

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6812-A

Petition of Entergy Nuclear Vermont Yankee,)
LLC and Entergy Nuclear Operations, Inc., for a)
certificate of public good to modify certain)
generation facilities at the Vermont Yankee)
Nuclear Power Station in order to increase the)
Station's generation output **IN RE:** Petitions of)
Central Vermont Public Service Corporation)
and Green Mountain Power Corporation seeking)
resolution of a dispute with Entergy Nuclear)
Vermont Yankee, LLC regarding the Ratepayer)
Protection Plan, as it relates to the June/July)
2004 Vermont Yankee Power Station fire-)
related outage)

Order entered: 9/13/2007

I. INTRODUCTION

In this proceeding, the Vermont Public Service Board ("Board") considers a request from Central Vermont Public Service Corporation ("CVPS") and Green Mountain Power Corporation ("GMP") seeking reimbursement from Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., (collectively, "Entergy" or "Entergy VY") for incremental replacement power costs arising from a fire-related outage in 2004 at the Vermont Yankee Nuclear Power Station ("Vermont Yankee" or the "Station"). GMP, CVPS, Entergy, and the Vermont Department of Public Service ("Department") (hereinafter referred to as "the Stipulating Parties") have reached a Memorandum of Understanding ("MOU") under which Entergy would pay a substantial portion of these incremental power costs pursuant to the ratepayer protection mechanisms (herein referred to as the "RPP") that the Board approved in Docket 6812.¹ These parties assert that it is appropriate to approve the MOU, by granting summary judgment, without the need for hearings. The New England Coalition ("NEC") opposes approval of the MOU and

1. Docket 6812, Order of 3/15/04 at 119.

instead requests a hearing on the agreement and on the underlying question of whether the outage was related to the uprate so that Entergy's obligation under the RPP can be determined.

In this Proposal for Decision, I recommend that the Board find that no genuine issues of material fact exist. The sole purpose of the RPP is to reimburse GMP and CVPS for excess replacement power costs arising from an uprate-related outage. Here, no party has contested the reasonableness of the reimbursements to which Entergy agreed under the RPP; even though NEC continues to seek a determination of the cause of the outage, in the absence of a challenge to the compensation amounts, such a finding is irrelevant. Accordingly, no *material* fact issue exists and the Board should grant the Stipulating Parties' motion for summary judgment and approve the MOU as a reasonable settlement of the dispute under the RPP. Furthermore, because NEC has not shown that hearings on the cause of the uprate are material to the reimbursements or any other material fact, the Board should deny the request for an evidentiary hearing.

II. PROCEDURAL HISTORY

On March 15, 2004, the Board issued an Order and Certificate of Public Good approving a petition by Entergy to make physical modifications that would enable Entergy to increase the power output of Vermont Yankee by up to 20 percent, to a total output of approximately 620 MW.² As a part of its approval, the Board also accepted, and relied upon, the RPP, under which Entergy agreed to reimburse the Vermont purchasers of power from Vermont Yankee for incremental replacement power costs that they might incur in the event of an uprate-caused outage of Vermont Yankee at times when market prices exceed the Power Purchase Agreement prices.³ The RPP had a term of three years from the commencement of construction, with replacement power cost recovery by CVPS and GMP capped at \$4.5 million.

On June 18, 2004, Vermont Yankee experienced a transformer fire and shut down for 18 days. On February 10, 2005, CVPS filed a petition seeking resolution of a dispute with Entergy regarding the RPP as it related to the June/July 2004 Vermont Yankee fire-related

2. Docket 6812.

3. See Docket 6812 Order of 3/15/04 at 43–51. The RPP was incorporated into a Memorandum of Understanding between the Department and Entergy. The Board approved that agreement as a condition of the Docket 6812 Order.

outage. CVPS maintained that the June/July 2004 outage was uprate-related, which would require reimbursement under the RPP, and represented that Entergy disagreed with that conclusion.

