

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
ENTERGY NUCLEAR VERMONT)	Docket No. 50-271-LA
YANKEE, LLC and)	
ENTERGY NUCLEAR OPERATIONS, INC.)	October 20, 2014
)	
(Vermont Yankee Nuclear Power Station))	

ENTERGY'S ANSWER OPPOSING THE STATE OF VERMONT'S NOTICE OF INTENTION TO PARTICIPATE, PETITION TO INTERVENE, AND HEARING REQUEST

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I. INTRODUCTION AND SUMMARY

In accordance with 10 C.F.R. § 2.309(i)(1) and the Atomic Safety and Licensing Board’s (“Board”) Order Granting Request to Clarify Schedule for Answers and Reply,¹ Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) submit this Answer opposing the untimely Notice of Intention to Participate, Petition to Intervene, and Hearing Request filed by the State of Vermont (“State”), through the Vermont Department of Public Service, on September 24, 2014.² The State’s Petition challenges Entergy’s request to amend the Vermont Yankee Nuclear Power Station (“VYNPS”) renewed operating license to revise the site emergency plan. In addition to being untimely, the Petition fails to propose an admissible contention. As discussed below, the State’s sole contention is inadmissible, because it raises issues outside the scope of the proceeding, lacks adequate factual or expert opinion

¹ Licensing Board Order (Granting Request to Clarify Schedule for Answers and Reply) at 1 (Oct. 6, 2014) (unpublished).

² Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Sept. 24, 2014), *available at* ADAMS Accession No. ML14267A523 (“Petition”).

support, and fails to raise a genuine dispute with Entergy's license amendment request ("LAR") on a material issue of law or fact. Accordingly, the Petition must be denied.

Assuming, however, that the State's contention is admitted, the procedures set forth in 10 C.F.R. Part 2, Subpart L should govern this LAR proceeding. The State has not demonstrated that its contention meets the criteria of 10 C.F.R. § 2.310(d), which would mandate the use of Subpart G procedures.

II. PROCEDURAL AND FACTUAL BACKGROUND

By letter dated September 23, 2013, Entergy informed the Nuclear Regulatory Commission ("NRC" or "Commission") that VYNPS would permanently cease operations at the end of its current operating cycle, which is expected to occur in the fourth quarter of 2014.³

On January 8, 2014, the VYNPS Emergency Preparedness Manager gave a presentation to the Vermont, Massachusetts, and New Hampshire directors of their respective state emergency management organizations. Included in the presentation was a discussion on the various changes Entergy planned to make to the VYNPS emergency plan, including the exemption requests and license amendment requests that Entergy planned to submit to the NRC that would allow Entergy to implement those changes. The staffing changes that are the subject of the instant LAR were discussed with the state representatives, including the Vermont representative.

On March 24, 2014, Entergy submitted an LAR seeking to revise the VYNPS site emergency plan to reflect the permanently defueled condition.⁴ In accordance with 10 C.F.R. § 50.91(b)(1), Entergy provided a copy of the LAR and associated attachments to the Vermont Department of Public Service Commissioner, the designated State official. The proposed

³ Letter from C. Wamser, Entergy, to NRC, "Notification of Permanent Cessation of Power Operations" (Sept. 23, 2013), *available at* ADAMS Accession No. ML13273A204.

⁴ Letter from C. Wamser, Entergy, to NRC, "Proposed Changes to Vermont Yankee Emergency Plan" (March 24, 2014), *available at* ADAMS Accession No. ML14085A257 ("License Amendment Request" or "LAR").

emergency plan changes would eliminate the on-shift staff positions not needed for the safe storage of spent fuel in the spent fuel pool and eliminate the Emergency Response Organization (“ERO”) staff positions not needed to effectively respond to credible accidents once Entergy permanently ceases operations at VYNPS and permanently defuels the reactor.⁵ Based on a comprehensive evaluation, Entergy concluded that the proposed staffing reductions would not compromise the site’s ability to respond to an emergency and that the revised site emergency plan would continue to meet the emergency planning standards and requirements of 10 C.F.R. § 50.47(b) and Appendix E to 10 C.F.R. Subpart 50.⁶ Entergy also concluded that the proposed changes would not involve a significant hazards consideration, pursuant to the criteria in 10 C.F.R. § 50.92(c).⁷ In particular, Entergy determined that the proposed staffing reductions would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.⁸

The NRC Staff issued requests for additional information (“RAIs”) on May 5 and July 1, 2014.⁹ Entergy responded to the RAIs on May 21, 2014 and August 14, 2014, respectively.¹⁰ In

⁵ *Id.*, Attachment 1 at 1.

