LBP-15-4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of ENTERGY NUCLEAR VERMONT YANKEE, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. (Vermont Yankee Nuclear Power Station)	Docket No. 50-271-LA ASLBP No. 15-934-01-LA-BD01 January 28, 2015

MEMORANDUM AND ORDER
(Ruling on Request for Hearing and Petition to Intervene)

The Vermont Department of Public Service, on behalf of the State of Vermont, has petitioned for an evidentiary hearing to challenge a proposal by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. [hereinafter referred to collectively as "Entergy"] to amend the Site Emergency Plan for Vermont Yankee Nuclear Power Station (Vermont Yankee).[1] In this Memorandum and Order, we determine that Vermont submitted a timely petition and has standing to intervene, but we nevertheless deny the petition because Vermont's contention collaterally challenges an NRC regulation and therefore is not admissible.[2]

[1] Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Sept. 22, 2014) [hereinafter "Vermont's Petition"].

[2] Judge Wardwell agrees that Vermont submitted a timely petition and has standing, but he disagrees with the conclusion that Vermont's contention is not admissible. His dissent is attached at the end of this Memorandum and Order.

I. BACKGROUND

Incident to its decommissioning activities for Vermont Yankee, on March 24, 2014, Entergy submitted a license amendment request ("LAR") seeking permission from the NRC Staff to reduce levels in Vermont Yankee's on-shift staffing and Emergency Response Organization staffing to reflect a permanently shut down and defueled reactor condition.[3] In the LAR, Entergy observed that Vermont Yankee's Emergency Response Data System ("ERDS") "will not be operational [when the reactor is] in a permanently shut down and defueled condition."[4]

Vermont's petition to intervene includes a single contention that challenges the assumption in Entergy's LAR that "ERDS . . . will not be operational" after Vermont Yankee is permanently shut down.[5] Vermont argues that either (1) ERDS must remain operational while Vermont Yankee is permanently shut down; or (2) Entergy must provide an alternate means similar to ERDS to supply Vermont with radiation monitoring information, meteorological information, and containment parameters relevant to spent fuel pool conditions for as long as fuel remains in the pool.[6]

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[3] Letter from Christopher Wamser, Site Vice President, Vermont Yankee Nuclear Power Station, to Document Control Desk, U.S. Nuclear Regulatory Commission, "Proposed Changes to the Vermont Yankee Emergency Plan" (Mar. 24, 2014) (ADAMS Accession No. ML14085A257) [hereinafter "LAR"].

Vermont Yankee permanently shut down its reactor on December 29, 2014. See Letter from Christopher Wamser, Site Vice President, Vermont Yankee Nuclear Power Station, to Document Control Desk, U.S. Nuclear Regulatory Commission, "Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel" (Jan. 12, 2015) (ADAMS Accession No. ML15013A426).

[4] LAR, attach. 4, Vermont Yankee Nuclear Power Station Analysis of Proposed Post-Shutdown On-Shift Staffing at 8 (Mar. 10, 2014) (ADAMS Accession No. ML14085A257).

[5] Vermont's Petition at 4.

[6] Id. at 5.

Because we conclude that the admissibility of Vermont's contention founders on the regulatory requirements relating to ERDS, we begin this section with a brief discussion of ERDS, followed by the procedural history of this case.

A. The Emergency Response Data System

As a result of the accident at Three Mile Island in March 1979, the NRC recognized a need to improve its ability to acquire accurate and timely data on reactor plant conditions during emergencies.[7] Accordingly, in October 1990, the NRC issued a proposal to amend its regulations to (1) require certain licensees to participate in the ERDS program; and (2) set a schedule for implementation of that program.[8] As described in the proposed rule:

> The ERDS is a direct electronic data link between computer data systems used by licensees and the NRC Operations Center. The ERDS would supplement the voice transmission over [the] currently installed Emergency Notification System (ENS). The ERDS would provide the NRC Operations Center with timely and accurate values of a limited set of parameters that describe selected plant conditions. The parameter values would be taken directly from data systems existing on a licensee's onsite computer. The ERDS would be activated by a licensee during the declaration of an alert or higher emergency classification at a licensed nuclear power facility.[9]

The purpose of ERDS was to "improve the reliability and timeliness of data transmission and help ensure that any reactor unit in distress can be suitably monitored."[10] To that end, the proposed rule stated that the class of participants would consist of "all operating nuclear power reactors."[11] Expressly excluded from the proposed rule were those nuclear power reactor facilities "that are permanently or indefinitely shut down" and "Big Rock Point," which was

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[7] See Proposed Rule, Emergency Response Data System, 55 Fed. Reg. 41,095 (Oct. 9, 1990).

[8] Id. at 41,095-96.

[9] Id. at 41,095.

[10] Id. at 41,098.

[11] Id.

exempt because it had an insufficient number of transmittable data points available for effective participation in the ERDS program.[12]

As relevant here, the final (and current) rule – which was issued on September 12, 1991 and codified in 10 C.F.R. Part 50, Appendix E, Section VI – was identical to the proposed rule.[13] The regulatory history accompanying the final rule reiterates that ERDS is a direct electronic data link between "licensees of operating reactors and the NRC Operations Center," and its "objective" is to "allow the NRC to monitor critical parameters during an emergency . . . at operating power reactors."[14] The rule thus requires all operational nuclear power plants (except Big Rock Point) to participate in the ERDS program by providing "onsite hardware . . . at each unit . . . to interface with the NRC receiving station."[15] The rule expressly exempts "all nuclear power facilities that are shut down permanently or indefinitely" from participating in the ERDS program.[16] Moreover, consistent with this regulatory provision exempting permanently shut down reactors from participating in the ERDS program, the NRC regulation directing licensees to activate ERDS during exigent circumstances applies, as denoted in the regulation's title, only to "operating nuclear power reactors."[17] As to the ERDS implementation schedule, the rule provides that "[e]ach licensee shall complete implementation of the ERDS by February 13, 1993, or before initial escalation to full power, whichever comes later."[18]

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[12] Id. at 41,096.

[13] See Final Rule, Emergency Response Data System, 56 Fed. Reg. 40,178 (Aug. 13, 1991).

[14] Id. at 40,178.

[15] Id. at 40,185; 10 C.F.R. Pt. 50, App. E § VI.2.

[16] 56 Fed. Reg. at 40,185; 10 C.F.R. Pt. 50, App. E § VI.2.

[17] 10 C.F.R. § 50.72(a)(4).

[18] 56 Fed. Reg. at 40,185; 10 C.F.R. Pt. 50, App. E § VI.4.d.

Lastly, in the final rule's regulatory history, the NRC "recommend[s] that States desiring an emergency data link to nuclear power plants within their jurisdiction use an ERDS connection from the NRC Operations Center. A Memorandum of Understanding with the NRC will provide the State with ERDS data."[19]

B. Procedural Background

On March 24, 2014, Entergy submitted an LAR seeking permission from the NRC to reduce levels in Vermont Yankee's on-shift staffing and Emergency Response Organization staffing after the reactor is in a permanently shut down and defueled condition.[20] In the LAR, Entergy excluded activation of the ERDS from its staffing analysis, noting that the "[ERDS] link to the NRC will not be operational in a permanently shut down and defueled condition."[21]

A notice for the LAR was published in the Federal Register on July 22, 2014, informing the public of the 60-day deadline to file a petition to intervene and describing the process for submitting the petition through NRC's required E-Filing system.[22]

On the deadline of September 22, 2014, Vermont emailed its petition to the Secretary of the Commission, explaining that the State was "not able to file this through the web-based submission form for E-Filings."[23] The petition contained a single contention challenging Entergy's assumption that ERDS would not be operational after Vermont Yankee's reactor was

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[19] 56 Fed. Reg. at 40,181.

[20] See supra note 3. As previously mentioned, the LAR is part of Entergy's decommissioning activities for Vermont Yankee, which permanently ceased operations on December 29, 2014.

[21] See supra note 4.

[22] Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 42,539, 42,540-42, 42,546 (July 22, 2014).

[23] Memorandum from Annette L. Vietti-Cook, Secretary of the Commission, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, "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," attach. at 1 (Sept. 30, 2014).

permanently shut down and defueled.[24] Two days later, Vermont resubmitted the same petition via the E-Filing system.[25] The Secretary of the Commission referred the petition to the Atomic Safety and Licensing Board Panel, and this Licensing Board was established on October 3, 2014.[26]

We granted the NRC Staff's unopposed motion for a clarification of the briefing schedule, thereby giving Entergy and the Staff 25 days from the E-Filing of Vermont's petition to file their answers.[27] On October 20, Entergy and the NRC Staff submitted answers opposing the intervention request,[28] and Vermont filed its reply on October 31.[29] We heard oral argument on December 1 regarding the admissibility of Vermont's contention.[30]

II. ANALYSIS

A. Standing and Timeliness

Before analyzing the admissibility of Vermont's contention, we consider the threshold issues of the timeliness of the petition and Vermont's standing to intervene. We address the

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[24] See Vermont's Petition at 3-5.

[25] See supra note 23.

[26] See Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board, 79 Fed. Reg. 61,107 (Oct. 9, 2014).

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

[28] Entergy's Answer Opposing the State of Vermont's Notice of Intention to Participate, Petition to Intervene and Hearing Request (Oct. 20, 2014) [hereinafter "Entergy's Answer"]; NRC Staff Answer to Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 20, 2014) [hereinafter "NRC Staff's Answer"].

[29] State of Vermont's Reply to NRC Staff and Entergy Answers to the State of Vermont's Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 31, 2014) [hereinafter "Vermont's Reply"].

[30] See Licensing Board Order (Scheduling and Providing Instructions for Oral Argument) (Nov. 12, 2014) (unpublished); Transcript of Oral Argument (Dec. 1, 2014) [hereinafter "Tr."].

latter issue first, which is easily resolved. As Entergy and the NRC Staff acknowledge,[31] Vermont has standing because Vermont Yankee is "located within the boundaries of the State" and, accordingly, "no further demonstration of standing is required."[32]

But Entergy and the NRC Staff challenge the timeliness of Vermont's petition, arguing that it is untimely because Vermont submitted it on the September 22 deadline by email, instead of using the required E-Filing system.[33]

Vermont responds that it was engaged in negotiations with Entergy up until the filing deadline, leading the State to delay its request for the proper digital credentials needed to use the E-Filing system.[34] At oral argument, counsel for Vermont clarified that the State determined it might need to file a petition on the Thursday or Friday before the Monday deadline,[35] well after the 10-day lead-time for requesting a digital certificate.[36] The State stresses that it (1) informed Entergy prior to the deadline of its plan to file a petition; (2) submitted its petition to the NRC by email before the deadline lapsed; and (3) filed the petition on the E-Filing system at the earliest opportunity two days later upon obtaining the required digital credentials for the system.[37]

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[31] See Entergy's Answer at 10 n.43; NRC Staff's Answer at 4.