On February 18, 2005, the Board convened a prehearing conference to consider CVPS's petition. As discussed in the Board's Prehearing Conference Memorandum issued on March 4, 2005, the Board concluded that the issue raised by CVPS — namely, the application of the RPP that Entergy proposed in Docket 6812 to ameliorate any adverse economic impacts arising from the power uprate — was closely linked to the evidence that the Board considered in deciding whether to approve the power uprate. Many parts of that record, including questions such as which party bears the burden of proof, were directly related to the Board's determination of whether Entergy must compensate CVPS under the RPP. Consequently, the Board created a separate sub-docket ("Docket 6812-A") within Docket 6812 to consider CVPS's petition. Any party in Docket 6812 was able to participate in Docket 6812-A simply by filing a letter stating that intent. The Board also stated that any company or person that was not a party in Docket 6812 would need to file a motion to intervene in Docket 6812-A.⁴ The Board also incorporated into Docket 6812-A all portions of the evidentiary record of Docket 6812 related to the RPP. Finally, the Board appointed William Jordan, Utilities Engineer, as Hearing Officer in this sub-docket.⁵

On March 4, 2005, GMP filed a motion to intervene and a separate petition raising substantially the same claim as did CVPS's petition. For this reason, GMP requested that the Board resolve the dispute in this proceeding. On March 21, 2005, the Hearing Officer issued an Order that expanded the scope of Docket 6812-A to include the petitions by both CVPS and GMP.

On April 29, 2005, Entergy filed a Final Root Cause Analysis Report, and filed supporting testimony on July 22, 2005.

4. This included GMP, which did not elect to intervene in Docket 6812.

5. Mr. Jordan is no longer employed by the Board. The Board appointed me to replace him.

On August 10, 2005, Entergy filed a letter stating that it had "reached an agreement in principle" with CVPS and GMP, and that the agreement was also supported by the Department. The letter further stated that the Stipulating Parties were in the process of preparing a memorandum of understanding to submit to the Board, but would "probably not be able to make that submittal prior to the week of August 22." The Stipulating Parties requested that the Hearing Officer stay the litigation schedule established in this case pending the submission of a memorandum of understanding. On August 22, 2005, the Board received comments from NEC, which stated that NEC:

does not object to the proposed stay provided that the Board conditions the stay so as to protect New England Coalition's interests in the matter as a party and intervener in Docket 6812 and Docket 6812-A. Thus, while New England Coalition does not object to a temporary stay for the purpose of considering a settlement agreement, New England Coalition most strenuously objects to any consideration of voiding this proceeding should the proposed settlement not fix liability (emphasis in original).

On August 23, 2005, the Hearing Officer granted a temporary stay in the litigation schedule, pending submittal of a memorandum of understanding.

Entergy filed the MOU on March 16, 2006. Under the MOU, the Stipulating Parties agreed that Entergy would reimburse CVPS and GMP \$2,419,018.29 as a resolution of all claims under the RPP as of February 28, 2006.

On March 31, 2006, NEC filed comments on the MOU. These comments reiterated (and requested that the Board incorporate by reference) NEC's previous comments on various requests from the Stipulating Parties parties for extensions of time⁶ and requests to stay the litigation schedule. NEC's March 31, 2006, filing also included a "Motion to Proceed With a Hearing."

On August 8, 2006, Hearing Officer Jordan held a status conference to hear comments from the parties regarding how this Docket should proceed. At the status conference, the parties to the MOU requested that the Board approve the MOU and close the Docket. The Stipulating Parties requested that they be allowed to file a motion for summary judgment pursuant to

6. NEC filed comments on the time extensions on June 16, 2005, and February 21, 2006. NEC's March 31, 2006, filing also requested that the Board incorporate NEC's "Comments filed on December 14, 2005 in response to CVPS' Request to Stay Litigation Schedule of December 14, 2005." The Board did not receive comments filed by NEC on or about December 14, 2005.

Vermont Rules of Civil Procedure ("VRCP") Rule 56, that NEC be allowed to reply to the motion, and the Stipulating Parties be allowed to respond to NEC's reply.