⁶ *Id.*, Attachment 1 at 1, 19.

⁷ *Id.*, Attachment 1 at 21.

⁸ *Id.*, Attachment 1 at 21-22.

⁹ Letter from J. Kim, NRC, to Entergy, “Vermont Yankee Nuclear Power Station – Request For Additional Information Regarding License Amendment Request For Emergency Plan Change (TAC NO. MF3668)” (May 5, 2014), *available at* ADAMS Accession No. ML14115A029; Letter from J. Kim, NRC, to Entergy, “Vermont Yankee Nuclear Power Station – Request For Additional Information Regarding License Amendment Request For Emergency Plan Change (TAC NO. MF3668)” (July 1, 2014), *available at* ADAMS Accession No. ML14163A590.

¹⁰ Letter from C. Wamser, Entergy, to NRC, “Proposed Changes to Vermont Yankee Emergency Plan – Supplement 1 (TAC No. MF3668)” (May 21, 2014), *available at* ADAMS Accession No. ML14149A048 (“LAR Supplement 1”); Letter from C. Wamser, Entergy, to NRC, “Proposed Changes to Vermont Yankee Emergency Plan – Supplement 2 (TAC No. MF3668)” (Aug. 14, 2014).

parallel with the RAI process, the Staff issued a *Federal Register* notice, indicating that it had reviewed Entergy's significant hazards consideration analysis, and that the proposed changes appeared to satisfy the three 10 C.F.R. § 50.92(c) standards.¹¹ Accordingly, the Staff "propose[d] to determine that the amendment request involves no significant hazards consideration."¹² The *Federal Register* notice also provided an opportunity for the public to submit comments on the proposed LAR, as well as an opportunity to file a request for hearing and petition for leave to intervene.¹³ The notice clearly stated that any "request for hearing must be filed by September 22, 2014."¹⁴ The notice also provided specific filing instructions for petitioners, including the need for petitioners to obtain a "digital ID certificate" from the NRC's Office of the Secretary well in advance of the due date so that filings could be made through the NRC's E-Filing system and served by the system on the appropriate parties.¹⁵

A. The State's Petition

Despite the *Federal Register* notice's clear filing instructions, the State did not serve its Petition through the NRC's E-Filing system (the Electronic Information Exchange ("EIE") system) until September 24, 2014.¹⁶ In its Petition, the State asserts that it has standing to

¹¹ Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 42,539, 42,546 (July 22, 2014).

¹² *Id.*

¹³ *Id.* at 42,539-40.

¹⁴ *Id.* at 42,539.

¹⁵ *Id.* at 42,541.

¹⁶ The State initially e-mailed its Petition directly to NRC Secretary Vietti-Cook shortly before midnight on September 22, 2014. See Memorandum from A. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, Atomic Safety and Licensing Board Panel Chief Administrative Judge, "Referring a Request for Hearing and Petition to Intervene with Respect to the License Amendment Request of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for the Vermont Yankee Nuclear Power Station, Docket No. 50-271" at 1 (Sept. 30, 2014), available at ADAMS Accession No. ML14273A498.

participate in the proceeding, given that VYNPS is located in Vermont and the LAR, if granted, would present a safety risk to Vermont residents.¹⁷ The State's sole contention alleges:

Entergy has failed to ensure a Radiological Monitoring System that will provide the information that the State needs to assess Vermont Yankee conditions as part of the State's protective action decision-making process, and Entergy has thus failed to demonstrate that its license amendment request (1) will not significantly reduce the margin of safety or significantly increase the consequences of an accident previously evaluated as required by 10 CFR § 50.92; (2) will provide adequate protection for the public health and safety as required by 10 CFR § 50.57(a)(3); and (3) will comply with the requirements of 10 CFR § 50.47 to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.¹⁸

In support of its contention, the State asserts that the LAR includes an attachment that discusses Time Motion Studies that assume that the VYNPS Emergency Response Data System ("ERDS") will not be operational when the plant is permanently shut down and defueled.¹⁹ The State alleges that the ERDS, which is currently linked to the NRC, provides "crucial data that the State needs to assess Vermont Yankee conditions as part of the State's protective action decision-making process."²⁰ Although the State acknowledges that "many of the ERDS parameters (such as those related to the reactor coolant system and safety injection) are not needed once Vermont Yankee is in a permanently shut down and defueled condition," it asserts that it requires continued access to data related to the Radiation Monitoring System, Meteorological Data, and Containment parameters.²¹ Accordingly, the State requests that either:

(1) the ERDS link to the NRC be retained during Vermont Yankee's permanently shut down and defueled period; or (2) an alternate means similar to ERDS be made available to provide equivalent Radiation Monitoring System,

¹⁷ Petition at 3.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.* at 4-5.

