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April 30, 2004

Sen. Peter Welch, President Pro Tempore
State House
Montpelier VT 05602

Re: Vermont Yankee Facility – Spent Fuel Storage

Dear Senator Welch:

In a letter to Attorney General Sorrell you have asked for an opinion concerning legal issues involving the storage of spent fuel at the Vermont Yankee Nuclear Power Facility (Vermont Yankee).

Your questions arise in the context of the efforts of the current operator of Vermont Yankee to obtain approval to increase the output of the plant by 20%. If the output of the plant is increased, fuel will be used faster and consequently the current on-site facility for storage of spent fuel will reach the limit of its capacity sooner.

Whether or not the output of Vermont Yankee is increased, the capacity of the existing spent fuel storage pool at Vermont Yankee will be reached within the foreseeable future. This opinion assumes that the operator of Vermont Yankee will seek approval for on-site dry cask storage of spent fuel before the existing storage pool reaches it capacity.

Your specific questions are as follows:

First, what authority or responsibility does the Vermont General Assembly have to address the issue of dry cask storage at the Vermont Yankee facility?

Second, what is the legal difference between temporary storage and long term storage, and are they treated differently under Vermont Law?

Third, how does new ownership of the Vermont Yankee facility by Entergy, instead of the Vermont Yankee Nuclear Power Corporation, change how the law is applied if at all?

The statutory provisions that deal with storage of radioactive material are found at 10 V.S.A. Chapter 157.

10 V.S.A. Chapter 157 provides that no facility for the deposit, storage, reprocessing or disposal of spent nuclear fuel elements may be constructed or established in Vermont unless the general assembly finds that it promotes the general good and approves a petition for approval of the facility. Therefore, if Chapter 157 is applicable, dry cask storage could not be undertaken without the specific approval of the general assembly. Approval would have to be expressed either by passage of a bill or a joint resolution.

Applicability of Chapter 157 turns on the interpretation of the exemption section found at 10 V.S.A. § 6505. That section reads as follows:

> "This subchapter does not apply to any temporary storage by Vermont Yankee Nuclear Power Corporation of spent fuel elements or other radioactive waste at its present site."

As your letter notes, in 2002 Vermont Yankee Nuclear Facility was purchased by Energy Nuclear Vermont Yankee, LLC (Entergy). The sale gives rise to the question of the scope of § 6505. Is that exemption intended to apply to the Vermont Yankee Nuclear Power Corporation or is it intended to apply to the site or facility?

Section 6505 does make reference to the Vermont Nuclear Power Corporation. The plain meaning of the language in that section gives some strength to the argument that the legislature intended the exemption to apply only to the corporation that was operating the facility at the time that the legislation was passed. In interpreting the statute we must assume that the legislation was drafted advisedly, and that the plain ordinary meaning of the language used was intended. *Committee to Save the Bishop's House v. Medical Center Hospital,* 137 Vt. 142 (1979). Additionally, there are other statutory provisions in which the legislature makes reference to the Vermont Yankee site. (See 10 V.S.A. § 7001(13) and § 7011(5)). There are also provisions in which reference is made to the Vermont Yankee facility. (See 10 V.S.A. § 7002(21)) Therefore, it is apparent that the legislature has used language making distinctions between the corporation, the facility and the site.

As a general rule, reference is made to legislative history if the meaning of statutory language is ambiguous. *Holmberg v. Brent,* 161 Vt. 153 (1993). Here we do not view the language as ambiguous. However, in an abundance of caution we have looked at the legislative history.

