has interpreted the phrase "judicially cognizable" by referring to V.R.E. 201(b), which states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[11]

It is well-recognized that judicial notice does not extend to the truth of the matters asserted in other judicial proceedings. Under Vermont law, it is "improper to judicially notice the content of testimony in another proceeding."[12] Judicial notice is not intended as a means of by-passing cross-examination or other testing of documents and declarations for their admissibility as substantive proof pursuant to the rules of evidence.[13] Rather, a court may take judicial notice of testimony from another proceeding "'not for the truth of the matters asserted in

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9. *See* Michael H. Graham, Handbook of Federal Evidence § 201.1 (3rd ed. 1991); *cf.*, *Carson v. Department of Employment Security*, 135 Vt. 312, 315 (reversing administrative referee who found it was "common knowledge" that store clerks generally work six days a week because "practice is not so widespread and uniform that its existence may be assumed without proof.").

10. 3 V.S.A. § 810(4).

11. *In re Handy*, 144 Vt. 610, 612 (1984).

12. *Jakab v. Jakab*, 163 Vt. 575, 579 (1995).

13. *Jakab*, 163 Vt. at 579 (describing procedural and evidentiary rules presenting "a clear, albeit limited, method of introducing testimony from a past proceeding into the proceeding before the court.").

the other litigation, but rather to establish the fact of such litigation and related filings.'"[14] Thus, by way of example, using judicial notice to establish the "fact of" prior litigation — or prior statements made in prior litigation — may be appropriate to support a *res judicata* argument or to enable an administrative agency to exercise its quasi-judicial duty of regulatory supervision.[15]

We observe that the Judicial Notice Motion does not clearly set forth the purpose for which the Company is seeking to have judicial notice taken of the prior testimony and pleadings attached to its motion. The Judicial Notice Motion begins with a "preliminary statement" that it is appropriate for the Board to take notice of the "existence" of the JNM Exhibits and then concludes with a request that the Board "enter an order" admitting these materials "into evidence."[16] However, an order noticing the "existence" of facts and an order admitting evidence are not interchangeable evidentiary rulings. Judicial notice affords the weight of record evidence to a fact that is known to lie beyond dispute, thus obviating the need for formal proof through the evidentiary process. In contrast, absent a stipulation by the parties, an order admitting evidence into the record only issues after the proffered testimony has undergone the very process of formal proof that is waived by taking judicial notice.

In view of the foregoing, we understand Entergy VY to be requesting two evidentiary rulings: (1) to admit the JNM Exhibits into the record as officially noticed matters for the limited purpose of establishing the "existence" of these documents and the fact that such statements were made; and (2) to admit the content of the JNM Exhibits for its use as substantive evidence to support findings in this proceeding. To the extent that Entergy VY has requested that we take

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14. *Liberty Mutual Insurance Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992), *on remand* 969 F.2d 1384 (2d Cir. 1992)(*citing Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)); accord *Jakab*, 163 Vt. at 578-579.

15. *See, e.g., In re Petition of EMCO CATV, Inc.*, 141 Vt. 385, 388 (1982)(upholding Public Service Board's judicial notice of its own prior decision in rejecting petitioner's *res judicata* argument); *Handy*, 144 Vt. at 613 (in license suspension proceeding, approving Liquor Control Board's judicial notice of its records of licensee's past infractions, citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953)(quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194(1941)("'[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . . .' That competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding.")).

16. Judicial Notice Motion at 4 and 7. Nor does the Company's sur-reply offer any further explanation of what purpose will be served by our taking judicial notice of the JNM Exhibits. See *Entergy VY's Reply Brief in Support of its Motion for Official Notice and Proffer of Party Admissions*, dated March 11, 2013 ("Entergy VY Reply").

judicial notice of JNM Exhibits A through E and H through P to establish their "existence" as statements made and briefs filed in other proceedings, the request is granted.

To the extent the Company requests that we take judicial notice of the content in JNM Exhibits A through E and H through P for use as substantive evidence in this Docket, the request is denied as such judicial notice would be improper under Vermont law.

As for JNM Exhibits F, G and Q, all of these documents are legal briefs written by attorneys for either the Department or Entergy VY. Statements in legal briefs fall outside the scope of "judicially cognizable" facts within the meaning of Section 810(4) and V.R.E. 201(b).[17] Therefore, we decline to take judicial notice of the content of these documents for use as substantive evidence because statements made by counsel in the service of advocacy by definition are subject to "reasonable dispute."

Having thus ruled on all of Entergy VY's requests for judicial notice, we emphasize that we have made no determination as to the relevance or materiality to be accorded to the matters we have noticed in this Order.

B. The Request for a Ruling Regarding Admissions of Party-Opponents

Entergy VY further contends that JNM Exhibits A through P variously constitute statements by the DPS, ANR and CLF, all of whom are party-opponents, and that therefore these materials are admissible and should be admitted as non-hearsay admissions pursuant to V.R.E. 801(d)(2)(A).[18] With the exception of JNM Exhibits F, G and Q, the Department "does not necessarily object" to a ruling that these statements are admissible under V.R.E. 801(d)(2)(A), but the DPS does insist that the Company "must seek to admit these statements either in prefiled testimony or through cross-examination."[19] In turn, the Company responds that "DPS cites no support for its contention that Entergy VY may not seek admission of this prior testimony

17. We note that JNM Exhibits F, G and I have already been admitted into the evidentiary record in this proceeding in conjunction with the cross-examination of DPS witness Hopkins as Exhibit Cross-Hopkins-16, Exhibit Cross-Hopkins-17, and Exhibit Cross-Hopkins-1, respectively. Tr. 2/26/13 Vol. I at 15.

18. Entergy VY Reply at 3.

19. DPS Reply at 8. Neither VNRC nor ANR filed any objection or other comments on this issue.

through a motion and, in fact, DPS sought admission of just such evidence for the same reason in its own motion."[20]

For purposes of this Order, there is no need to decide whether it is appropriate to use a written motion to move into evidence the admissions of non-hearsay party-opponents pursuant to V.R.E. 801(d)(2)(A). Our review of the JNM Exhibits — in particular JNM Exhibits J, K, L and M — leads us to conclude that the clarity of the record in this case would be better promoted by requiring Entergy VY to seek the admission of this proffered evidence in the customary context and through the customary process of conducting cross-examination, through which the relevance and materiality of the particular statements contained in these JNM Exhibits will be made more readily apparent and therefore can be more accurately assessed by the Board in ruling on their admissibility and admission into evidence.

Accordingly, the Company's request as presented in the Judicial Notice Motion to admit JNM Exhibits A through P as non-hearsay admissions of party-opponents is denied.

SO ORDERED.

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20. Entergy VY Reply at 3. We note that, in contrast to Entergy VY, the Department never sought a ruling in its judicial notice motion to admit the materials at issue into evidence as opposing-party admissions. Rather, the Department only sought an alternative ruling as to the *admissibility* of these materials pursuant to V.R.E. 801(d)(2)(A). DPS Judicial Notice Motion at 5 (emphasis added). In turn, we never reached the DPS's admissibility argument because, absent any objection, we granted the Department's request for judicial notice, thus obviating the need to rule on the alternative admissibility request.

Dated at Montpelier, Vermont, this 29th day of March, 2013.

s/James Volz)
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) PUBLIC SERVICE
)
s/David C. Coen) BOARD
)
) OF VERMONT
s/John D. Burke)

OFFICE OF THE CLERK

FILED: March 29, 2013

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

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