Meteorological information, and Containment parameters relevant to the spent fuel pool conditions for as long as fuel remains within the spent fuel pool.²²

B. Additional Procedural Background

In light of the State's initial attempt to e-mail its Petition directly to the NRC Secretary on September 22, 2014, and subsequent filing through the EIE system on September 24, the NRC Staff filed a motion to clarify the schedule for the filing of Entergy and Staff answers to the Petition.²³ Specifically, the motion requested clarification that such answers would be due no later than 25 days after it was served on the parties via the EIE system (i.e., by October 20, 2014).²⁴ On October 6, 2014, the Board issued an Order granting the Staff's motion and clarifying that the Staff's and Entergy's answers to the State's Petition are due no later than October 20, 2014 and that any State reply is due no later than October 27, 2014.²⁵

C. The Emergency Response Data System

In 1991, the NRC amended its regulations to require all licensees of operating power reactors to participate in the ERDS program.²⁶ Under 10 C.F.R. § 50.72(a)(4), a licensee must activate the ERDS as soon as possible, but not later than one hour, after declaring an alert or higher emergency classification. The ERDS is a direct electronic data link between the licensee's onsite computer system and the NRC Operations Center that provides for the

²² *Id.* at 5.

²³ NRC Staff's Unopposed Motion to Clarify the Filing Schedule with Respect to the Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 2, 2014), available at ADAMS Accession No. ML14275A467.

²⁴ *Id.* at 1.

²⁵ Licensing Board Order (Granting Request to Clarify Schedule for Answers and Reply) at 1 (Oct. 6, 2014) (unpublished).

²⁶ Final Rule, Emergency Response Data System, 56 Fed. Reg. 40,178 (Aug. 13, 1991); *see also* 10 C.F.R. § 50.72(a)(4); 10 C.F.R. Part 50, Appendix E ("Appendix E") § VI.

automated transmission of a limited data set of selected parameters.²⁷ For boiling water reactors (such as VYNPS), the five selected parameters relate to: (1) reactor coolant system; (2) safety injection; (3) containment; (4) radiation monitoring system; and (5) meteorological data.²⁸ The licensee's system must be able to transmit these data parameters at time intervals of not less than 15 seconds or more than 60 seconds.²⁹ Licensees are required to periodically test the ERDS to verify system availability and operability.³⁰

Notably, the requirement to maintain and use ERDS does not apply to reactors that are permanently shut down.³¹ In a June 2014 memorandum, the NRC Director of the Division of Preparedness and Response clarified that the ERDS program requirements “do not apply to nuclear power reactor licensees who have submitted a certificate of permanent cessation of operation.”³² The memorandum further clarifies that such licensees need not seek prior NRC approval or an exemption from Appendix E Section VI to retire the ERDS, provided that certain conditions are met.³³

Entergy currently maintains a continuous ERDS connection between VYNPS and the NRC Operations Center. Although 10 C.F.R. § 50.72(a)(4) requires only that Entergy activate the ERDS within one hour of declaring an alert or higher emergency classification, the VYNPS

²⁷ Appendix E § VI(1).

²⁸ *Id.* § VI(2)(a)(ii).

²⁹ *Id.* § VI(2)(b).

³⁰ *Id.* § VI(1).

³¹ *Id.* § VI(2); *see also* 56 Fed. Reg. at 40,178 (“This rule applies to all licensed nuclear power reactor facilities, except ... those that are permanently or indefinitely shut down.”).

³² Memorandum from R. Lewis, NRC Director of Division of Preparedness and Response, “Emergency Response Data System at Plants that have Permanently Ceased Operations” at 1 (June 2, 2014), *available at* ADAMS Accession No. ML14099A520.

³³ *Id.*

ERDS is activated “24/7” and continuously transmits data to the NRC, even during normal operations.