10 V.S.A. Chapter 157 came in being in 1977 when Public Act No. 77 was passed and signed by the governor.

Act No. 77 was originally introduced as H. 261. That bill was considered by the House Government Operations Committee. The Committee held a public hearing on the bill on February 22, 1977. Not surprisingly, most of the testimony focused on the general provisions of the Act. However, at the hearing John Beck testified on behalf of his employer, Vermont Yankee Nuclear Power Corporation. Mr. Beck testified that his employer would not oppose H. 261 provided that it included a "savings clause" that would exempt the continued operation of Vermont Yankee from the provisions of the act. At the conclusion of his remarks Mr. Beck had the following exchange with the Committee Chair:

> Rep. Douglas: Just so I am clear, Mr. Beck, your proposed exemption refers to the plant that is in operation in Vernon now, but it would not apply to any other plant that your company would propose.
>
> Mr. Beck: That is correct.

It could be implied from the chair's question that he was of the opinion that the exemption referred to the plant. However, the chair's question does not suggest that the exemption does not also apply to the corporation. On March 28, 1977 the Committee on Government Operations reported in favor of passage of the bill as amended. One of the amendments was the savings clause, which reads as follows:

> This act shall not apply to any temporary storage by Vermont Yankee Nuclear Power Corporation of its spent nuclear fuel elements at its present site.

The language of the savings clause of 1977 can be reasonably read as being specific to both the corporation and the site. The same is true as to the language of the current § 6505.[1]

Based on the foregoing, we do not find that the legislative history contradicts the plain meaning of the language used in § 6505. It is our opinion that the exemption contained in § 6505 is applicable only to the temporary storage of

[1] The only change to the original savings clause was made in 1980. At that time Chapter 157 was amended to cover low-level as well as high-level radioactive waste. The words "other radioactive waste" were then added to the savings clause.

radioactive waste by the Vermont Yankee Nuclear Power Corporation at the Vernon site. There is nothing in the language of the statute that suggests that the exemption applies to any entity other than the Vermont Yankee Nuclear Power Corporation. We find nothing in the legislative history to suggest that the plain meaning of the language be ignored.

Having concluded that § 6505 applies only to the Vermont Nuclear Power Corporation, we must consider the question of possible assignment or transfer of the exemption contained in §6505 from the Vermont Yankee Nuclear Power Corporation to Entergy.

At the outset, it is important to note the Vermont Nuclear Power Corporation itself was not sold. Under the purchase and sale agreement dated August 15, 2001, what was sold and transferred is a number of assets. Included among those assets is "all of the Seller's right, title, and interest immediately prior to Closing in and to all properties and assets constituting or used in the operation of the Facility on or prior to the Closing Date (collectively, "Acquired Assets"), …" Consequently, we will assume for purposes of this opinion that purchase and sale agreement intends the transfer or assignment of the exemption contained in § 6505.

The intent of the parties as expressed in the purchase and sale agreement will have no effect if the statutory exemption is not transferable.

It is not clear on the face of the statute whether the exemption for Vermont Yankee Nuclear Power Corporation contained in 10 V.S.A. §6505 is assignable. Certainly the Legislature may authorize assignment if it chooses to do so. In *Lemieux v. Tri-State Lotto Commission,* 164 Vt. 110 (1995), the Vermont Supreme Court determined that the then existing lottery statutes not only did not prohibit assignment of lottery prizes, but in fact conveyed "a broad power, not a limited one," to assign lottery prizes pursuant to a judicial order ("any person pursuant to an appropriate judicial order may be paid the prize to which the winner is entitled." 31 V.S.A. §674(L)(1)). *Id. at* 114.

The Legislature may also expressly prohibited assignment of statutory rights. In 24 V.S.A. §2255, for example, the General Assembly prohibited the assignment of a junkyard license. The "[a]pproval shall be personal to the applicant and not assignable." *Id.*

In the case of 10 V.S.A. §6505, however, the Legislature has not stated whether it intended to authorize, or limit, an assignment of the exemption: "[t]his subchapter does not apply to any temporary storage by Vermont Yankee Nuclear Power Corporation of spent nuclear fuel elements or other radioactive waste at its present site." Thus, the statute is silent as to assignability.

There does not appear to be any court precedent in Vermont concerning the assignability of statutory rights. There are several recent decisions from other states concerning the assignability of tax deductions, which may provide some guidance.