On August 18, 2006, the Stipulating Parties (also referred to as the "Movants") filed a "Motion for Summary Judgment or, in the Alternative, for Voluntary Dismissal With Prejudice" (the "Motion for Summary Judgment") pursuant to VRCP 41(a)(2), 56 and Board Rules 2.103 and 2.219. On August 28, 2006,⁷ NEC filed its response to the Motion for Summary Judgment. On September 1, 2006, the Movants filed a response to NEC's filing.

On October 26, 2006, the Deputy Clerk of the Board requested that Movants provide clarifications relating to the adjustments to the replacement power costs contained in Exhibit A to the MOU. On November 8, 2006, Movants filed a letter responding to this clarification request. NEC filed reply comments on November 20, 2006.

III. DISCUSSION

A. The Memorandum of Understanding

The MOU resolves all issues among its signatories related to the amounts owed by Entergy under the RPP through February 28, 2006. This includes amounts for replacement power attributable to the July 2004 Fire Outage as well as to the reduced power output resulting from operating Vermont Yankee with the uprate modifications, but at pre-uprate capacity.⁸ Specifically, the Stipulating Parties agreed to the following:

- Entergy would pay CVPS and GMP \$2,419,018.29 as a resolution of all claims under the RPP as of February 28, 2006, including (i) claims related to the July 2004 Outage, to be paid pursuant to the mechanics of the RPP as if Entergy VY had determined during the Calculation Period ended November 2004 that the July 2004 Outage was "uprate related," and (ii) claims related to

7. NEC filed its response via electronic mail on August 25, 2006, and filed the hard copy on August 28, 2006. On August 31, 2006, NEC requested a post facto time extension, and on August 31, 2006, I approved the time extension.

8. As a result of the physical modifications to Vermont Yankee necessary to enable the increase power output — primarily the turbine modifications — operation at pre-uprate capacity would be less efficient, leading to a reduced power output of up to 20 MW (reducing the power output of Vermont Yankee from approximately 530 MW to 510 MW). This derate would require GMP and CVPS to purchase replacement power, the incremental costs of which would be reimbursed by Entergy under the RPP. The Board considered the financial effects of this derate during its review of the proposed power output. *See* Docket 6812, Order of 3/15/04 at 56–58.

the Derate Liability. Of this total, \$1,529,714.73 would be paid to CVPS and \$889,303.56 would be paid to GMP.

- Entergy would pay these amounts within three business days of the closure of this Docket, after giving effect to the agreements in the MOU, for Calculation Periods 2 and 3. The Stipulating Parties also agreed that \$451,192.09 of Entergy's total liability to CVPS and GMP under the RPP through February 28, 2006 to date would be "carried forward" for payment in future Calculation Periods in accordance with the terms of the RPP.
- The Department agrees to support approval of the MOU.
- The Stipulating Parties agree that (i) the settlement does not reflect agreement that the July 2004 outage was related to the uprate modifications or (ii) the methodology for calculation of any liability of Entergy VY pursuant to the RPP for any periods after February 28, 2006.

The MOU also provides that the parties would ask that the Board issue an order approving the MOU without substantive modification or conditions; dismissing the petitions filed in Docket 6812-A with prejudice, and closing Docket No. 6812-A.

The parties to the MOU subsequently clarified that, notwithstanding the provisions in the MOU stating that Entergy would reimburse CVPS and GMP "as if" the outages had been uprate-related, the adjusted costs did not reflect the full incremental replacement power costs claimed by CVPS and GMP. Instead, the payments set out in the MOU reflected a settlement of the total amounts in dispute reached in light of the litigation risks to each party, in recognition of the fact that Entergy disagreed with the appropriate calculation of damages as well as liability for the fire outage. Specifically, the parties agreed that Entergy would reimburse GMP and CVPS for 82.5% of their replacement power costs associated with the fire outage and 90% of the replacement power costs related to the derate. The parties made clear that:

If the case was fully litigated, and Entergy was found to be liable, CVPS and GMP would likely seek the amounts higher than the MOU and Entergy would likely seek lower amounts.