[32] 10 C.F.R. § 2.309(h)(2).

[33] See Entergy's Answer at 9-10; Tr. at 65-67; see also 10 C.F.R. § 2.302(a).

[34] Vermont's Reply at 15-16.

[35] Tr. at 18.

[36] 79 Fed. Reg. at 42,541 ("To comply with the procedural requirements of E-Filing, at least ten 10 days prior to the filing deadline, the participant should contact the Office of the Secretary . . . to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating.").

[37] See Vermont's Reply at 15; Tr. at 17.

On balance, we conclude that Vermont has provided good cause for its late E-Filing submission,[38] particularly because the State submitted its petition to the NRC by email before the deadline lapsed, and it is clear that the delay was purely a matter of obtaining digital credentials for the system, not an attempt to gain extra time to prepare a pleading or otherwise to flout the NRC's procedural requirements.[39] Moreover, the delay in E-Filing did not prejudice Entergy or the NRC Staff, because both were aware of the substance of Vermont's petition by the September 22 deadline, and both received a full 25 days from the September 24 E-Filing submission to file their answers.[40]

Although we decline to dismiss Vermont's petition as untimely, we caution future petitioners that failure to comply with the NRC's E-Filing requirements without good cause or without obtaining an exemption from the requirements under 10 C.F.R. § 2.302(g) can result in rejection of a pleading. In particular, when a filing deadline is approaching, notwithstanding that an attorney is engaged in good faith settlement discussions, prudence should compel the attorney to take all actions that are necessary to ensure the deadline will be met in the event that settlement discussions are unsuccessful.[41]

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[38] 10 C.F.R. §§ 2.309(c)(2)(i), 2.307(a); cf. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-09, 78 NRC 551, 556 n.17 (2013) (the Commission exercises its discretion to consider briefs that were not filed via the agency's E-Filing system).

[39] Cf. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 and 7), LBP-11-6, 73 NRC 149, 247 (2002) (finding no good cause where petitioner's late-filed contention was due to "careless 'inadverten[ce]'" and not, as petitioner claimed, attributable to technical difficulties with the E-Filing system).

[40] See supra note 27. Although Entergy and the NRC Staff correctly observe that lack of prejudice, standing alone, does not excuse an untimely filing (see Tr. at 63, 65), it is a factor the Commission has considered in determining whether good cause exists. See Crow Butte Resources, Inc. (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 549-50 (2009).

[41] See e.g., Justice v. Town of Cicero, Ill., 682 F.3d 662, 665 (7th Cir. 2012) ("Courts used to say that a single day's delay can cost a litigant valuable rights. With e-filing, one hour's or even a minute's delay can cost a litigant valuable rights. A prudent litigant or lawyer must allow time for difficulties on the filer's end.") (citation omitted).

B. Contention Admissibility

1. Contention Admissibility Standards

Vermont's contention is admissible only if it satisfies all six criteria set forth in 10 C.F.R. § 2.309(f)(1).[42] That rule requires Vermont to (i) provide a specific statement of the issue of law or fact to be raised; (ii) explain briefly the basis for the contention; (iii) show that the issue raised in the contention is within the scope of the license amendment proceeding; (iv) demonstrate that the issue is material to the findings the NRC must make to support the LAR; (v) state concisely the alleged facts or expert opinions that support Vermont's position on the issue and on which Vermont intends to rely at hearing; and (vi) show that a genuine dispute exists with Entergy on a material issue of law or fact, with reference to the disputed portion of the LAR.[43]

Additionally, except as provided by the waiver provision in 10 C.F.R. § 2.335(b) & (d), "no rule or regulation of the Commission, or any provision thereof . . . is subject to attack . . . in any adjudicatory proceeding subject to [10 C.F.R. Subpart 2]."[44] Thus, absent a waiver, contentions that raise a direct or indirect challenge to a Commission regulation must be rejected as nonjusticiable and, hence, inadmissible.[45]

2. Vermont's Contention, and the Parties' Arguments Regarding Admissibility

In its petition, Vermont argues that Entergy's plan to deactivate Vermont Yankee's ERDS link to the NRC Operations Center upon permanent cessation of reactor operations and permanent removal of fuel from the reactor violates Entergy's regulatory duty to ensure public

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[42] See FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 395-96 (2012).

[43] 10 C.F.R. § 2.309(f)(1).

[44] Id. § 2.335(a).

[45] Id. § 2.335(b); see also infra note 64 (citing cases).

safety because, the State asserts, the lack of timely information will hinder the State's emergency response.[46] Specifically, Vermont's contention alleges that:

> 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.[47]

In support of its contention, Vermont asserts that its Radiological Emergency Response Plan depends on the ERDS link to provide information during an emergency.[48] This Plan was developed by the State and approved by the Federal Emergency Management Agency to ensure that the State is prepared to handle the offsite effects of a radiological emergency at Vermont Yankee.[49] Vermont requests that either (1) the ERDS link "be retained during Vermont Yankee's permanently shut down and defueled period"; or (2) Entergy provide an alternative system, similar to ERDS, that will "provide equivalent Radiation Monitoring System, Meteorological information, and Containment parameters relevant to the spent fuel pool conditions for as long as fuel remains within the spent fuel pool."[50]

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[46] Vermont's Petition at 4. Vermont has a Memorandum of Understanding with the NRC (see supra note 19) enabling it to access ERDS data via a link with the NRC Operations Center. See Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Vermont, 62 Fed. Reg. 6,281 (Feb. 11, 1997). The Memorandum of Understanding may be terminated by either party "upon 30 days written notice." Id. at 6,282.

[47] Vermont's Petition at 3-4.

[48] Id. at 4; Vermont's Reply, attach. A, at 99-100.

[49] 44 C.F.R. § 350; see Emergency Preparedness Program Office, Office of Nuclear Reactor Regulation, Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants, NUREG-0654/FEMA-REP-1, Rev. 1 (1980) (ADAMS Accession No. ML040420012).

[50] Vermont's Petition at 5.

Entergy argues that Vermont's contention is not admissible for several alternative reasons. First, Entergy argues that Vermont's demand that Entergy must maintain its ERDS link with the NRC after Vermont Yankee's nuclear reactor is permanently shut down is an impermissible collateral attack on 10 C.F.R. Part 50, Appendix E, Section VI, which exempts "all nuclear power facilities that are shut down permanently" from the requirement of providing ERDS hardware.[51] Additionally, Entergy argues that Vermont's contention is inadmissible for the following independent reasons: (1) it falls outside the scope of this proceeding, contrary to section 2.309(f)(1)(iii);[52] (2) it is unsupported by adequate factual information or expert opinion, contrary to section 2.309(f)(1)(v);[53] and (3) it does not raise a genuine dispute of material law or fact with the LAR, contrary to section 2.309(f)(1)(vi).[54]

The NRC Staff also opposes the admission of Vermont's contention. First, the Staff, like Entergy, characterizes Vermont's contention as an impermissible collateral attack on 10 C.F.R. Part 50, Appendix E, Section VI.[55] Additionally, the Staff argues that Vermont's contention is (1) outside the scope of this proceeding, contrary to section 2.309(f)(1)(iii);[56] and (2) not material to findings the NRC must make on the LAR, contrary to section 2.309(f)(1)(iv).[57]

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[51] Entergy's Answer at 9, 15.

[52] Id. at 14-15.

[53] Id. at 15-16.

[54] Id. at 16-17.

[55] NRC Staff's Answer at 12-13.

[56] Id. at 9-12.

[57] Id. at 15-16.

In its reply, Vermont denies that its contention is an impermissible collateral attack on ERDS regulations, and it also contests the other arguments advanced by Entergy and the NRC Staff regarding the alleged inadmissibility of its contention.[58]

3. Vermont's Contention is Not Admissible

Vermont's contention seeks to require Entergy to maintain its ERDS link *after* its reactor is permanently shut down and defueled, or, alternatively, to create an ERDS-like system that would provide Vermont with data relevant to the spent fuel pool.[59] In our view, the relief sought by Vermont is inconsistent with the exception provision in 10 C.F.R. Part 50, Appendix E, Section VI.2, which exempts "all nuclear power facilities that are shut down permanently" from providing an ERDS link.[60] As discussed infra Part II.B.3.a, the scope of this exception is informed by the regulatory history, which states that ERDS is to be "used by *licensees of operating reactors*"[61] and which repeatedly stresses that the purpose of ERDS is to enhance the NRC's ability to monitor "what is taking place *at the reactor during an accident*."[62] In light of the regulation's unambiguous purpose, the exception provision is most reasonably interpreted as exempting from the ERDS program all nuclear reactors that, like Vermont Yankee, have permanently ceased operations and defueled – i.e., that are permanently shut down. This conclusion is confirmed by 10 C.F.R. § 50.72, which, as discussed infra Part II.B.3.a, is the only regulation that requires a licensee to activate its ERDS link, and which applies only to "operating nuclear power reactors."[63] The upshot of section 50.72 is clear: if the licensee of a permanently

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[58] Vermont's Reply at 2-15.

[59] Vermont's Petition at 5.

[60] 10 C.F.R. Pt. 50, App. E § VI.2.

[61] 56 Fed. Reg. at 40,178 (emphasis added).

[62] Id. at 40,179 (emphasis added).