The data that VYNPS provides through the ERDS is collected, processed, and transmitted through a complex configuration of systems and networks both on and off the site. At VYNPS, data inputs are collected from various field sources, such as the meteorological tower and radiation monitors, and through data acquisition units and multiplexers within the plant. This source data is then processed by the on-site VYNPS plant process computer and transmitted to on-site computers (e.g., control room computers) through the on-site plant network and to off-site sources through the site local network. Once the data leaves the site, it is transmitted to Entergy’s off-site offices in Brattleboro, Vermont, and also passed through two different sets of server and software systems located in Brattleboro. The data is then transmitted via the Entergy corporate wide area network (“WAN”) to two more sets of server and software systems (located in Little Rock, Arkansas, and Jackson, Mississippi). For purposes of transmitting ERDS data to the NRC, the Entergy corporate information technology system is configured such that all Entergy nuclear facilities, including VYNPS, transmit their plant data via the Entergy corporate WAN through the Arkansas and Mississippi systems before it is ultimately transmitted to the NRC through a single ERDS interface.

The State receives VYNPS data through its direct link to the ERDS, which the NRC agreed to provide to the State pursuant to a 1996 Memorandum of Understanding between the NRC and the State.³⁴ Thus, the State receives plant data through the NRC; it does not receive plant data directly from VYNPS or from Entergy’s systems.

³⁴ Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Vermont, 62 Fed. Reg. 6,281 (Feb. 11, 1997).

As permitted by Appendix E and consistent with the Staff’s June 2014 interpretation of the regulations, Entergy plans to stop transmitting VYNPS data to the NRC via the ERDS after the permanent cessation of operations and permanent defueling.

III. THE PETITION IS UNTIMELY

As an initial matter, the State’s Petition should be dismissed as untimely, given that the State did not file its Petition through the NRC’s E-Filing system until September 24, 2014—two days after the filing deadline. As noted above, the *Federal Register* notice of opportunity for hearing for Entergy’s LAR stated unequivocally that “[a] request for hearing *must be filed by September 22, 2014.*”³⁵ The notice was equally unambiguous in specifying that “[a]ll documents filed in NRC adjudicatory proceedings, including a request for hearing [or] a petition for leave to intervene ... must be filed in accordance with the NRC’s E-Filing rule.”³⁶ The notice advised prospective participants to contact the NRC’s Office of the Secretary at least ten days prior to the filing deadline to ensure compliance with the E-Filing rule.³⁷ It made clear that “[a] filing is considered complete at the time the documents are submitted through the NRC’s E-Filing system,” and that to be timely, a filing must be submitted to the E-Filing system no later than 11:59 p.m. on the due date.³⁸ For those participants who have good cause for not submitting their filings through the E-Filing system, the notice instructed that such participants “must file an exemption request, in accordance with 10 CFR 2.302(g).”³⁹ Finally, the notice emphasized that any requests for hearing or petitions for leave to intervene filed after the deadline “*will not be*

³⁵ 79 Fed. Reg. at 42,539 (emphasis added).

³⁶ *Id.* at 42,541; *see also* 10 C.F.R. § 2.302(a).

³⁷ 79 Fed. Reg. at 42,541.

³⁸ *Id.*

³⁹ *Id.*

entertained, absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i)-(iii).”⁴⁰

Despite these explicit instructions, the State did not submit its Petition through the E-Filing system until September 24, 2014.⁴¹ The State’s Petition does not acknowledge its lateness, let alone demonstrate good cause for lateness under the criteria of 10 C.F.R. § 2.309(c)(1). Nor did the State request an exemption from Section 2.302(g)’s E-Filing requirements, as required by the *Federal Register* notice. Under Commission precedent, a petitioner has the burden of demonstrating that its untimely petition should be admitted based upon the factors in Section 2.309(c), and a late petition that fails to address those factors may be summarily rejected.⁴² Accordingly, the State’s Petition should be dismissed as untimely.

IV. THE PETITION FAILS TO PROFFER AN ADMISSIBLE CONTENTION

Even putting aside its untimeliness, however, the State’s Petition should be dismissed because it fails to propose an admissible contention.⁴³

A. Standards for Contention Admissibility

Under 10 C.F.R. § 2.309(f)(1), a hearing request “must set forth with particularity the contentions sought to be raised.” Further, each contention must:

⁴⁰ *Id.* at 42,542 (emphasis added).

⁴¹ *See* Petition Certificate of Service.

⁴² *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-68 (1985); *see also Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1, 3-4 (1993); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993). Given that the State is an experienced participant in NRC proceedings, it is (or should be) well aware of the Commission’s E-Filing requirements. *See, e.g.*, the State’s participation in the VYNPS extended power uprate license amendment proceeding (*Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686 (2004)) and the VYNPS license renewal proceeding (*Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, *rev’d in part*, CLI-07-16, 65 NRC 371 (2007)).