Movants also asserted that the MOU payment is consistent with the RPP for both outages and derates.

B. Positions of the Parties

The Stipulating Parties argue that the Board should grant their request for summary judgment. Movants contend that "[s]ummary judgment is appropriate because there is no genuine issue of material fact in this proceeding and Movants are entitled to summary judgment as a matter of law." This occurs, they assert, because "[a]ll issues raised by the CVPS and GMP Petitions in this matter have been completely resolved by the [MOU]." In support of their position, Movants maintain that:

even if NEC established that the Vermont Yankee outage was related to the uprate, that would not change the amounts to be paid to CVPS and GMP under the MOU. Therefore any issue as to liability is not material to this proceeding. Accordingly, there is no genuine issue of material fact and summary judgment should be granted in favor of Movants and against NEC with respect to the entitlement to and amount of compensation to be paid to CVPS and GMP by Entergy.

Finally, Movants argue that, because NEC does not contest the amounts to be paid under the MOU, the risk or uncertainty of future reliability of Vermont Yankee due to the uprate is "irrelevant to the narrow issue at the heart of [sub-docket 6812-A], i.e., the utilities' right to compensation under the RPP."

If the Board does not grant summary judgment, Movants contend that "this case should be dismissed under the provisions of VRCP 41(a)(2). As required by the rule, plaintiffs (CVPS and GMP) seek voluntary dismissal and there is no prejudice to the defendant, Entergy, because it also seeks dismissal."

NEC does not contest the reasonableness of the payment amounts set out in the MOU, stating that it "has no position with respect to the amount of money due to the utilities that the filing parties have agreed upon." NEC agreed with Movants that, even if NEC established that the Vermont Yankee outage was related to the uprate, the amounts to be paid to CVPS and GMP under the MOU would not change. NEC observes that, once the issue of liability is settled, "there would be little room for dispute on the cost of replacement power."

Nonetheless, NEC maintains that the Board should not accept the MOU, but must instead hold hearings on the issue of liability. NEC maintains that the RPP is intended not solely to provide compensation, but also, in part, to address the public's interest in reliability and certainty, noting that non-monetary benefits of Vermont Yankee may be jeopardized by diminished

reliability. NEC also contends that "[t]he Board cannot make a material finding of fact with respect to adequacy of compensation under the RPP and the Terms of the Board's final 6812 Order because those terms do not provide for compensation for outages other than outages that are uprate related."⁹ NEC argues that there remains a genuine issue of material fact because under the terms of the RPP, Entergy bears the burden of proving that an outage is not uprate-related. NEC argues that Entergy has not met this burden.

As a result, NEC maintains that "a hearing (begun with the filing of Entergy testimony) on the question of whether the 2004 Vermont Yankee fire and resulting outage was caused in whole or in part by uprate related activities is warranted."¹⁰ In support of its belief that liability is the preeminent issue to be resolved in this case, NEC cites to several statements made by Board members during the prehearing conference which, it contends, demonstrate that liability itself is an issue.

CHAIRMAN DWORKIN: I'll make an observation that may be premature, and I hope people will correct me if I am wrong, but it seems to me that if we do move to factual issues here, that they fall essentially into two categories. One is what might be called liability. In other words, did Entergy take actions in order to create the uprate that led to the outage? And those would seem to be identical for CV and GMP. The other would be the degree of damages.¹¹

BOARD MEMBER BURKE: ...[I]s it right for us to kind of cut that is where the rubber is meeting the road here? The issue isn't so much the cost of replacement power but the issue of liability. Are we reading that primarily correctly?