[63] 10 C.F.R. § 50.72 (regulation's title).

shut down reactor is never required to activate the ERDS link, it follows that such a licensee need not maintain the ERDS link. To the extent Vermont's contention would require Entergy to maintain the ERDS link or to create another ERDS-like system after Vermont Yankee's reactor is permanently shut down and defueled, it seeks to impose a requirement more stringent than the requirement imposed in Section VI. It is therefore an impermissible collateral attack on a regulation in derogation of 10 C.F.R. § 2.335(a) and must be rejected as inadmissible.[64]

Vermont advances several arguments in an effort to rescue its contention from being rejected as a collateral attack on Section VI. As discussed below, we are not persuaded by those arguments.[65]

a. Noting that the exception provision in Appendix E, Section VI.2 applies to "nuclear power facilities that are shut down permanently" and not simply to nuclear reactors that are shut down permanently, Vermont argues that a permanently shut down nuclear power facility should be construed as a nuclear power plant that has (1) permanently shut down its reactor, *and* (2) moved all fuel from spent fuel pools to dry storage.[66] So construed, asserts

[64] See, e.g., Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC __, __ n.27 (slip op. at 9 n.27) (Aug. 26, 2014) ("Contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings."); NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012) ("This proposition contravenes our longstanding practice of rejecting, as a collateral attack, any contention calling for requirements in excess of those imposed by our regulations."); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000) (rejecting an "attempt[] to impose . . . a requirement more stringent tha[n] the one imposed by the regulations"); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 170 (1995) ("[T]he Intervenors are, in essence, contending that those regulatory provisions are themselves insufficient to protect the public health and safety. This assertion constitutes an improper collateral attack upon our regulations.") (footnote omitted)).

[65] Because we reject Vermont's contention as a collateral attack on 10 C.F.R. Part 50, Appendix E, Section VI, we do not consider whether it is inadmissible on the alternative grounds that it (1) falls outside the scope of this proceeding; (2) is not material to findings the NRC Staff must make on the LAR; (3) is unsupported by adequate factual information or expert opinion; and (4) fails to raise a genuine dispute of material law or fact with the LAR. See supra notes 52-54 and 56-57.

[66] See Tr. at 21-22; Vermont's Petition at 5.

Vermont, its request for relief does not seek to impose a requirement more stringent than the one imposed by regulation.

But Vermont's interpretation of the phrase "nuclear power facilities that are shut down permanently" is not tenable. First, the regulation speaks of facilities instead of reactors because any facility with an operating "unit" (i.e., an operating reactor) is required to provide ERDS for that unit, regardless of the status of other reactors at the facility.[67] Second, nothing in Section VI or its regulatory history ties the design or purpose of ERDS to spent fuel pools or spent fuel storage.[68] Rather, the regulation speaks of "transmit[ting] data from each [reactor] *unit*,"[69] and the regulatory history repeatedly stresses that the purpose of ERDS is to improve the NRC's ability to monitor "any *reactor unit* in distress."[70] The regulatory history thus refers to the class of required participants as "all operating nuclear power *reactors*."[71]

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[67] 10 C.F.R. Pt. 50, App. E § VI.2; see also Office for Analysis and Evaluation of Operational Data, Emergency Response Data System (ERDS) Implementation, NUREG-1394, Rev. 1 at 6 (June 1991) ("Since ERDS treats each reactor unit as an individual plant, a separate data stream is required for each reactor unit.").

[68] Significantly, the NRC Staff represents that in 1991 when Section VI was promulgated, reactors at six NRC-regulated nuclear power facilities were shut down permanently but still stored fuel in their spent fuel pools. All of these facilities continued to store fuel in spent fuel pools beyond the regulation's implementation date in February 1993, and five of the six facilities continued to store fuel in spent fuel pools until 2002 and beyond. See NRC Staff Answer to [ASLB] Question Asked During December 1, 2014 Contention Admissibility Argument at 2-3 (Dec. 8, 2014) [hereinafter "NRC Staff Dec. 8, 2014 Answer"]. Yet, to the Staff's knowledge, "ERDS was never installed at any of these facilities." Id. at 3.

[69] 10 C.F.R. Pt. 50, App. E § VI.2 (emphasis added).

[70] 55 Fed. Reg. at 41,098 (emphasis added); accord, e.g., id. at 41,096 ("[the NRC] has placed a high priority on the implementation of the ERDS program by all *operational nuclear power units*") (emphasis added); 56 Fed. Reg. at 40,178 (the "objective" of ERDS is to "allow the NRC to monitor critical parameters during an emergency . . . *at operating power reactors*") (emphasis added); id. at 40,179 ("*ERDS is designed to transfer needed reactor data* from a nuclear power plant only during emergencies") (emphasis added); id. ("the principal effect of ERDS will be a marked improvement in the availability, timeliness, and reliability of key information about what is taking place *at the reactor* during an accident") (emphasis added); id. at 40,183 (same).

[71] 55 Fed. Reg. at 41,098 (emphasis added); accord, e.g., 56 Fed. Reg. at 40,178 (ERDS is an electronic data link between "*licensees of operating reactors* and the NRC") (emphasis added).

Given its emergency planning function, the regulation sensibly focuses on emergencies at operating reactors because the NRC Staff has determined that permanently shut down reactors face a smaller number of potentially severe accident scenarios.[72] The following categories of ERDS-transmitted data demonstrate this focus: (1) reactor core and coolant systems; (2) reactor containment conditions; (3) radioactivity release rates relating to operating reactors; and (4) meteorological tower data.[73] By design, ERDS-transmitted data in the above categories "allow[s] the NRC to monitor critical parameters during an emergency . . . at operating power reactors."[74] Vermont itself concedes 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."[75] Yet Vermont's flawed reading of the term "facility" would require plants to continue providing reactor-related parameters via ERDS even after all reactors units have been permanently shut down.[76]

In light of the above regulatory language and history, we conclude that a nuclear power facility has shut down permanently within the meaning of 10 C.F.R. Part 50, Appendix E,

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[72] See Office of Nuclear Reactor Regulation, Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants, NUREG-1738 at x (2001) (ADAMS Accession No. ML010430066) ("The staff found that the event sequences important to risk at decommissioning plants are limited to large earthquakes and cask drop events. For emergency planning (EP) assessments this is an important difference relative to operating plants where typically a large number of different sequences make significant contributions to risk.").

[73] See 10 C.F.R. Pt. 50, App. E § VI.2; see also id. § VI.2(a)(ii) (identifying parameters from which ERDS transmits data points for boiling water reactors).

[74] 56 Fed. Reg. at 40,178.

[75] Vermont's Petition at 4.

[76] Vermont's definition of nuclear power "facility" is also flawed because there is no regulatory basis for concluding that a nuclear power "facility" is permanently shut down just because the licensee has moved all fuel from on-site spent fuel pools to on-site dry storage. Cf. Tr. at 22 (counsel for Vermont acknowledges possibility of a "dry cask accident" after fuel has been removed from spent fuel pools). Indeed, a nuclear power "facility" arguably exists until final decommissioning, which may take up to 60 years, or longer if approved by the Commission. See 10 C.F.R. § 50.82(a)(3). Not even Vermont, however, presses for such an expansive definition of "facility" in the context of Appendix E, Section VI.2. See Tr. at 21-22.

Section VI.2 when it has permanently ceased reactor operations, and permanently removed fuel from the reactor vessel, as those terms are defined in 10 C.F.R. § 50.2.[77] This interpretation of the exception provision in Section VI.2 comports with what NRC Staff represents is its longstanding interpretation[78] and the longstanding practice of the industry.[79] Pursuant to this interpretation, Entergy is categorically exempt by regulation from maintaining an ERDS link under the terms of its LAR, which seeks a revision to its site emergency plan to reflect a permanently shut down and defueled condition.[80]

Our conclusion that Entergy falls within the exception provision of Section VI.2 is confirmed by the regulatory framework. The only regulation that requires a licensee to turn on its ERDS link is 10 C.F.R. § 50.72(a)(4), which directs licensees to "activate the [ERDS] as soon as possible but not later than one hour after declaring an Emergency Class of alert, site area emergency, or general emergency."[81] Dispositively, the activation requirement in section 50.72

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[77] "[P]ermanent cessation of operation(s) . . . for a nuclear power reactor facility" is defined as "a certification by a licensee to the NRC that it has permanently ceased or will permanently cease reactor operations(s)." 10 C.F.R. § 50.2. "[P]ermanent fuel removal . . . for a nuclear power reactor facility" is defined as "a certification by the licensee to the NRC that it has permanently removed all fuel assemblies from the reactor vessel." Id.

[78] See Tr. at 78-80, 97; NRC Staff Dec. 8, 2014 Answer at 2-3; NRC Staff's Answer at 8 n.33.

[79] According to the NRC Staff, all nuclear reactors decommissioned since 1991 have removed ERDS from their emergency plans or have deactivated the ERDS link. See Tr. at 78-80, 97.

[80] In a recent NRC Staff Memorandum, the Director of the Division of Preparedness and Response viewed the Section VI exception provision as applying to "nuclear power reactor licensees who have submitted a certificate of permanent cessation of operation." Memorandum from Robert J. Lewis, NRC Director of Preparedness and Response, "[ERDS] at Plants that have Permanently Ceased Operations" at 1 (June 2, 2014) (ADAMS Accession No. ML14099A520) [hereinafter "Lewis Memorandum"]. As stated above in text, we conclude the exception provision applies to licensees who certify permanent cessation of operations *and* permanent removal of fuel from the reactor vessel. When these two conditions are satisfied, the "license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel" (10 C.F.R. § 50.82(a)(2)), and "physically the reactor can't be operated." Tr. at 78; see also NRC Staff's Answer at 8 n.33.

[81] 10 C.F.R. § 50.72(a)(4).

applies only to "operating nuclear power reactors."[82] Restated, there is no regulatory requirement for the licensee of a reactor that has permanently ceased operations to activate the ERDS link during an emergency. If the licensee of a permanently shut down reactor is never required to activate the ERDS link, it must be concluded that – consistent with the language and history of Appendix E, Section VI.2 – such a licensee is exempt from the ERDS program.

The dissent attempts to discount the significance of 10 C.F.R. § 50.72 to this case, arguing that the activation requirement of section 50.72 is irrelevant because Vermont Yankee's ERDS link is activated at all times.[83] But continuous activation of the ERDS link is not required by regulation, so Vermont Yankee's action in this regard offers no guidance in terms of regulatory interpretation.[84] In contrast, the fact that section 50.72 requires only "operating nuclear power reactors" to activate the ERDS link convincingly supports the conclusion that only licensees with operating reactors are required to maintain the ERDS link.[85]

b. Vermont also argues that 10 C.F.R. Part 50, Appendix E, Section VI merely implemented the mandatory roll-out of the ERDS program in 1991, creating obligations and exceptions that applied only to nuclear reactor facilities existing in 1991. Pursuant to this

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[82] Id. § 50.72 (regulation's title). It is well established that the title of a regulation can aid in construing regulatory text. See, e.g., INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189-90 (1991).