⁴³ Under 10 C.F.R. § 2.309(a), to intervene in a proceeding, a petitioner must both demonstrate standing and propose at least one admissible contention. Given that VYNPS is located within the State of Vermont, Entergy acknowledges that the State has demonstrated standing to participate in this proceeding.

- 1) provide a specific statement of the legal or factual issue sought to be raised or controverted;
- 2) provide a brief explanation of the basis for the contention;
- 3) demonstrate that the issue raised is within the scope of the proceeding;
- 4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
- 5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and
- 6) provide sufficient information to show that a genuine dispute exists with the applicant with regard to a material issue of law or fact.⁴⁴

The purpose of these six criteria is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁴⁵ The NRC’s contention admissibility rules are “strict by design.”⁴⁶ Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.⁴⁷ The criteria that are most relevant to the State’s contention are discussed in further detail below.

1. Contentions Must Be Within the Scope of the Proceeding

A petitioner must demonstrate “that the issue raised in the contention is within the scope of the proceeding.”⁴⁸ The scope of the proceeding is defined by the Commission’s notice of opportunity for a hearing.⁴⁹ Furthermore, contentions are necessarily limited to issues that are

⁴⁴ See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

⁴⁵ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004).

⁴⁶ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-1, 55 NRC 1 (2002).

⁴⁷ 69 Fed. Reg. at 2,221; *see also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁴⁸ 10 C.F.R. § 2.309(f)(1)(iii).

⁴⁹ *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

germane to the specific application pending before the licensing board.⁵⁰ Any contention that falls outside the specified scope of the proceeding must be rejected.⁵¹

A contention that challenges an NRC rule is also outside the scope of the proceeding and, therefore, inadmissible.⁵² This is because, absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”⁵³ Likewise, contentions that advocate stricter requirements than agency rules impose are outside of the scope of the proceeding.⁵⁴

2. Contentions Must Be Supported by Adequate Factual Information or Expert Opinion

A petitioner bears the burden of presenting the factual information or expert opinions necessary to support its contention adequately, and failure to do so requires the licensing board to reject the contention.⁵⁵ The petitioner’s obligation in this regard has been described as follows:

[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section [2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.⁵⁶

⁵⁰ See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998).

⁵¹ See *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

⁵² *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 16 (2001).

⁵³ 10 C.F.R. § 2.335(a).

⁵⁴ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159-60, *aff’d*, CLI-01-17, 54 NRC 3 (2001) (rejecting the petitioner’s contention that a license renewal applicant was required to prepare a probabilistic risk assessment, where the Commission’s license renewal regulations did not require such an assessment).

⁵⁵ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996); see also 10 C.F.R. § 2.309(f)(1)(v).

⁵⁶ *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

Where a petitioner neglects to provide the requisite support for its contentions, the licensing board may not make assumptions of fact that favor the petitioner or supply information that is lacking.⁵⁷

3. Contentions Must Raise a Genuine Dispute of Material Law or Fact

The Commission has stated that the petitioner must “read the pertinent portions of the license application . . . state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant.⁵⁸ If a petitioner believes the license application fails to adequately address a relevant issue, then the petitioner is to “explain why the application is deficient.”⁵⁹ A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.⁶⁰

B. The State’s Proposed Contention Does Not Satisfy the Admissibility Criteria

As shown below, the State’s contention raises issues outside the scope of the proceeding, lacks adequate factual or expert opinion support, and fails to raise a genuine dispute with Entergy’s LAR on a material issue of law or fact. Consequently, it should be rejected for any one of these independent reasons.

⁵⁷ See *Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009) (“[A] board should not add material not raised by a petitioner in order to render a contention admissible.”); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991) (rejecting petitioners’ basis for a contention, where the board inferred information that was not presented in the proposed contention).

⁵⁸ Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); see also *Millstone*, CLI-01-24, 54 NRC at 358.

⁵⁹ 54 Fed. Reg. at 33,170; see also *Palo Verde*, CLI-91-12, 34 NRC at 156.

⁶⁰ See *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992), vacated as moot, CLI-93-10, 37 NRC 192 (1993).

