UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT	)	Docket No. 50-271
YANKEE, LLC AND ENTERGY	)	
NUCLEAR OPERATIONS, INC.	)	March 12, 2015
	)	
(Vermont Yankee Nuclear Power Station)	)	

STATE OF VERMONT'S PETITION FOR RECONSIDERATION OF COMMISSION DECISION APPROVING ENTERGY'S EXEMPTION REQUESTS

INTRODUCTION

NOW COMES the State of Vermont ("State"), through the Vermont Department of Public Service, with the following petition for reconsideration of the Nuclear Regulatory Commission's ("NRC") March 2, 2015 divided decision to approve a request by Entergy Nuclear Operations, Inc. ("Entergy") for exemptions from certain emergency planning requirements at the Vermont Yankee Nuclear Power Station ("VY"), pursuant to 10 CFR §§ 2.341(d) and 2.345. The NRC's March 2, 2015 decision interferes with the State's rights under the directly related License Amendment Request ("LAR") and was made without any apparent consideration of the State's interests in the matter. The March 2, 2015 decision violates NRC precedent requiring a hearing for exemption requests that are directly related to a LAR. The decision also violates the National Environmental Policy Act ("NEPA") and federal court decisions applying NEPA.

PROCEDURAL HISTORY

On March 14, 2014, Entergy filed requests for exemptions from portions of 10 CFR § 50.47 and Part 50, Appendix E at VY ("Exemption Request").[1] Entergy sought the requested exemptions to "allow VY to reduce emergency planning requirements and subsequently revise

[1] *See* Letter from Christopher Wamser, Entergy Site Vice President, to NRC Document Control Desk (March 14, 2014)(BVY 14-009)(NRC ADAMS Accession No. ML14080A141).

the VY Emergency Plan consistent with the anticipated permanently defueled condition of the station."[2] To date, the Exemption Request has not been noticed in the Federal Register. On June 12, 2014, Entergy filed its LAR seeking to revise the VY site emergency plan ("SEP") and Emergency Action Level ("EAL") scheme to reflect a permanently defueled condition.[3] Entergy explicitly conceded the LAR was "predicated on approval of requests for exemptions" that were filed three months earlier, but had not been approved or granted by the NRC at the time of filing.[4]

On November 14, 2014, NRC Staff issued a recommendation to the NRC to approve Entergy's Exemption Request.[5] The LAR was noticed in the Federal Register on December 9, 2014.[6] The Federal Register notice made neither reference to the Exemption Request, nor provided an opportunity for public comment regarding the same. On February 9, 2015, the State filed its LAR Petition and supporting comments in response to the LAR—all of which are attached here as Exhibit 1.[7] The LAR Petition contained two contentions: one, the LAR was not ready for review as the predicate exemptions had not been ruled upon by NRC at the time of filing; and two, the LAR fails to adequately account for all credible emergency scenarios and increases the risk to public health and safety.

On March 2, 2015, the NRC approved the Staff's recommendation to grant the Exemption Request, on a 3-1 vote – 21 days after the State submitted its LAR Petition and

[2] *Id.* at 1.
[3] *See* Letter from Christopher Wamser, Entergy Site Vice President, to NRC Document Control Desk, (June 12, 2014)(BVY 14-033)(NRC Agencywide Document Access Management System [ADAMS] Accession No. ML14168A302).
[4] *Id* at 2.
[5] *See* Memorandum from Mark A. Satorius, Executive Director for Operations, to NRC Commissioners (November 14, 2014)(SECY 14-0125)(ML14227A711).
[6] *See Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations,* (79 FR 73109)(December 9, 2014).
[7] *See* State of Vermont's Petition for Leave to Intervene, and Hearing Request (Feb. 9, 2015)(ML15040A726). The December 9, 2104 LAR *Federal Register* notice requested public comments on or before January 8, 2015. On January 8, 2015, NRC issued a 30 day extension of the public comment period to February 9, 2015. *See* Notice from James Kim, Plant Licensing IV-2 and Decommissioning Transition Branch (Jan. 8, 2015)(ML15008A098).

supporting comments speaking directly to concerns and objections it had over the exemption request, but four days before the deadline for Entergy and NRC Staff to file answers to the LAR Petition.[8] The NRC had previously indicated, and the State understood, that this decision would occur "by July" 2015[9]—after the requested LAR hearing. The NRC's voting record and supporting comments provided no analysis in response to the State's comments submitted on February 9, much less gave any indication that the Commissioners reviewed the comments, or were aware of the directly related LAR before the ASLB.