[83] See Dissent at 11 n.36.

[84] As explained in the regulatory history, a licensee is not required to activate ERDS continuously, because ERDS "is designed to transfer needed *reactor data* from a nuclear power plant *only during emergencies.*" 56 Fed. Reg. at 40,179 (emphasis added).

[85] Significantly, Vermont's contention attacks the assumption in Entergy's LAR that "ERDS . . . will not be operational" after Vermont Yankee's reactor is permanently shut down. See Vermont Yankee's Petition at 4. If that assumption were re-written to state that ERDS need not be activated after Vermont Yankee's reactor is permanently shut down, it would be unassailable in light of 10 C.F.R. § 50.72, and Vermont's contention would be groundless. For present purposes, we discern no material difference between these two assumptions.

argument, Section VI.2 exempted permanently shut down reactors from implementing ERDS in 1991, but it did not authorize a licensee to discontinue ERDS after it had been implemented.[86]

We disagree. If, as Vermont argues, Section VI were a one-time requirement that applied only to units existing in 1991, that would mean it was not intended to apply prospectively to newly built reactors. In addition to defying common sense, such an interpretation of Section VI is negated by 10 C.F.R. § 50.47(e), which confirms that a holder of a combined license for a newly built reactor "may not load fuel or operate except as provided in accordance with [A]ppendix E."[87]

Moreover, nothing in the regulation suggests it was intended to apply only to plants that were operating in 1991, or that its exemption was intended to be limited to plants that were already shut down in 1991. The regulation is written in broad terms: it requires that, "[e]xcept for Big Rock Point and all nuclear power facilities that are shut down permanently or indefinitely, onsite [ERDS] hardware shall be provided at each unit by the licensee to interface with the NRC receiving system."[88] Concluding that the regulation operates prospectively to include *all* operating reactors, and *only* operating reactors, satisfies the rule's goal of ensuring that NRC can monitor the "critical parameters during an emergency . . . at operating power reactors."[89]

In support of its argument that Section VI is solely an implementation rule, Vermont also asserts that the NRC did not consider whether to require ERDS hardware at facilities that shut

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[86] See Vermont's Reply at 8-9.

[87] Id. § 50.47(e); see also id. § 50.54(q)(2) ("A holder of a license under this part, or a combined license under part 52 . . ., shall follow and maintain the effectiveness of an emergency plan that meets the requirements in [A]ppendix E to this part . . . ."). Vermont's argument is also belied by the implementation deadline in Appendix E, Section VI.4.d, which requires each licensee to "complete implementation of the ERDS by February 13, 1993, *or before initial escalation to full power, whichever comes later*." 10 C.F.R. Pt. 50, App. E § VI.4.d (emphasis added).

[88] 10 C.F.R. Pt. 50, App. E § VI.2.

[89] 56 Fed. Reg. at 40,178.

down after installing the hardware.[90] But that assertion ignores the plain language of the exception provision, which unequivocally exempts licensees of "all nuclear power facilities that are shut down permanently" from providing "onsite [ERDS] hardware." And if additional evidence were needed to show that the ERDS link need not be maintained by a licensee after its reactor is permanently shut down, that evidence is found in 10 C.F.R. § 50.72, which requires only "operating nuclear power reactors" to activate the ERDS link.[91] Vermont fails to explain how the ERDS link will protect the public health and safety in a regulatory regime that does not require the link to be activated.

c. Vermont also argues that its contention, properly viewed, does not collaterally attack Appendix E; rather, it simply seeks to have Entergy comply with Appendix E as well as the emergency planning standards in 10 C.F.R. § 50.47(b).[92] Vermont asserts that Entergy has not satisfied those requirements, because the discontinuation of ERDS following permanent shut down of the reactor will result in the State receiving inadequate information during an emergency.[93] This argument fails to render Vermont's contention admissible.

First, as shown above (supra Parts II.B.3.a and II.B.3.b), Entergy satisfies the requirements of Appendix E, Section VI by maintaining the ERDS link until its reactor is permanently shut down and defueled. Vermont's assertion that Entergy must thereafter

[90] Tr. at 23-24; Vermont's Reply at 8-9.

[91] See supra text accompanying notes 81-85.

[92] Vermont's Reply at 8-10.

[93] Vermont's Petition at 4-5; Tr. at 28-29.

maintain the ERDS link or an equivalent alternative is a demand for requirements beyond those established by Section VI and, thus, is an impermissible collateral attack on a regulation.[94]

Second, it is a well-established principle that a petitioner in an adjudicatory proceeding cannot use one regulation to challenge another without first obtaining a waiver by showing "special circumstances."[95] Vermont has not sought, much less obtained, a waiver to the exception provision in Section VI. For this reason, Vermont's reliance on section 50.47(b) to support its assertion that Entergy must maintain an ERDS link or an ERDS-like link after the reactor is permanently shut down and defueled is unavailing.[96]

d. In its reply, Vermont argued for the first time that 10 C.F.R. § 50.54(q)(3) forbids Entergy from changing its emergency plan to discontinue the ERDS link unless Entergy "performs and retains an analysis that demonstrates the changes do not reduce the effectiveness of the plan as changed . . . ."[97] At the December 1 oral argument, counsel for Entergy acknowledged that Entergy has not yet completed the section 50.54(q)(3) analysis.[98]

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[94] Vermont concedes that, "at most, [Appendix E] only removes [the] regulatory obligation for Vermont Yankee to continue ERDS" following permanent shutdown of the reactor. Vermont's Reply at 9. That concession is fatal to Vermont's contention, because once the regulatory obligation to continue ERDS has been removed, a contention that seeks to re-impose that obligation, or to otherwise "impose . . . a requirement more stringent tha[n] the one imposed by the regulation[]," must be rejected as an impermissible collateral attack on the regulation. Oyster Creek Nuclear Generating Station, CLI-00-6, 51 NRC at 206; see also supra note 64.

[95] 10 C.F.R. § 2.335(b); see Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 385-88 (2012); supra text accompanying notes 44-45.

[96] See Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 69 NRC 68, 75 (2009) ("Absent a waiver, parties are prohibited from collaterally attacking our regulations in an adjudication. Intervenors did not seek such a waiver. Therefore, under our rules, the Board should not have admitted the contention.") (footnote omitted).

[97] 10 C.F.R. § 50.54(q)(3); see Vermont's Reply at 11-12.

[98] Tr. at 44.

Entergy's failure to complete the required analysis, asserts Vermont, bars Entergy from changing its emergency plan to discontinue the ERDS link.[99]

We agree. Significantly, so do Entergy and the NRC Staff. Specifically, in the NRC Staff's view, before Entergy may change its emergency plan to discontinue the ERDS link, section 50.54(q)(3) requires Entergy to "perform and retain an analysis that concludes that the removal of ERDS is not a reduction in [emergency plan] effectiveness."[100] Entergy likewise acknowledges that prior to changing its emergency plan to discontinue the ERDS link, section 50.54(q)(3) requires an analysis showing that such a change does not reduce the plan's effectiveness.[101]

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[99] Vermont's Reply at 11-12; Tr. at 15-16, 32.

[100] Lewis Memorandum at 2. The Lewis Memorandum (supra note 80) was written in June 2014 by the NRC Director of the Office of Nuclear Security and Incident Response and addressed to designated Office Directors and Deputy Directors in the NRC's four regional offices, with a recommendation that the information be provided to the regional inspection staffs. Id. at 1-2. The stated purpose of the Memorandum was to clarify the requirements for maintenance and use of ERDS for licensees who no longer are subject to the requirements of Appendix E, Section VI. Id. at 1.

The dissent asserts that the existence of the Lewis Memorandum indicates that the exception provision in Appendix E, Section VI is ambiguous, and confirms that the exception provision does not apply to licensees, like Entergy, whose reactors are permanently shut down and defueled. See Dissent at 15. The dissent is wrong. It ignores that (1) any alleged ambiguity in the exception provision is eliminated when the regulatory language is examined in light of the regulatory history and framework (see supra Parts II.B.3.a and II.B.3.b); (2) the Lewis Memorandum supports the conclusion that that the exception provision of Section VI applies to Entergy (see Lewis Memorandum at 1); and (3) the NRC Staff represents that, since the issuance of Section VI, licensees have been consistent in their interpretation and application of the exception provision. See supra notes 78-79.

[101] See Tr. at 44, 50. According to the dissent, the majority opinion construes the exception provision of Section VI as giving Entergy "carte blanche permission" to shut down ERDS "regardless of the impact of this action on the effectiveness of the emergency plan." Dissent at 2, 19; see also id. at 11-13, 15-16. This is a mischaracterization of the majority opinion. We conclude that a licensee, like Entergy, is no longer subject to the requirements of Section VI after its reactor is permanently shut down and defueled. As explained above, however, and as more fully described in the Lewis Memorandum, Entergy still must comply with the requirements of 10 C.F.R. § 50.54(q)(3) before it effects a change to its emergency plan to delete references to ERDS or its use during an emergency.

Contrary to Vermont's assertion, however, the fact that Entergy has not yet completed a section 50.54(q)(3) analysis does not provide a basis for granting Vermont's hearing request. First, Vermont belatedly raised this argument in its reply. Vermont's petition referred once to the emergency planning requirements of 10 C.F.R. § 50.47,[102] but the State's only dispute with the proposed license amendment concerned the assumption that ERDS would not be operational after Vermont Yankee began decommissioning. Because the petition did not cite section 50.54(q)(3) or make even a cursory attempt to explain how a contention based on the section 50.54(q)(3) analysis would satisfy the contention admissibility standards, we reject this new argument as untimely.[103]

Even if the section 50.54(q)(3) argument were timely, however, it would not salvage Vermont's hearing request. Based on the relief Vermont seeks (i.e., retention by Entergy of the ERDS link, or an ERDS-like link, after permanent shut down of the reactor), it is plain that Vermont is relying on Entergy's alleged non-compliance with section 50.54(q)(3) to impose requirements on Entergy that are in derogation of the exception provision in Appendix E, Section VI.2. But, as discussed supra Part II.B.3.c, absent a waiver – which Vermont has neither sought nor obtained – Vermont cannot rely on one regulation to collaterally attack another regulation.[104]

e. That Vermont does not advance a litigable contention in this proceeding does not leave it without an opportunity to seek relief. If Vermont wishes to effect a substantive change

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[102] See Vermont's Petition at 4.