In *Chrysler Financial Co. v. Indiana Dep't of State Revenue,* 761 N.E.2d 909 (Ind. Tax Ct. 2002), the Indiana Tax Court was faced with a statute that was silent on the issue of whether an auto dealer could assign its rights to a tax deduction. The Court in that case looked to common law for guidance on the question. It determined that Indiana common law permitted the assignment of contractual rights, statutory rights and causes of action. Accordingly, the court ruled that Indiana law permits the assignment of tax deductions.

Another line of tax cases, however, arrives at the opposite result. In *In Re appeal of Ford Motor Credit Co.,* 275 Kan. 857 (2003); *Suntrust Bank v. Johnson,* 46 S.W.3d 216 (Tenn.Ct. App. 2000); *Daimler Chrysler v. State Tax Assessor,* 817 A.2d 862 (Me. 2003); and *Daimler Chrysler v. Commissioner of Revenue Services,* 36 Conn. L. Rptr. 345 (CT Super. Ct., J.D. New Britain 2003) the courts all read their respective tax laws strictly. "Tax credits are conferred by legislative grace and are not assignable as a contractual right in the absence of either explicit contractual or statutory language." *Daimler Chrysler v. State Tax Assessor,* 817 A.2d 862, 866 (Me. 2003). Rejecting the reasoning of the Indiana Tax Court, the Connecticut Superior Court instead took its lead from the Kansas Supreme Court, and determined that principles governing the interpretation of tax credit and exemption statutes should overcome more general assignment law. "The right to a sales tax refund would be a statutory right . . . not a common-law principle." *Daimler Chrysler v. Commissioner of Revenue Services,* 36 Conn. L. Rptr. 345 (CT Super. Ct., J.D. New Britain 2003) *quoting from In Re appeal of Ford Motor Credit Co.,* 275 Kan. 857, 871 (2003).

Obviously, neither line of cases is controlling in Vermont. They may provide guidance, however, in determining how a Vermont court might interpret the statute at issue. If a Vermont judge were to utilize the Indiana court's formula, he or she could determine that the Vermont Supreme Court has indeed relied upon common law to interpret otherwise neutral statutes. *State v. Oliver,* 151 Vt. 626, 563 A.2d 1002 (Vt. Jun 16, 1989) ("must be guided by the fundamental principle that the common law in force at the time the statute was passed is to be taken into account in construing undefined words of the statute."). Unfortunately, there does not appear to be any case law recognizing a common law right to assign statutory rights in Vermont. Therefore, it could be difficult to rely on this precedent.

Applying the other line of cases, it could be argued that an exception to the nuclear waste disposal statutes should also be read strictly. Where the Legislature

has not seen fit to create a right of assignment, none should be read into the law. Obviously, it could also be said that this line of cases applies only to questions involving tax refunds.

On balance, given the lack of express legislative intent and the lack of clear precedent permitting the assignment of statutory rights, we believe that it is more likely than not that a Vermont court would refuse to enforce such an assignment.

In light of the above, our opinion concerning your specific questions is as follows.

First, the Vermont General Assembly has authority to address the issue of dry cask storage under 10 V.S.A. Chapter 157.[2]

Second, both temporary and long term storage are within the scope of 10 V.S.A. Chapter 157.

Third, as a result of the transfer of ownership of the Vermont Yankee facility dry cask storage at that facility is not exempted from 10 V.S.A. Chapter 157.

I hope that this is responsive to your concerns.

Very truly yours,

Michael McShane
Assistant Attorney General

Approved: _____

cc: Sen. John Campbell
Sen. Ann Cummings

[2] Note, however, that nuclear power plants are extensively regulated by the federal government under the Atomic Energy Act. State regulation of operation and safety at such plants is generally preempted. *Pacific Gas and Electric v. Energy Resources Commission,* 461 U.S. 190 (1983). State regulation of matters other than operation and safety would not be preempted.