MR. PICTON: That's correct. The issue of liability is clearly the preeminent issue here. We don't believe that the issue of damages would necessarily even have to get to the Board if the liability issue¹²

IV. CONCLUSION

9. NEC submitted an affidavit from Arnold Gunderson which states that the outage was uprate-related.

10. In advance of a hearing, NEC asks that the parties be permitted to engage in discovery.

11. Tr. 2/18/05 at 16-17.

12. Tr. 2/18/05 at 18.

The standard for summary judgment is set forth in Vermont Rule of Civil Procedure 56 which, pursuant to Board Rule 2.219, applies to proceedings before the Board. Under Rule 56:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

The party against whom summary judgment is sought is entitled to the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists.¹³ It is not the function of the court to weigh the probative effect of conflicting testimony; summary judgment must be denied if a genuine issue of material fact arises.¹⁴

In determining what facts are material to the resolution of this docket, we must examine the specific provisions of the RPP, which Entergy put in place during Docket 6812.¹⁵ In that Docket, Entergy sought approval to make physical modifications to Vermont Yankee that would allow for a 20 percent increase in power output. Parties presented evidence suggesting that the physical modifications had the potential to affect the reliability at Vermont Yankee; for example, several nuclear plants that had performed power uprates had experienced outages or power derates as a result. Because GMP and CVPS purchase power from Vermont Yankee through a Purchase Power Agreement ("PPA") between Entergy and the Vermont Yankee Nuclear Power Corporation, reductions in power output arising from an uprate would result in a loss of power supply to these utilities and could require them to purchase replacement power, possibly at prices in excess of those in the PPA.¹⁶

13. *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990).

14. *Baldwin v. Upper Valley Services, Inc.*, 162 Vt. 51 (1994).

15. As noted above, the Board ruled at the prehearing conference (and reiterated that ruling in the March 4, 2005, prehearing conference memorandum), that all portions of the Docket 6812 evidentiary record related to the RPP were incorporated into this docket. This would include the RPP and the Memorandum of Understanding between Entergy and the Department in that docket that modified and expanded the RPP (as explained below).

16. Even if the utilities had sufficient power to meet their loads, the loss of output from Vermont Yankee could deprive the utilities of incremental revenues from the resale of excess power.

To largely protect Vermont ratepayers from financial harm arising from the uprate, Entergy offered a Ratepayer Protection Proposal,¹⁷ the terms of which were subsequently modified through a Memorandum of Understanding between the Department and Entergy.¹⁸ In general, the RPP provides that, during the first three years after the physical changes to Vermont Yankee,¹⁹ Entergy will reimburse GMP and CVPS for incremental replacement power costs due to an uprate-related outage or derate. The payments under the RPP are capped at a total of \$4.5 million, which is spread over the three-year period.²⁰

Paragraph 2(a) of the original Ratepayer Protection Proposal sets out Entergy's basic commitment; it provides (in relevant part):

Entergy VY agrees to reimburse the Utilities . . . for net loss, if any, incurred by the Utilities purchasing replacement energy ("Replacement Energy") actually required for their native needs to the extent the need to purchase the Replacement Energy was caused by (a) the failure of or lack of expected performance efficiency of equipment modified or replaced in connection with the Uprate or equipment directly impacted by such replaced or modified equipment or (b) an extension of the time of the refueling outage during which the Uprate equipment is installed or modified beyond the scheduled time due to unanticipated circumstances arising from Uprate ("Uprate Deficiencies").²¹

The remaining subsections of Paragraph 2 establish the expenses for which Entergy will compensate GMP and CVPS. They also establish a dispute resolution mechanism, the final step of which is a petition to the Board to resolve the dispute. The Memorandum of Understanding in

17. Exh. EN-CCW-3.

18. The Memorandum of Understanding also increased the amount of compensation that Entergy would provide in the event of an uprate-related derate or outage. The original proposal, as modified by the Memorandum of Understanding, has generally been referred to as the Ratepayer Protection Plan. Exh. DPS-WKS-12.

19. The potential for increased outages or forced derates was considered to be highest during the first three years after the physical changes to Vermont Yankee. See, e.g., Wells 9/24/04 reb. pf. at 4.