[103] See USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 476 (2006) (explaining that petitioner cannot cure a deficient contention with new arguments not presented in the initial petition); Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004) (explaining that petitioners cannot rely on "a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs").

[104] Whether Vermont's contention is characterized as one of omission or one of adequacy, it ultimately seeks to impose requirements in excess of those imposed by Section VI and, accordingly, must be rejected as a collateral attack on a regulation. See supra note 64.

to Appendix E, Section VI.2, it may petition for rulemaking.[105] Or if Vermont has a credible basis to question the adequacy of Entergy's compliance with 10 C.F.R. § 50.54(q)(3), it may petition for enforcement action under 10 C.F.R. § 2.206, which provides a process for stakeholders "to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted."[106] Vermont may also seek relief from the Federal Emergency Management Agency (which coordinates emergency responses to radiological releases) and endeavor to show that, without ERDS-like data, the State's emergency plan is no longer adequate.[107]

Our observation that other avenues of administrative relief may be available to Vermont is not an intimation that Entergy will fail to meet its regulatory obligations. Entergy represents that it will comply with the requirement in section 50.54(q)(3),[108] and Entergy's actions will be subject to review by the NRC Staff.

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[105] See 10 C.F.R. § 2.802. As the Commission has stated, "[t]he regulatory process continuously reassesses whether there is a need for additional oversight or regulations to protect public health and safety." Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 463 (2010).

[106] Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC __, __ (slip op. at 17) (Dec. 19, 2014).

At oral argument, counsel for NRC Staff represented (Tr. at 81) that Vermont may seek section 2.206 relief to challenge Entergy's compliance with section 50.54(q)(3). Staff counsel expressed uncertainty, however, as to whether Vermont would be provided access to the section 54(q)(3) analysis. See Tr. at 69. To promote public confidence in the emergency planning process, we encourage the Staff and Entergy to make the analysis available to Vermont.

[107] See 10 C.F.R. § 50.47(a)(2) ("In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation ability [of state and local emergency plans]."); see also Tr. at 54 (Entergy counsel acknowledges that FEMA has "responsibility to make findings and determinations about whether the off-site [emergency response] plans are adequate and capable of being implemented").

[108] See Tr. at 50-51. The Commission has "long declined to assume that licensees will refuse to meet their obligations under their licenses or our regulations." Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003).

III. Conclusion

For the foregoing reasons, we deny Vermont's Request for Hearing and Petition to Intervene.[109]

An appeal of this Memorandum and Order may be filed within twenty-five (25) days of service of this decision by filing a notice of appeal and an accompanying supporting brief under 10 C.F.R. § 2.311(b). Any party opposing an appeal may file a brief in opposition to the appeal. All briefs must conform to the requirements of 10 C.F.R. § 2.341(c)(3).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 28, 2015

[109] On December 12, 2014, Vermont moved to file an additional brief addressing new information concerning a FEMA letter that the NRC Staff discussed at oral argument (see Tr. at 95-96) in response to a question asked by the Licensing Board. See State of Vermont's Submission of Additional Information and Request to File Supplemental Briefing Addressing New Information and Argument Raised at Oral Argument (Dec. 12, 2014). Because our decision neither considers nor relies on new information regarding the FEMA letter, Vermont's request is moot.

Wardwell, J., Dissenting

In its LAR, Entergy asks permission to reduce its staffing upon the shutdown of Vermont Yankee to levels that are predicated in part on the premise that the ERDS link will be retired pursuant to Entergy's reading of Section VI.2 of Appendix E to 10 C.F.R. Part 50 (Section VI.2).[1] Vermont contests Entergy's right to disconnect the ERDS without adequately demonstrating that this would not reduce the margin of safety by increasing the potential consequences from emergency actions during an accident due to the loss of crucial data.[2] The majority opinion accepts Entergy's and NRC Staff's (Staff's) claim that Vermont's proposed contention is a collateral attack on NRC regulations,[3] while Entergy and Staff also maintain that it is not within the scope of the proceeding and Entergy claims that it lacks material support.[4]

The majority's opinion (rejecting Vermont's contention) rests on an interpretation of the first sentence of Section VI.2,[5] which states that "[e]xcept for . . . all nuclear power facilities that are shut down permanently or indefinitely" (exemption clause), operating plants must provide the hardware for an ERDS, and electronically assemble and transmit the data.[6] The majority maintains that the "exemption clause" not only excuses those plants that were inactive at the time of rulemaking from installing and operating an ERDS, but also allows licensees of plants

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[1] LAR at 1-2.

[2] Vermont's Petition at 3-4.

[3] Majority opinion at 1, 12.

[4] Entergy's Answer at 1-2; NRC Staff's Answer at 1-2; Tr. at 68:4-8, 85:12-19. Entergy also claims that Vermont's petition lacks adequate factual or expert opinion, which I reject based on Vermont's declarations. See Vermont's Reply at 7; Tr. at 34, 89.

[5] Majority opinion at 12-13. The majority uses their reading of the text of the rule, its regulatory history and structure to support their interpretation of Section VI.2 but as will be demonstrated in this dissent, their objections to admitting this contention fall by the wayside if their take on Section VI.2 does not hold.

[6] 10 C.F.R. Pt. 50, App. E § VI.2.

that installed and operated an ERDS to shut down the system at decommissioning without seeking further agency approval.[7]

I disagree. A more logical reading of Section VI.2 is that the "exemption clause" only applies to those plants that were already shut down at the time of the rulemaking and not to plants at which an ERDS was later installed. Moreover, in my opinion, under either interpretation of Section VI.2, Entergy must still adequately assess the impact of shutting down its active ERDS before taking such action to assure no reduction in the effectiveness of its emergency plan and, in turn, no adverse impact on public health and safety. Therefore, I would find Vermont's contention admissible and must dissent.

I. Contention not a Challenge to the Regulations and Presents a Material Dispute

The majority opinion reads the "exemption clause" in Section VI.2 as excusing Entergy from the requirement to maintain a functioning ERDS once the Vermont Yankee reactor ceases operation and fuel has been transferred from the reactor to the spent fuel pool (SFP), regardless of the impact of this action on the effectiveness of the emergency plan. But, as Vermont contends, this regulation can be read a second way – that the "exemption clause" only exempts those reactors that were already shut down at the time the regulation was promulgated.

As discussed below, the correct reading of Section VI.2 is not conclusively established by either the plain language of the regulation or the statement of consideration (SOC) for the rule. But when the purpose and overall function of the regulation are considered, it becomes apparent that this rule does not automatically allow a licensee with an active ERDS established as a result of Section VI to terminate the system upon reactor decommissioning.

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[7] The exemption clause also references Big Rock Point which, as explained in the statement of consideration (SOC) for the rule, is "exempt because configuration of the facility does not make available as transmittable data a sufficient number of parameters for effective participation in the ERDS program." 56 Fed. Reg. at 40,178. The Big Rock Point exemption is not an issue in this proceeding.

Ignoring for the moment the ambiguity in the interpretation of Section VI.2, Vermont also contends that there are compelling requirements relating to the protection of public health and safety that support the premise that a licensee must take other steps before retiring its ERDS – a system that was established to assure effective emergency actions during an accident. In contrast with the majority opinion, analysis of the latter argument, discussed below, establishes that the petitioner's contention does not create a collateral attack on the regulations in raising material disputes with Entergy and the Staff. [8]

A. Regulatory Requirement to Assure Public Health and Safety

As Vermont contends, regardless of the reading of Section VI.2, other regulatory requirements prohibit a licensee from simply disconnecting its ERDS when the reactor is powered down during decommissioning.[9] Because the regulations do not require a licensee to shut down its system,[10] Vermont posits that Entergy and Staff have another responsibility associated with assuring public health and safety. This requirement supports its claim that the ERDS should remain active (or that Entergy should provide an equivalent alternative means to communicate crucial data to the State)[11] as long as spent fuel remains in the SFP because the

[8] For example, material disputes evident from the filings and the oral argument include questions regarding: the reduction in the effectiveness of Entergy's emergency plan, the number of personnel changes that are directly related to the reduced labor effort in the LAR, the effort required to keep the ERDS operational during the 6-year period while fuel resides in its SFP, the actual monitoring parameters lost to Vermont with the retirement of the system, and the alternative mechanisms available to provide the same data relevant to emergency planning that could take the place of the lost information, among others.

[9] See 10 C.F.R. §§ 50.47(b), 50.57(a)(3), 50.92.

[10] See Tr. at 37:13-16.

[11] Vermont's Petition at 5. As allegedly required to meet Section 50.47(b), Vermont asks Entergy to provide radiological, meteorological, and containment information relevant to the spent fuel pool conditions to assure no reduction in the effectiveness of the State's emergency plan.

monitoring data[12] may be useful in tracking and managing the risk in the event of a SFP accident after plant shutdown.[13]

I agree. No regulation requires Entergy to shut down its ERDS. Rather, in addition to the SOC establishing the need for emergency planning as a critical element in the protection of public health and safety, the Commission states that "the principal effect of ERDS will be a marked improvement in the availability, timeliness, and reliability of key information about what is taking place at the reactor during an accident, particularly during the critical early hours before the NRC Site Team arrives", and that "the implementation of ERDS will provide a significant improvement in the NRC's ability to accurately and promptly assess the situation at the site."[14] Nothing prohibits these same considerations from being applied to the operation of the spent fuel pool which, in turn, needs to be addressed before a licensee disconnects its ERDS.

Vermont contends that Entergy is required to operate its ERDS (or provide an equivalent means for data transfer) at Vermont Yankee until the fuel is removed from the SFP in 2020 to meet its communications and notification requirements of section 50.47(b)[15] and to meet the

[12] Tr. at 30 (alleging that 37 parameters currently being monitored by the ERDS are crucial to continued operation of Vermont's Radiological Emergency Response Plan (RERP)).