1. The Contention Raises Issues Outside the Scope of the Proceeding

The scope of a proceeding is defined by the notice of opportunity for a hearing.⁶¹ In this case, the *Federal Register* notice provided that “[c]ontentions shall be limited to matters within the scope of the amendment under consideration.”⁶² The State’s contention, which focuses on the State’s continued access to ERDS data, raises issues that have nothing to do with the proposed licensing action. In its Petition, the State alleges that “Entergy’s license amendment request, if granted, would hamper the State’s ability to assess Vermont Yankee conditions as part of Vermont’s protective action decision-making process.”⁶³ This assertion demonstrates a fundamental misunderstanding of the requested licensing action. The LAR proposes to “revise the site emergency plan for the permanently defueled condition to reflect changes in the on-shift staffing and Emergency Response Organization staffing.”⁶⁴ It does not request permission to stop transmitting plant data to the NRC via the ERDS.

Rather, as part of the analysis that Entergy submitted with the LAR to show that the proposed staffing reductions would not reduce the effectiveness of the emergency plan, Entergy merely stated that:

The VY Emergency Response Data System (ERDS) link to the NRC will not be operational in a permanently shut down and defueled condition. The task of ERDS activation is therefore not included as an on-shift task requiring evaluation as part of this Staffing analysis.⁶⁵

In addition, Entergy listed the task of “Activate ERDS” as “N/A,” or not applicable, as one of 15 emergency plan tasks that the reduced on-shift staff must accomplish for the various analyzed

⁶¹ See *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-825, 22 NRC 785, 790-91 (1985).

⁶² 79 Fed. Reg. at 42,540.

⁶³ Petition at 5.

⁶⁴ 79 Fed. Reg. at 42,546.

⁶⁵ LAR, Attachment 4 at 8.

accident scenarios.⁶⁶ Apart from this handful of references, the ERDS is not discussed elsewhere in the LAR submission, the NRC Staff's RAIs, or Entergy's RAI responses (comprising over 200 pages of correspondence). To include consideration of the issue of the State's continued access to ERDS data in this proceeding would be an unreasonable and impermissible expansion of the scope of the proposed licensing action.

Further, to the extent the State's contention calls for continued access to VYNPS ERDS data, it impermissibly challenges an NRC rule, in that it would impose stricter requirements than 10 C.F.R. § 50.47(b) and Appendix E would require.⁶⁷ As explained above, licensees of permanently shutdown reactors are not required to participate in the ERDS and generally do not require prior NRC approval to retire the system.⁶⁸

For all these reasons, the State's contention raises issues that are outside the scope of this proceeding and is, therefore, inadmissible.

2. The Contention Is Unsupported by any Factual Information or Expert Opinion

In addition, the State's Petition is devoid of any factual information or expert opinion to support its contention. Rather, the State relies on vague, conclusory statements without any references or citations to any studies, analyses, or other sources. For example, the State makes the assertion that, "[w]ithout timely access to the spent fuel pool, radiological, and meteorological data currently available to the State's radiological response organizations via ERDS, the State would need significantly more time to obtain accurate data needed for State

⁶⁶ *Id.*, Attachment 4 at 21, 27, 33, 39, 45.

⁶⁷ 10 C.F.R. § 2.309(f)(1)(iii); *see Turkey Point*, LBP-01-6, 53 NRC at 159-60.

⁶⁸ Appendix E § VI(2); Memorandum from R. Lewis, NRC Director of Preparedness and Response, "Emergency Response Data System at Plants that have Permanently Ceased Operations" at 1 (June 2, 2014), *available at* ADAMS Accession No. ML14099A520.

protective action recommendations.”⁶⁹ As an initial matter, this assertion suggests that the State recognizes that it will, in fact, continue to have access to the accurate data that it needs to form its protective action recommendations. But more to the point, the State merely states that it “would need significantly more time to obtain accurate data.”⁷⁰ The State does not provide any information related to how quickly it believes it needs to obtain the data, how often it needs to receive updated data, how much longer it would take to obtain the data it needs without access to the ERDS, or what the consequences would be if it does not obtain the data within whatever time period it believes it needs to receive the data.

Rather, the State asserts that “[a] hearing is required so that Vermont can put forward testimonial evidence on the potential consequences of [the] delay” in obtaining plant data.⁷¹ The Commission’s rules of practice require the State to provide supporting evidence or information now—at the contention admissibility stage.⁷² The rules do not permit the State to introduce that support for the first time at hearing. Under Commission precedent, a contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”⁷³ The State’s contention is inadmissible under these standards.

3. The Contention Does Not Raise a Genuine Dispute of Material Law or Fact with the LAR

In addition to raising issues beyond the scope of the proceeding and failing to provide sufficient support for its contention, the Petition also fails to raise a genuine dispute of material

⁶⁹ Petition at 5.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 10 C.F.R. § 2.309(f)(1)(v).