20. For a more complete description of the RPP, see Docket 6812, Order of 3/15/04 at 42–43.

21. Exh. EN-CCW-3 at 2.

Docket 6812 modified Entergy's reimbursement obligation, eliminating certain restrictions incorporated into the original proposal.²²

As the parties discussed at the prehearing conference, the RPP requires that the Board make findings on two issues. The first issue to be determined is that of liability (*i.e.*, whether the outage or derate was uprate-related). If, and only if, the outage or derate was found to be uprate-related, then the second issue to be determined is that of damages (*i.e.*, the amount Entergy would compensate CVPS and GMP, based upon the difference in cost between the PPA rates and the cost of replacement power purchased on the market).

Ultimately, however, the RPP requires a determination of only one fact: the amount of the compensation owing to Vermont utilities. A finding as to the cause of the outage is necessary only in order to ascertain Entergy's responsibility to pay compensation. Conversely, where there is no dispute as to the appropriate amount that Entergy must reimburse the Vermont utilities, the cause of the outage is irrelevant and immaterial.

In this case, the parties to the MOU have reached agreement as to the appropriate compensation to the Vermont utilities arising from the derate and fire outage during the periods in question. NEC has affirmatively stated that it has no position with respect to the amount of compensation due to the utilities.²³ I also find the amount of reimbursement set forth in the MOU to be reasonable.²⁴ In reaching this conclusion, I have considered the initial amounts claimed by CVPS and GMP, the litigation risks that exist for these parties as well as Entergy, and

22. Exh.DPS-WKS-12. For example, Paragraph 3(a) of the Memorandum of Understanding stated that:
Entergy VY will reimburse the Utilities, as defined in Attachment A, for net loss incurred because of Entergy's failure to deliver the Utilities' full VY allotment of energy under the PPA regardless whether the Replacement Energy is actually required for their native needs. It is further agreed that in this MOU and in Attachment A hereto, Replacement Energy means the power not delivered to the utilities as their full VY allotment of energy under the PPA.

This removed the restriction in the original Entergy proposal that would not have allowed compensation except for loss of power needed to serve native loads.

23. NEC Comments at 3.

24. I note that in the MOU, the parties agree that Entergy would compensate the Vermont utilities as if the outage were uprate-related. This implied that the compensation would be 100 percent of the incremental replacement power costs. It was not until the Board asked additional questions that the Stipulating Parties made clear that the actual compensation was less than the amounts CVPS and GMP had booked as replacement power costs.

the costs of potentially extensive litigation. In fact, according to the Stipulating Parties, if NEC's motion is granted, the issue of liability is fully litigated, and Entergy is found to be liable, CVPS and GMP would likely seek amounts higher than provided for in the MOU and Entergy would likely seek lower amounts, as had been the case before the Stipulating Parties arrived at the MOU. Under the MOU, GMP would receive approximately 82.5 percent of their initially claimed replacement power costs associated with the fire outage and 90 percent of their incremental derate replacement power costs. I recommend that the Board find these uncontested compensation amounts to be reasonable.

Because no party questions the compensation amounts and, after independent review, I recommend that the Board accept them as well, the issue of causation is irrelevant to the final outcome of this proceeding. For example, if the Board conducted extensive proceedings and concluded that the outage was uprate-related, it would not affect the level of the reimbursements set forth in the MOU. Since the compensation is agreed to and causation is irrelevant, I conclude that no material facts exists and that summary judgment is appropriate.

NEC also argues that the focus on the compensation ignores the fact that the RPP had a dual purpose: compensation of the Vermont utilities *and* to address the public's concern about reliability. Neither the plain language of the RPP, the testimony supporting its original adoption, nor the Board's March 15, 2004, Order that accepted the RPP supports this conclusion. Rather, the provisions of the RPP show that it had a single purpose of compensating the two Vermont utilities for higher replacement power costs in the event of an uprate-related outage or derate, thus mitigating the potential loss of economic benefit that could arise from such an outage. This is apparent not only from the sections cited above, but also from Paragraph 1 of the RPP which states (in relevant part) its purpose:

The purpose of this proposal is to protect Central Vermont Public Service Corporation and Green Mountain Power Corporation (the "Utilities") and their ratepayers from certain possible losses that could be incurred if (a) the implementation of the Uprate results in extension of the Station refueling outages during which the Uprate modifications are undertaken or results in equipment failure or loss of equipment performance and (b) replacement energy

purchased by the Utilities costs more than the price of such energy under the PPA. . . .²⁵

The March 15, 2004, Order also does not discuss the RPP as a mechanism for assessing the reliability of Vermont Yankee. Rather, the Board discussion focuses solely on the RPP as a compensation mechanism intended to redress the potential economic harms to GMP and CVPS, and thereby, to Vermont ratepayers, from uprate-related outages.²⁶ I, therefore, reject NEC's argument that the RPP requires an assessment of the cause of an outage or derate for any purpose other than to affix Entergy's obligation to reimburse Vermont utilities for excess replacement power costs.

I am also unpersuaded that the discussion at the prehearing conference that characterized liability as the preeminent issue requires a different result. Based upon the positions of the parties at that time, it appeared that both liability and compensation would be litigated; of the two, liability was expected to be the more contentious issue. However, NEC's reliance upon the parties' and Board's expectations at that time ignores the intervening events, in particular the MOU, through which Entergy agreed not to contest liability as a part of an overall settlement that set out the amounts due to Vermont utilities. As discussed above, the resolution of the compensation issue, with no contest by any party, made liability moot. I note that, had NEC challenged the compensation amounts, it would have been necessary to resolve both compensation *and* liability through hearings. Such a challenge would have made compensation an issue of material fact; in assessing the appropriate level of compensation, the causation issues would have become material again. This did not occur.

NEC also made additional arguments, which I collectively summarize as that it is in the public interest, relating to the issue of the reliability of Vermont Yankee, that it be determined whether the outage was uprate-related. I do not disagree that it may be useful to know what caused the outage and whether it is related to the uprate. It is not, however, material to the outcome of this investigation, which is focused on *cost recovery* under the RPP, and not the reliability of Vermont Yankee.

25. Exh. EN-CCW-3 at 1; *see also* Wells 9/24/03 reb. pf.

26. Docket 6812, Order of 3/15/04 at 47–50.

For the above reasons, I conclude that there is no genuine issue as to any material fact to be tried because denying the Movants' Motion for Summary Judgment and granting NEC's Motion to Proceed With a Hearing would not change the amounts to be paid to CVPS and GMP under the MOU. Consequently, I recommend that the Board grant the Stipulating Parties' request for summary judgment and deny NEC's Motion to Proceed With a Hearing.

Moroever, I recommend that the Board approve the MOU, and close Docket 6812-A within 30 days of the date of a Board order (if no appeals are filed). I do not recommend that the Board dismiss CVPS's and GMP's petitions, because this would preclude approval of the MOU. I further recommend that the Board require the Stipulating Parties to update the Board regarding the schedule for payment of the amount that is indicated as "carried forward" in the MOU and Exhibit A thereto.

This Proposal for Decision, including the proposed Board Order, below, has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 21st day of August, 2007.

s/George E. Young
George E. Young
Hearing Officer

V. BOARD DISCUSSION

NEC and the Petitioners filed comments upon the Proposal for Decision ("PFD"). NEC opposes the Hearing Officer's recommendations and asks that the Board proceed with a hearing on the cause of the outage.²⁷ The Stipulating Parties (GMP, Entergy, CVPS, and the Department) support issuance of an order substantially in the form of the PFD, subject to two revisions. For the reasons set out below, we adopt the PFD, revised to reflect the changes requested by the Stipulating Parties.