[13] Vermont's Reply at 3-4, 13; Tr. at 19-20, 87-88. While severe reactor accidents create a larger risk, it has been established that accidents do not stop after the fuel is unloaded from the reactor and placed in the SFP, or that the risk of accidents drop to zero once the reactor is defueled. See Vermont's Reply at 5 (citing Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (Oct. 2013) (ADAMS Accession No. ML13256A342) at 160 et. seq.; A Safety and Regulatory Assessment of Generic BWR and PWR Permanently Shutdown Nuclear Power Plants, NUREG/CR 6451 (1997) (ADAMS Accession No. ML082260098) at Table 4.2).

[14] 56 Fed. Reg. at 40,179.

[15] 10 C.F.R. § 50.47(b)(2), (5), (6).

Commission's performance levels (discussed in the SOC)[16] to provide the public health and safety protection afforded by this system during emergency actions after a SFP accident. I agree, noting that the majority does not address Entergy's obligation to provide emergency planning data in accordance with section 50.47(b)[17] even if the ERDS is retired. And contrary to the majority opinion, Vermont's contention is not a challenge of one regulation (i.e., Section 50.47(b)) via another (i.e., Section VI.2), because the former regulation holds regardless of the interpretation of the latter.

Whether the ERDS data actually provides any increased safety during this brief period is a merits question for a hearing, as is the need, if any, for Entergy to provide data to outside entities based on the SOC summary of the Staff mandate to assure that it is providing "the flow of accurate information to affected offsite officials and the public regarding the status of the emergency" and "providing to State and local authorities, and to other Federal agencies, an independent assessment of protective actions recommended by the licensee."[18]

ERDS access is called for in both Vermont's plan and in Entergy's program for Vermont Yankee,[19] and Staff has recognized the potential for spent fuel pool accidents.[20] These points clarify the need for Staff to assure that the effectiveness of both these emergency programs is not jeopardized by Entergy's shut down of the ERDS. Entergy is obligated to provide an adequate emergency plan under 10 C.F.R. § 50.47 and has failed to demonstrate that the

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[16] 56 Fed. Reg. at 40,179. The SOC states that there is a regulatory and statutory basis for having emergency planning as a critical element in the protection of public health and safety, the NRC has a responsibility to monitor a licensee's response to an accident to minimize the consequences of the accident, and the agency must help assure the transfer of information relating to emergency status.

[17] 10 C.F.R. § 50.47(b)(2), (4), (5), (6) and (9).

[18] 56 Fed. Reg. at 40,179.

[19] Tr. at 94:8-10.

[20] Supra note 13.

elimination of the ERDS (that directly influences the level of staff reductions in the LAR) does not reduce the effectiveness of the plan. Nor has it demonstrated how adequate "[p]rovisions exist for prompt communications among principal response organizations to emergency personnel and to the public"[21] with the shutdown of the ERDS. Entergy's alleged failure to adequately address the impacts to public health and safety from retiring its ERDS is sufficient cause to admit this contention.[22]

B. Interpretation of VI.2

1. Plain Language of the Rule and its Regulatory History

Section VI.2 simply states that plants that are shut down do not have to provide the ERDS hardware, or assemble and transmit data. It is clear that Section VI.2 excludes all the plants that were shut down at the time the rule was promulgated from the need to install, implement, and maintain an ERDS. This was a reasonable waiver of the requirements because at the time the regulation was implemented, there was no need to install an ERDS at a plant that was already shut down and whose spent fuel had been cooling in its pool for a period of time.

Likewise, as attested to by Staff, the backfit requirements of Section VI are not necessary as a specific mandate for new plants because "in the future all plants are required to have ERDS, so there's no backfit to a new plant that is getting say a COL license, or a new Part 50 license, because all these regulations already apply to it from the get-go."[23] Based on this, applicants for new plants would recognize the requirement for this system and provide the

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[21] 10 C.F.R. § 50.47(b)(6).

[22] In accordance with 10 C.F.R. § 50.54(q)(3), Entergy is preparing an analysis of the impact of its LAR on the effectiveness of its emergency plan. Entergy notes that (exclusive of this contention), there is no regulatory basis for Vermont to challenge this study. Tr. at 50:9-16. While Entergy has not completed this analysis, the outcome is clear (see infra note 55), and Vermont has challenged the adequacy of the Applicant's study in meeting the requirements of 10 C.F.R. § 50.47(b).

[23] Tr. at 84:21-25.

necessary equipment to meet design criteria – negating any need to require that the terms in Section VI.2 be explicitly extended to future plants that were neither in existence nor anticipated at the time of rulemaking.

The critical question is whether the "exemption clause" applies only to those plants that were shut down at the time the regulation was written or was intended to also apply to operating reactors that have already installed and implemented the ERDS, but are now ceasing operations. But the rule is ambiguous, so the SOC[24] is consulted. In the instant matter, the SOC, like the rule itself, focuses on implementing the ERDS at existing plants. Nothing in the regulations or the SOC supports the questionable reasoning that, because operating plants must provide the ERDS hardware, plants that are ceasing operations can automatically remove an already installed and implemented system.

The regulatory history does state that "[Section VI.2] applies to *all licensed nuclear power reactor facilities*, except . . . those that are permanently or indefinitely shut down" and clarifies the objective of the rule as one to "ensure timely and effective implementation of ERDS to provide NRC increased assurance that a reliable and effective communication system . . . is in place at *operating power reactors*."[25] While these comments may appear to support the interpretation of the rule as applying to all future plants, the reference to "all licensed nuclear power reactor facilities" and to "operating power reactors" may only apply to those facilities and reactors that were active at the time the rule was written with no intent of applying to any possible future reactors – not an unlikely proposition in 1991.[26] This interpretation is reinforced by a recognition that this rule is not needed to assure installation of the ERDS for future Part 50 licenses or COLs.

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[24] 56 Fed. Reg. at 40,178.

[25] 56 Fed. Reg. at 40,178 (emphasis added).

[26] Id.

The regulatory history, like the regulation itself, is focused entirely on implementation and maintenance of the ERDS operations,[27] with not one word about decommissioning the system – an issue that could easily be addressed at a future date. To rely on the simple references in the SOC and "exemption clause" as a rationale for a licensee to turn off these systems without additional analysis or action once the reactor shuts down stretches the credibility of a fair reading of the plain language of the rule and its history. There is just no indication whatsoever of the procedures required to terminate this system in a rule that clearly deals with only the initial installation, startup, operation, and maintenance of the ERDS.

But Entergy (with the Board majority following suit) would like to broaden the influence of the short introductory clause of Section VI.2 to one that identifies and requires participation by certain categories of entities.[28] Even so, Entergy concurs that there is nothing in the SOC that says anything about terminating or decommissioning its ERDS, concludes that Section VI could be characterized as an implementation rule, and agrees that there is nothing in the regulation or SOC prohibiting an alternative reading of Section VI.2.[29] In lieu of this, Entergy suggests looking at the Staff guidance issued in 2014 – the Lewis Memorandum.[30] But, as will be discussed below in further detail, under Entergy's and Staff's reading of Section VI.2, this memo would be unnecessary because with their interpretation, the licensee would already have been permitted to shut off the ERDS system once the reactor was defueled.

With little help provided by the plain language of the rule and SOC, I consider the construction of the regulation for ascertaining those plants covered by the "exemption clause."

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[27] See generally id.; 10 C.F.R. Pt. 50, App. E § VI; 56 Fed. Reg. at 40,178.

[28] Tr. at 57:19 to 58:1; Majority opinion at 12-13.

[29] Id. at 42:4-12, 58:17-25, 61:9-16.

[30] Tr. at 61:9-16.

Staff argues that regulations are often written prospectively,[31] and I note that such is the case with Section VI – a prospective regulation that requires future action by the "nuclear power reactor facilities." Specifically, this regulation requires operating plants that had declined to participate in a voluntary program to install the ERDS equipment and implement the operations of this new electronic data retrieval and transmission system.

But regulations are not written prospectively to dictate specific inactions, and the "exemption clause" itself is not one of action; rather it is merely a passive indication that those nuclear power plants that were shut down at the time the rule was written need not meet this rule. Inherent in the majority's position is the needed assumption that the "exemption clause" is prospective in construction to include not only inaction by those decommissioned facilities existing at the time the regulation was promulgated but also future action by all decommissioned facilities. While the overall regulation provides prospective actions to backfit the operational plants that existed at that time, there is no indication that the passive "exemption clause" can also be turned into an active prospective phrase that allows operating plants or proposed new plants (of which none were anticipated at that time) to terminate their active monitoring systems when they cease operations in the future. An exemption from initially providing the system (a passive, non-action statement) is a far cry from using this same phrase to allow a licensee with an already installed, implemented, and operating system to actively shut down (i.e. "not provide") its ERDS without first ensuring there is some explicit judgment (in the context of a license amendment or a rulemaking actually dealing with this particular subject) about whether such an action provides continued reasonable assurance of public health and safety.

2. Purpose and Theme of Appendix E Section VI

As an aid in evaluating the appropriate meaning of Section VI.2, the theme and overall purpose of Appendix E, Section VI is assessed as an indicator of the nature of the regulation.

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[31] Id. at 81:21 to 82:3, 82:10-13.

According to the SOC, Section VI was developed to "provide NRC increased assurance that a reliable and effective communication system that will allow the NRC to monitor critical parameters during an emergency is in place at operating power reactors."[32] Entergy also agrees that this rule concerns the implementation and maintenance of the ERDS in those active plants that had not chosen to do so voluntarily up to that point.[33]

The rule discusses the characteristics of the necessary equipment, the implementation of the system and the process for maintaining the ERDS. When read in its totality, the subject matter of the regulation and its history is limited to implementing this new valuable system at the operating plants – it has nothing to do with retiring an already implemented system. The one sentence "exemption clause" should not be used to justify the premature shutdown of a viable operating data transfer system that, in the words of the NRC, has the potential to "provide a substantial increase in the overall protection of the public health and safety by ensuring far more accurate and timely flow of data for the NRC to fulfill its role during an alert or higher emergency."[34]

Entergy believes that the regulations refer to power facilities that "are" shut down under its assumption that, if "the NRC's intent had been to apply this exclusion only to those reactors that were permanently shut down as of 1991 . . . NRC could have made that intent very clear by substituting the word 'were' instead of 'are'" or inserted a date specific.[35] But conversely, nothing rules out the use of "are" to mean all those plants that are currently shut down as the regulation was being written. Moreover, an equally valid counter argument is that had the NRC intended to apply the "exemption clause" to operational systems in existing and future reactors, the agency could have made it clear by adding these modifiers to the sentence. Furthermore,

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[32] 56 Fed. Reg. at 40,178; see also Tr. at 41:8-16; Lewis Memorandum at 1-2.