⁷³ *Fansteel, Inc.* (Muskogee, Oklahoma, Site) CLI-03-13, 58 NRC 195, 203 (2003) (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

law or fact with the LAR. Indeed, the State does not challenge the actual proposed licensing action—i.e., to revise the site emergency plan by reducing on-shift and ERO staffing after permanent shutdown and defueling. Nor does the State challenge any of the LAR’s key assumptions or conclusions, including:

- The spectrum of credible accidents will be reduced once VYNPS is permanently defueled.⁷⁴
- All ERO members will report to their respective emergency response facilities when activated.⁷⁵
- All functional responsibilities from eliminated ERO and on-shift positions can be satisfactorily reassigned to remaining staff positions.⁷⁶
- The proposed staffing reductions will not impact Entergy’s ability to respond to an emergency, address the risks to public health and safety, or to comply with the site emergency plan, site commitments, and applicable regulations.⁷⁷
- The proposed changes do not involve a significant hazards consideration.⁷⁸

Although the State suggests that “[a] hearing is required whenever a license amendment request ‘*creates the possibility of a new or different kind of accident,*’” it does not identify what new or different kind of accident could potentially be created by Entergy’s LAR.⁷⁹ To that point, the LAR squarely addresses this issue and concludes that the proposed amendment would not create the possibility of any new or different kind of accident, given that the proposed changes do not introduce any new equipment failure modes or create any new accident initiators.⁸⁰

⁷⁴ LAR, Attachment 1 at 3.

⁷⁵ *Id.*, Attachment 1 at 6.

⁷⁶ *Id.*, Attachment 1 at 8, 10.

⁷⁷ *Id.*, Attachment 1 at 8, 11.

⁷⁸ *Id.*, Attachment 1 at 21-22.

⁷⁹ Petition at 5 (quoting *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268, 1270 (9th Cir. 1986)) (emphasis in original).

⁸⁰ LAR, Attachment 1 at 21.

Under the NRC's rules, a contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.⁸¹ Because the State's contention does not directly controvert a position taken by Entergy in the LAR, it fails to raise a genuine dispute of material law or fact with the LAR and is, therefore, inadmissible.

. . . .

For the reasons discussed above, the State's sole contention is inadmissible under the criteria set forth in 10 C.F.R. § 2.309(f)(1). Accordingly, the State's Petition must be dismissed.

V. SUBPART L PROCEDURES SHOULD GOVERN THIS PROCEEDING IF THE STATE'S PETITION IS GRANTED

If the Board grants the State's Petition and hearing request, the procedures set forth in 10 C.F.R. Part 2 Subpart L should govern the proceeding. The State contends that the Board should conduct the proceeding under the 10 C.F.R. Part 2 Subpart G procedures.⁸² In particular, the State wishes "to conduct full discovery with document production requests and, if needed, depositions, followed by a full evidentiary hearing with live witnesses subject to cross-examination."⁸³

Pursuant to 10 C.F.R. § 2.310(a), the customary format for a license amendment proceeding is the "informal" hearing process in Subpart L.⁸⁴ The more formal Subpart G procedures are generally reserved for enforcement, uranium enrichment facility licensing, and high-level waste repository licensing proceedings.⁸⁵ Subpart G procedures may be used for

⁸¹ See *Comanche Peak*, LBP-92-37, 36 NRC at 384; see also *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 95 (2004).

⁸² Petition at 5.

⁸³ *Id.*

⁸⁴ See also 69 Fed. Reg. at 2,222 (unless otherwise provided in 10 C.F.R. § 2.310, Subpart L proceedings should "ordinarily" be used).

⁸⁵ See 10 C.F.R. §§ 2.310(b), (c), (f).

license amendment proceedings *only if* the presiding officer finds that resolution of a contention or contested matter necessitates resolution of: (1) material facts relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue; or (2) issues of motive or intent of the party or an eyewitness.⁸⁶ A petitioner requesting a Subpart G hearing “must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.”⁸⁷ The State has failed to show why invocation of the formal hearing procedures of Subpart G is warranted in this proceeding. In particular, it has not alleged any past activity in which the credibility of an eyewitness could be at issue or alleged that the motive or intent of Entergy or any eyewitness is material to the resolution of its contention.