On March 6, 2015, Entergy and NRC Staff separately filed answers in opposition to the State's Petition.[10] Both Entergy and NRC Staff argued that NRC's approval of the Staff's exemption request recommendation made the LAR Petition's first contention moot.[11] However, Entergy asserted the State had the opportunity to comment on the Exemption Request prior to the State filing the LAR Petition.[12] In stark contrast to Entergy, the NRC Staff argued flatly that "Vermont is [n]ot [e]ntitled to [c]omment on the [e]xemption."[13]

REQUEST FOR RECONSIDERATION

The NRC has, by all indications, failed to consider the State's comments regarding the adverse impacts of granting Entergy's Exemption Request on the State. As discussed above, the Exemption Request was not noticed in the Federal Register. Likewise, NRC's voting record on the Exemption Request does not reflect consideration of the State's comments addressing the Exemption Request and filed in conjunction with the LAR Petition. As NRC Staff recognized in

[8] *See* Commission Voting Record re Request by Entergy Nuclear Operations, Inc., for Exemptions From Certain Emergency Planning Requirements (3/2/15)(ML15062A135); Memorandum from Annette L. Vietti-Cook to Mark A. Satorius re Staff Requirements – SECY 14-0125 (Mar. 2, 2015)(ML15061A516).
[9] *See* Platts, *Inside NRC* vol. 36 at 9 (Aug. 25, 2014) (citing an email from NRC spokesman Neil Sheehan).
[10] *See* Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015)(ML15065A300); NRC Staff's Answer to State of Vermont's Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) (ML15065A364).
[11] *See* Entergy's Answer at 16-17; NRC Staff's Answer at 21-22.
[12] *See* Entergy Answer at 12-13.
[13] NRC Staff Answer at 27.

opposing Vermont's LAR Petition, it was fully aware of Vermont's position on the Exemption Request.[14] In addition, the LAR was explicitly predicated on granting the exemptions. The NRC violated its own precedent and relevant federal law when it approved the Exemption Request, rather than allowing the exemption request to be considered as part of the LAR hearing, and did so without an opportunity for public comment or participation and without considering comments filed by the State. The NRC should have granted a hearing on an exemption request when, as here, the exemption is necessary for a licensee to amend its license. Lastly, the NRC should reconsider the Exemption Request because, even if it is granted, Entergy may not implement many of the changes it seeks to make to its SEP and EAL. Entergy is subject to long-standing commitments it made to the State related to emergency response and preparedness.

A. NRC Action on the Exemption Request Contravenes Federal Law and NRC Precedent

The NRC's action to approve NRC Staff's recommendation to approve the Exemption Request in isolation from the related LAR and without providing an opportunity for public comment and participation creates two clear violations of federal law, either of which justifies reconsideration and reversal of the March 2, 2015 NRC decision.

1. <u>The exemption request is necessary for Entergy to amend its license, triggering a right to a hearing and review of the exemptions and license amendment requests together.</u>

Although the NRC has held that, in general, an intervenor has no right to a hearing to challenge an exemption request,[15] it has created a clear exception to this rule. The NRC has held that when an exemption request is "directly related" to a licensing amendment action, and an intervenor raises an admissible contention related to the exemption, that contention should be

[14] *Id.*
[15] *See* 42 U.S.C. § 2239(a)(1) and *In the Matter of Commonwealth of Edison Co. (Zion Nuclear Power Station)*, CLI-00-05, 51 NRC 90, 98.

subject to a hearing.[16] In *PFS*, the NRC granted a hearing on an exemption request that was made during the pendency of a licensing proceeding for a proposed Independent Spent Fuel Storage Installation ("ISFSI"). The key to the decision was whether the exemption request was a direct part of an initial license or licensing amendment request:

> [I]t is not true that the Commission only grants a hearing on exemption requests that are directly related to an already-admitted contention. The proper focus is on *whether the exemption is necessary for the applicant to* obtain an initial license or *amend its license*. Where the exemption is thus a direct part of an initial licensing or licensing amendment action, there is a potential that an interested party could raise an admissible contention on the exemption, triggering the right to a hearing under that AEA.[17]