NEC raises several arguments that it contends justifies rejection of the PFD and initiation of a hearing. First, NEC asserts that the Hearing Officer is incorrect in concluding that the investigation is focused on cost-recovery, reiterating its view that liability was the key issue. NEC maintains that the ratepayer protection mechanisms ("RPP") was intended to address the public's interest in reliability. Second, NEC argues that diminished reliability will jeopardize non-monetary benefits of Vermont Yankee. Third, NEC asserts that the Hearing Officer did not make any attempt to view the evidence in the light most favorable to the moving party, as required in a motion for summary judgment. Fourth, NEC avers that a material fact, the liability for the outage, remains undetermined, to the detriment of its members. Finally, NEC contends that CVPS and GMP have acknowledged that, if litigated, compensation monies may be greater than set out in the settlement.

The PFD explains in detail both the origins of the RPP and the specific requirements and purpose. We agree with that analysis. Entergy proposed the RPP for the purpose of reimbursing GMP and CVPS for uprated-related replacement power costs in excess of their normal power costs. It was never intended to have a broader application or as a vehicle for assessing the reliability of Vermont Yankee. In fact, as NEC notes in its comments, our Order approving the uprate specifically observed that "Entergy has proposed outage protection plans that reduce the

27. On August 27, 2007, following the deadline for comments, NEC submitted an additional filing providing the Board with information regarding a recent derate at Vermont Yankee as well as the status of cooling tower structural failures. NEC maintains that the recent events share causes identical to the 2004 fire outage. For the reasons set out in our discussion and in the PFD, we find that the cause of the outage is not material to the issues in this case. Thus, we have not considered NEC's late filing.

financial risk."²⁸ NEC has presented no citation or information that indicates any intent to use the RPP as a mechanism to monitor reliability.

NEC is correct that under the specific requirements of the RPP, compensation was only due if the outage was uprate-related. As the Hearing Officer points out, in most instances, this would require us to determine the cause of the outage. In this case, Entergy agreed to compensate GMP and CVPS as if the outage were uprate-related and the Stipulating Parties reached an uncontested agreement on the amount of reimbursement. This agreement as to compensation, which the Hearing Officer found to be reasonable, rendered the determination of liability unnecessary; in the absence of a disagreement as to the reasonableness of that compensation, liability became immaterial. Thus we do not accept NEC's assertion that a material fact exists.

We also agree that outages at Vermont Yankee can have secondary effects on benefits that the state of Vermont receives beyond the favorably-priced power contract. The reliability of Vermont Yankee and the effects of power outages have consistently been concerns of the Board. Nonetheless, the scope of the inquiry under the RPP is limited, encompassing solely Entergy's obligation to reimburse GMP and CVPS for additional replacement power costs they incur due to an uprate-related reduction in power output.

NEC also faults the Hearing Officer for not viewing the evidence in the light most favorable to NEC. We disagree. The only issue on which a dispute existed was liability. The PFD specifically considered the possibility that NEC may prevail in showing that Entergy was liable but still concluded that it would have no effect on the reasonableness of the compensation.

Finally, NEC raises the possibility that the compensation for GMP and CVPS could be higher if the parties litigated the liability issue. This is correct, but it also could be lower; the Stipulating Parties reached a settlement that took the litigation costs and uncertainties into account. No party contests that settlement and the Hearing Officer independently reviewed the amounts and found them reasonable. We concur.

28. Order of 3/15/04 at 130 (emphasis added). We found that these plans were not adequate to achieve that goal, which caused us to condition our approval on an independent engineering assessment conducted by the NRC. But throughout our analysis, we focused on the financial consequences to Vermont utilities and ratepayers from increased outages or derates because such events would call into question the economic benefits of the power uprate.

We accept both of the modifications proposed by the Stipulating Parties. In light of the passage of time since the Stipulation, these modifications are reasonable; the ordering clauses have been changed accordingly.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the State of Vermont Public Service Board that:

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted.
2. The MOU is approved, except that we do not dismiss the petitions filed by CVPS and GMP in Docket 6812-A.
3. Within ten business days of the closure of this Docket, Entergy VY shall pay CVPS and GMP in accordance with the MOU and Exhibit A thereto.
4. This Docket shall be closed as of October 15, 2007, absent any motions for reconsideration or stay.

Dated at Montpelier, Vermont, this 13th day of September, 2007.

)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: September 13, 2007

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.