[33] Tr. at 41:17-20.

[34] 56 Fed. Reg. at 40,183.

[35] Tr. at 59:13-23.

the use of the word "are" is correct for referring to the status of those plants at the time the rule was being written if, consistent with the specific implementation actions of the rule, there was no interest in complicating this rule by also addressing the timing and criteria for terminating an active system decades in the future when the then-operating plants would start to be decommissioned.

3. Section VI.2 "Exemption" Provision and Difference with Terminating an Active System

Clearly, Section VI.2 exempts previously closed plants from meeting this regulation. To help determine whether this exception applies to the currently operating plants that have implemented the ERDS in accordance with Section VI or only to plants that had shut down at the time of rulemaking, I look to the regulation as to what is being excluded. This rule defines the activities that the closed plants in 1991 are exempt from performing – and these actions are limited to only implementation and maintenance of the ERDS,[36] with no requirements relating to termination of this system at the end of plant operations. Because the exemption in the regulation only deals with implementation and maintenance of the ERDS, the silence regarding procedures for retiring this system suggests that there was no thought to addressing the shutdown of systems activated in accordance with the rule. Under this interpretation, the rule only applies to those closed plants that never had to install the system, i.e. the ones shut down at the time of rulemaking.

This reading of the regulation also makes sense when considering the difference between never installing the system (the passive result of the "exemption clause" as applied to the closed plants in 1991), and taking action to terminate a system that was installed and

[36] See 10 CF.R. Pt. 50, App. E § V. In addition to implementation and maintenance, 10 C.F.R. § 50.72(a)(4) describes activation of the system in the event of an emergency. As with most plants, Vermont Yankee's system continuously supplies the data thus eliminating the need for system activation. See Entergy's Answer at 7-8; Tr. at 35:22 to 36:6, 41:21-25. As Entergy conceded (Tr. at 41:21-25), there is no need to be concerned with activation procedures for this proceeding, so that only implementation and maintenance of the tasks mandated in Part 50 will be referenced.

maintained as a result of Appendix E, Section VI. Because the criteria for terminating an active system are much more involved than merely exempting plants that were already shut down at the time of rulemaking (as evident by the detail provided in the 2014 Staff guidance expressed in the Lewis Memo), it seems obvious that the simple "exemption" statement in Section VI.2 cannot possibly apply to the complex process of decommissioning the ERDS and therefore only relates to those plants already darkened when the rule was promulgated.

The majority notes that 10 C.F.R. § 50.72(a)(4) directs licensees to activate the ERDS within one hour after declaring an emergency and, by referencing the term "operating nuclear power reactors" in the title of this regulation, maintain that this rule only applies to operating plants. With no such "activation" requirement for an inactive plant that has ceased operations and defueled its reactor, the majority concludes from the lack of activation instructions that shut down plants are exempt from the ERDS program.[37] I do not agree with that line of reasoning. Section 50.72(a)(4) is related to activation of a system that is provided for under and implemented by the requirements of Section VI.2 – something that has already been achieved at Vermont Yankee. Furthermore, no one is alleging that an inactive plant whose ERDS was never installed needs to be provided or one whose ERDS was shut down when the plant ceased operation needs to be reactivated. Plus, the absence of activation requirements after the reactor is shut down is not surprising with a rule that focused only on the operational need for this system that resulted from the Three Mile Island accident.[38] These reasons provide a rational explanation as to why there is no equivalent "activation" regulation for the ERDS after

[37] Majority opinion at 14.

[38] 55 Fed. Reg. at 41,095. With the rule's focus on implementation causing an absence of activation requirements once the reactor is shut down, it is obvious why Entergy used the assumption that its "ERDS. . . will not be operational" in its LAR instead of the materially different assumption that its ERDS would not be activated after reactor shutdown (see Majority opinion at 17 n.85).

reactor shut down, and that Section 50.72(a)(4) has no bearing on assessing the fate of an operating ERDS at plant closure.[39]

Thus, the validity of the majority's conclusion regarding 10 C.F.R. § 50.72(a)(4) again rests on the appropriate interpretation of Section VI.2, i.e. what steps are needed, if any, to shut down an ERDS that has already been implemented and activated. Can the licensee terminate its system at will (which is permitted under the majority opinion that Section VI.2 allows licensees of operating plants to unilaterally shut down its system) or are there certain criteria that must be met before licensees can do so (Vermont's position adopted by this dissent)? As pointed out, the rules are ambiguous on this issue but the balance of the arguments demonstrates that a licensee of an operating plant during decommissioning is not excluded by Section VI.2 from undertaking additional steps before turning off this system as established by the NRC Staff guidance issued in 2014 and discussed below.

4. NRC Staff Guidance (Lewis Memo)

To support their position that Section VI.2 allows a licensee to turn off its ERDS without additional analysis or action, Entergy and Staff refer to the Staff's Lewis Memo.[40] Although this memo is a guidance document and does not carry regulatory weight, staff guidance can be useful as one interpretation of regulatory intent. Relative to the instant issue, the guidance appears to be a regurgitation of the unchallenged Staff approach that has been used during plant shut-downs for the past 23 years.[41] But it also presents detailed criteria and procedures

[39] While the majority questions how the ERDS will protect health and safety in a regulation that does not require the link to be activated (Majority opinion at 19), the rules are silent on activation after current reactors are shut down because the regulation was not concerned with issues dealing with decommissioning. Furthermore, the rule does not require the link to be deactivated or relieve Entergy from providing crucial data if it is required to meet the health and safety standards of Section 50.47(b) associated with emergency planning. Also, Vermont does not demand that the ERDS remain operational, but only asks that accident information needed for its emergency planning be timely communicated in a manner similar to the ERDS.

[40] Tr. at 61:9-16.

[41] NRC Staff Dec. 8, 2014 Answer at 2-3.

on the processes to be followed to terminate an ERDS when a plant shuts down. These instructions are the types of steps that would have logically been included in the original rule if Section VI.2 was intended to be applied to the shutdown of an ERDS that was implemented at an operating plant as a result of Section VI.

The Lewis Memo restates that permanently shutdown facilities have the authority to retire ERDS without prior NRC approval, but then tacks on an important caveat: this can be done only if the licensee's emergency plan does not describe ERDS or its use – which most certainly is not the case here. This modifier runs counter to the majority opinion that Section VI.2 allows a licensee unfettered permission to retire its ERDS. Under the Lewis Memo, because the Applicant's emergency plan discusses its ERDS, Entergy must process a change to its plan, as required by 10 C.F.R. § 50.54(q)(3) by performing and retaining an adequate analysis as to whether the removal of ERDS is not a reduction in effectiveness of the plan.[42]

Referencing the Lewis Memo, Entergy and the Staff maintain that terminating the ERDS will not reduce the effectiveness of the Applicant's emergency plan because ERDS data is not an emergency planning function.[43] But this seems to prejudge the issue, given that the guidance indicating that if the licensee's emergency plan relies upon ERDS to provide data to the emergency response organization (e.g., directly to the NRC and ultimately to Vermont through its memorandum of understanding (MOU) with NRC[44]), then that action is an emergency planning function and the licensee is required to assess whether removing the

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[42] Lewis Memorandum at 1.

[43] Tr. at 53:1-14; Lewis Memorandum at 2. As mentioned, Entergy is in the process of preparing the Section 50.54(q)(3) analysis, allegedly stating that the shutdown of the ERDS will not reduce the effectiveness of emergency planning, an opinion shared by Staff. Infra note 55.

[44] 56 Fed. Reg. at 40,181; Entergy's Answer at 8; Vermont's Reply at 12; Tr. at 31:14-18, 72:21-25.

ERDS results in a reduction in effectiveness of its plan,[45] which is what Entergy is apparently doing in preparing its still-to-be-completed section 50.54(q)(3) analysis.

With the majority's interpretation of Section VI, there is no need for Staff guidance.[46] In support of its opinion (shared by the majority), Entergy notes that "the language of the rule is clear on its face by itself,"[47] implying that the Lewis Memo is unnecessary. Yet the Staff obviously detected enough ambiguity in the regulation to require amplifying remarks that would have been superfluous if the existing rule truly intended for an operating ERDS to be shut down at the initiative of the licensee (without further staff review or approval) once the reactor was defueled. And the Lewis Memo correctly addressed this issue by clarifying the actions needed if a plant relies on the ERDS in its emergency plan, while at the same time granting a plant that doesn't reference this system in its emergency plan the authority to retire it without prior NRC approval.[48]

Allowing the past and present operating plants that reference a functioning ERDS in their emergency plans to darken their systems on their own volition obviates the need to provide the supplemental guidance summarized in the Lewis Memo. The mere presence of the Lewis

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[45] Lewis Memorandum at 2.

[46] As restated in its note 101, the majority concludes that Entergy "is no longer subject to the requirements of Section VI [of Appendix E]." This means that Entergy no longer needs to provide its ERDS, which effectively allows the Applicant to shut down its system on its own accord. Clearly, the majority's position is in tension with the Lewis Memorandum and Section 50.54(g)(3) requiring, inter alia, that Entergy's emergency plan still meet the requirements of Appendix E (of which the majority believes it is no longer required to meet Section VI). This tension, caused by the majority's interpretation, is released only under Vermont's position that the "exemption clause" of Section VI does not apply to future plants.

[47] Tr. at 62:7-11.

[48] Lewis Memorandum at 1.