Rather, the State merely asserts that “[e]xtensive discovery and a full hearing are particularly important in light of Entergy’s failure to engage the State before submitting this license amendment request.”⁸⁸ As an initial matter, NRC regulations do not require Entergy to engage or consult with the State prior to submitting an LAR. Entergy complied with all applicable notice requirements by providing the designated State official with a copy of the LAR at the time it submitted the LAR to the NRC.⁸⁹ More to the point, however (and contrary to the State’s suggestion), Entergy did have discussions with State representatives regarding the

⁸⁶ *Id.* § 2.310(d); *see also Vermont Yankee*, LBP-04-31, 60 NRC at 694 (“We conclude that 10 C.F.R. § 2.310(d) provides only two criteria entitling a petitioner to a Subpart G process and that the first criterion combines two elements, requiring that a contention necessitate resolution of ‘a dispute of material fact concerning the occurrence of a past activity’ *and* that ‘the credibility of an eyewitness may reasonably be expected to be an issue’ in resolving that dispute.”) (emphasis in original).

⁸⁷ 10 C.F.R. § 2.309(g); *see also Vermont Yankee*, LBP-04-31, 60 NRC at 693.

⁸⁸ Petition at 5-6.

⁸⁹ *See* 10 C.F.R. § 50.91(b)(1).

proposed staffing reductions requested in the LAR as early as January 2014—two months before Entergy submitted the LAR.⁹⁰

The State also argues that, because the public “is interested in ensuring that any amendments to Vermont Yankee’s license do not decrease safety,” the Subpart G procedures are “necessary to assure the public that whatever decision is reached, there has been a full and public airing of the important safety issues” raised in the LAR.⁹¹ A similar argument was made by the State—and rejected by the licensing board—in the VYNPS extended power uprate license amendment proceeding.⁹² In that proceeding, the State had argued that the use of Subpart G procedures was warranted because “there is a high degree of public interest in this proceeding, ... it is controversial and therefore ... discovery and cross-examination are essential to assure that there will be public confidence in the proceeding and its decisions.”⁹³ The licensing board in that proceeding rejected that argument, noting that there was nothing in the plain language of 10 C.F.R. § 2.310(d) to support the State’s position and that the Commission had considered and rejected similar arguments when it promulgated rules in 2004 to make the hearing process more effective and efficient.⁹⁴ That rationale is equally applicable to the State’s argument in this proceeding.

Moreover, the Subpart L process does provide a “full and public airing” of the issues. Direct and rebuttal testimony from all parties is offered in written form, sworn to and affirmed

⁹⁰ See also *Vermont Yankee*, LBP-04-31, 60 NRC at 700 (“generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives do not satisfy the ‘credibility’ or ‘motive’ elements of either criterion of 10 C.F.R. § 2.310(d)”).

⁹¹ Petition at 6.

⁹² *Vermont Yankee*, LBP-04-31, 60 NRC at 697.

⁹³ *Id.*

⁹⁴ *Id.* (citing 69 Fed. Reg. at 2,192).

by the witnesses, and included in the evidentiary record.⁹⁵ The Subpart L hearing is a “live” hearing.⁹⁶ The parties and their witnesses attend the hearing in-person, and the respective witnesses are sworn in. The witnesses are also subject to live cross-examination conducted by the licensing board, with each party providing the Board with suggested questions for the opposing parties’ witnesses.⁹⁷

Thus, the State has not demonstrated that its contention meets the criteria of 10 C.F.R. § 2.310(d), which would mandate the use of Subpart G procedures. Bearing in mind the Commission’s statement of policy that, unless otherwise provided in 10 C.F.R. § 2.310, Subpart L proceedings should “ordinarily” be used, the use of Subpart L procedures is appropriate in this license amendment proceeding.⁹⁸ In addition, the Subpart L procedures will provide for the full and fair disclosure of the facts and for the development of a sufficient evidentiary record. The State has not suggested otherwise. Accordingly, if the Board admits the State’s contention, Subpart L procedures are appropriate for its adjudication.

VI. CONCLUSION

For reasons discussed above, the State’s Petition must be dismissed, because it is untimely and fails to proffer an admissible contention. In particular, the State’s contention raises issues outside the scope of the proceeding, lacks adequate factual or expert opinion support, and fails to raise a genuine dispute with Entergy’s LAR on a material issue of law or fact. In the event, however, that the State’s contention is admitted for adjudication, the Commission’s informal Subpart L hearing procedures should govern the proceeding.

⁹⁵ 10 C.F.R. § 2.1207(a)(1), (2).

⁹⁶ *Id.* § 2.1207(b).

⁹⁷ *Id.* § 2.1207(a)(3).

⁹⁸ 69 Fed. Reg. at 2,222.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

Signed (electronically) by Susan H. Raimo

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