Memo runs counter to the majority's position that Section VI.2 gives unlimited authority for the licensee to shut off its ERDS on its own discretion.[49]

5. Other Weighing Factors

The majority deems this contention inadmissible as a challenge to the regulations (i.e. Section VI of Appendix E),[50] and concludes that Vermont's allegations that Entergy must comply with Sections 50.54(q)(3), 50.47(b) are collateral attacks on Section VI.[51] But this purported challenge to and collateral attack on the regulations are caused by Entergy's own interpretation of Section VI.2 as exempting a decommissioning licensee from the need to provide the ERDS, or as specifically applied to this contention, allowing Entergy to shut off this system when Vermont Yankee ceases operations. The regulatory challenge and attack are not a result of Vermont's contention and indeed vanish with Vermont's interpretation of "exemption clause" in Section VI.2.

As a result, the admissibility of Vermont's contention hinges on a determination of the correct reading of the ambiguous "exemption clause" in Section VI.2, because there is no challenge to the regulations or a collateral attack on the rules if Vermont is correct that Section VI.2 was never intended to apply to a previously installed and operating ERDS once a plant ceases operations. And, as alleged in the contention, separate and apart from the reading of Section VI.2, Entergy is still required to demonstrate reasonable assurance of public health and safety during the period of recognized risk from spent fuel pool accidents[52] (an obligation that

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[49] The Entergy's and Staff positions adopted by the majority opinion are consistent with the procedures that have been followed for all plants that have ceased operations to date. See NRC Staff Dec. 8, 2014 Answer at 2-3; Tr. at 79:2-7, 20-25; 80:1-13, 97:11-19. But that does not make it the correct process – especially since this practice had never been challenged until now. See Tr. at 79:8-12. As such this prior practice has little, if any, bearing in this instance.

[50] Majority opinion at 12, 18, 20.

[51] Id. at 19-20.

[52] Supra note 13.

continues after the reactor ceases operation). Plus, Entergy must analyze the extent to which the retirement of its operating ERDS would adversely impact Vermont's emergency planning during these accidents by denying the State important monitoring data.

The majority concurs that Entergy must meet the analysis requirements of 10 C.F.R. § 50.54(q)(3), but goes on to repeat its refuted claim that Vermont is using this regulation to collaterally challenge Appendix E.[53] While all agree that the analysis mandated by Section 50.54(q)(3) must be prepared by Entergy,[54] the adequacy of this plan to demonstrate that the staffing reductions do not reduce the margin of safety during SFP accidents is a merits determination for a hearing.[55]

Additionally, I note that subsection 4 of Section VI states that "[e]ach licensee shall complete implementation of the ERDS by February 13, 1993, or before initial escalation to full power, whichever comes later."[56] The timing relating to the escalation to full power in this provision sounds like it is referring to new reactors that come on line, thus appearing to support the majority's opinion. But it is just as likely, if not more so, that the phrase "before initial escalation to full power"[57] applies to the existing "units shut down for maintenance, or authorized for fuel loading only, or low power operations" that are referenced in the SOC.[58] Stated

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[53] Majority opinion at 19-21.

[54] Id. at 20; Tr. at 44:15-16; Lewis Memorandum at 2.

[55] In addition to claiming that Vermont has no regulatory basis to challenge its Section 50.54(q)(3) analysis, Entergy concludes that there will be no reduction in the effectiveness of the emergency plan, and that the modified emergency plan will meet the requirements of Appendix E and 50.47(b). Tr. at 50:9-24, Tr. at 53:1-14. Staff concurs that the removal of ERDS from the licensee's emergency plan is the kind of change that does not result in a reduction in effectiveness of Entergy's emergency plan; NRC Staff's Answer at 2, Tr. at 69:1-14.

[56] 10 C.F.R. Pt. 50 App. E. § VI.4.d. This section also calls for the development and submittal of an ERDS implementation program plan to the NRC by October 28, 1991, which is obviously unattainable for future plants.

[57] Id.

[58] 56 Fed. Reg. at 40,178.

otherwise, because some operating reactors would be offline when the regulation was promulgated and would not be ready to go online in sufficient time to meet the February 1993 deadline, this language allows them to delay the implementation of the ERDS until they were ready to power back up.

The majority also concludes that "nothing in the regulation suggests it was intended to apply only to plants that were operating in 1991, or that its exemption was intended to be limited to plants that were already shut down in 1991."[59] But the converse is also true, i.e. nothing in the provision suggesting it includes future operating plants, or, more on point regarding Vermont's contention, nothing in the rule specifically expands the "exemption clause" to give unlimited authority to an operating plant licensee to retire its ERDS when it ceases reactor operation.

Entergy maintains as well that its ERDS would have to run indefinitely unless Section VI.2 is read to permit a licensee to terminate its system after defueling.[60] But the Lewis Memo summarizes the steps that Staff uses to retire this system, and Vermont's site-specific request is finite – asking only that Entergy's ERDS remain online from the cessation of reactor operations until the fuel is removed from the spent fuel pools, an activity that is planned for 2020, a mere 6 years from the present.[61] Moreover, the required level of Entergy effort to accomplish this task seems minimal since all the infrastructure for the system is in place and has been operating for more than more than two decades.

In sum, the issues discussed in this dissent provide convincing arguments supporting the premise that Section VI.2 only applies to the plants in operation at the time of the rule became effective. In addition, because nothing in the rule requires a licensee to shut down its ERDS, conclusive arguments have been advanced as to why the overall requirement to protect

[59] Majority opinion at 18.

[60] Tr. at 78:18-21.

[61] Vermont's Petition at 5; Vermont's Reply at 3, 13; Tr. at 38:15-17.

public health and safety mandates that a licensee adequately assess the impact of retiring this system on the effectiveness of both on-site and off-site emergency operations. As such, the contention stands on its own regardless of how Section VI.2 is interpreted, demonstrating as well that the issues raised are within scope of the proceeding and formulate well-defined material disputes for hearing. The opposite cannot be said of the majority view, which is predicated solely on the challenge to the regulations, specifically Section VI.2. Indeed, its position crumbles if it cannot rely on the simple "exemption clause" to provide each licensee carte blanche permission to close out the ERDS as soon as the plant ceases operations and removes fuel from the reactor.

II. Contention Within Scope of the Proceeding

Entergy's LAR seeks permission to reduce staffing levels ostensibly based, in part, on the reduced tasks associated with the impending shutdown of the ERDS performed by the Applicant using Section VI.2 as the authorizing authority. Vermont has presented sufficient arguments to demonstrate a potential connection between the staffing levels of the LAR and this contention. It receives ERDS data through an MOU with the NRC,[62] and incorporates that data into its RERP, which depends upon the link to the ERDS for guiding its emergency actions.[63] Vermont's RERP was developed to ensure that the State is prepared to handle the offsite effects of a radiological emergency at Vermont Yankee.[64] But Entergy states that the ERDS links to the NRC "will not be operational in a permanently shut down and defueled condition," and the "task of ERDS activation is therefore not included as an on-shift task requiring evaluation as part of this Staffing analysis."[65] To that, Vermont argues that deactivating the

[62] Entergy's Answer at 8; Vermont's Reply at 12; Tr. at 31:14-18, 72:23-25.

[63] Vermont's Petition at 5; Tr. at 15-16.

[64] Vermont's Petition at 4; Vermont's Reply at 2, 5, 13.

[65] Entergy's Answer at 14 (citing LAR, attach. 4, at 8).

ERDS link will hamper its ability to respond to an emergency, which leads to a reduced margin of public safety.[66]

Furthermore, Vermont alleges that the reduced staffing levels are, in part, directly related to Entergy's plans to independently turn off its ERDS.[67] The Applicant's estimated cost of nearly $700,000[68] to keep the system going until 2020, when the fuel in the SFP is scheduled to be removed to an independent spent fuel storage installation, strongly implies that significant labor costs must be involved with implementing and maintaining this system, given that the equipment has already been provided and operated for several decades in accordance with 10 C.F.R. Part 50 Appendix E, Section VI.[69] In my opinion, these explicit and implicit links between Entergy's LAR and the ERDS conclusively demonstrates that Vermont's contention and an associated discussion of the need to operate the ERDS after plant shut down are well within the scope of this proceeding.

III. Conclusion

I conclude that Vermont's contention is admissible with either of the two interpretations of Section VI.2, because Entergy still needs to assure public health and safety by demonstrating no reduction in the effectiveness of emergency actions during an accident. Yet, nothing in the LAR comes close to documenting such an assurance. In its petition, however, Vermont has presented sufficient bases raising material disputes as to the importance of this data from this system on emergency actions during a recognized SFP accident.

But the majority's interpretation of Section VI.2 may result in Entergy's unilateral retirement of its ERDS, which could potentially impact important health and safety issues during

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[66] Vermont's Reply at 13.

[67] Id. at 3, 5.

[68] Tr. at 38:11-17 (citing to an estimated $680,000 for ERDS costs over the next 6 years, which is not copacetic with its other statement that none of the staffing reductions proposed in its LAR are associated with the termination of the ERDS (Tr. at 50:1-7)).

[69] See 10 CF.R. Pt. 50, App. E, § VI.

accident emergencies. In the unlikely event of a SFP accident, the lack of crucial data, such as that provided by the ERDS, may have an impact on the effectiveness of implementing both Entergy's and Vermont's emergency actions. Vermont's contention deals with the important question whether or not Entergy's ERDS will continue to operate for the brief 6-year period that fuel remains in the SFP at Vermont Yankee, during which time events may occur that directly impact emergency actions that can affect the public health and safety of citizens surrounding a nuclear power plant. If admitted, a hearing would be held to document what impacts, if any, the early termination of the ERDS may have on the effectiveness of implementing these actions.

But if the majority's ruling holds, the State will be precluded from presenting its case and the important issues raised by Vermont will not be aired due solely to the majority's interpretation of the "exemption clause." In situations such as this, is it not better to err on the side of safety, which in this case, means that the regulations are not read to allow a licensee to shut down the ERDS on its own volition? With that interpretation, Vermont's contention is admissible because it is within the scope of the proceeding, is not a challenge to the regulations, and legitimately raises the question about whether the effectiveness of emergency planning is hampered by Entergy's requested reduction in staffing that is allegedly linked directly with the termination of its ERDS. For these reasons, Vermont's contention should be admitted so the issues can be explored at hearing where ambiguities in the regulations can best be resolved.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER LBP-15-4 (Ruling on Request for Hearing and Petition to Intervene)** have been served upon the following persons by the Electronic Information Exchange.

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Dated at Rockville, Maryland
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