A hearing right clearly exists where a licensing action is predicated on an exemption request: "[b]ecause resolution of the exemption request directly affects the licensability of the proposed ISFSI, the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties."[18]

Here, Entergy conceded in its LAR that the request is dependent on granting of the Exemption Request. A proper examination of the LAR's potential impact on public health and safety cannot be made independent of the Exemption Request – a point repeatedly stressed in the State's LAR petition. The two must be reviewed together. The use of an exemption "cannot remove a matter germane to a licensing proceeding from consideration in a hearing, assuming an interested party raises an admissible contention thereon. To hold otherwise would exclude critical safety questions from licensing hearings merely on the basis of an 'exemption' label."[19]

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[16] *In the Matter of Private Fuel Storage, LLC* ("*PFS*"), CLI-01-12, 53 NRC 459, 476; *see also, e.g., In the Matter of Honeywell International, Inc.*, CLI-13-1, 77 NRC 1, 7 ("But when a licensee requests an exemption in a related license amendment application, we consider the hearing rights of the amendment application to encompass the exemption request as well.").
[17] *PFS* at 470 (emphasis added).
[18] *PFS* at 467.
[19] *Id.*

The Commission, by acting on the exemption request when a Petition to Intervene that challenges both the exemption and the LAR is pending, was a violation of Commission precedent and the rights established by 42 U.S.C. § 2239(a).

2. In accordance with the National Environmental Policy Act, the NRC must analyze the environmental impacts of Entergy's proposed exemption request and related license amendment request

NEPA requires federal agencies to prepare "a detailed statement . . . on the environmental impact" of any proposed major federal action "significantly affecting the quality of the human environment."[20] At a minimum, if an agency is going to allow a licensee to engage in activities with environmental impacts without the agency first issuing a detailed environmental impact statement, the agency must first do an environmental analysis and issue a "finding of no significant impact" ("FONSI").[21] The NRC's March 2, 2015 decision was not NEPA-compliant.

The required NEPA analysis must be comprehensive and address all "potential environmental effects" unless those effects are so unlikely as to be "remote and highly speculative."[22] Potential environmental impacts from the storage of spent nuclear fuel include impacts resulting from "the possibility of terrorist attack."[23] Unless "the probability of a given risk [is] effectively zero," NEPA requires that the NRC's analysis "account for the consequences of each risk."[24]

The major federal action that the NRC took on March 2, 2015—granting Entergy's Exemption Request—has significant potential environmental impacts compared to the baseline "no-action alternative" of keeping the current regulatory requirements in place.[25] Yet there is no

[20] 42 U.S.C. § 4332(1)(C)(i); *see generally* 42 U.S.C. §§ 4321 et seq.
[21] 40 C. F. R. § 1501.4; id. § 1508.14.
[22] *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1030 (9th Cir. 2006).
[23] *Id*. at 1031.
[24] *New York v. NRC I*, 681 F.3d 471, 483 (D.C. Cir. 2012).
[25] *See* 40 C.F.R. § 1502.14(d) (environmental analysis must include "the alternative of no action").

indication in the NRC's March 2, 2015 decision that it performed any environmental analysis, let alone a NEPA-compliant analysis that looks at other reasonable courses of action, including the no-action alternative and potential mitigation measures. This does not comply with NEPA, particularly in light of the significant potential environmental impacts detailed by the State in its February 9, 2015 comments and LAR Petition.[26] First and foremost, the potential environmental impacts associated with Entergy's specific Exemption Request include the elimination of the federal regulatory and licensing requirement to maintain a 10-mile Emergency Planning Zone ("EPZ"), and the consequent increased risk to Vermont citizens and the citizens of neighboring states in the event of a zirconium fire from, for instance, a terrorist attack on VY that results in loss of cooling in the spent fuel pool.

Also, VY exhibits unique site-specific factors that can—and do—affect the potential environmental impacts of an emergency in the spent fuel pool while spent fuel is present. These include factors that have never before been analyzed for their environmental impacts. In fact, there has been *no* previous environmental analysis of potential impacts from VY being exempted from the usual emergency preparedness requirements such as a 10-mile EPZ, since the 10-mile EPZ and other requirements were assumed to remain in place during all previous licensing and relicensing proceedings. For instance, Vermont Yankee has an operating elementary school located just 1500 feet from the reactor building. The 2002 Decommissioning GEIS (NUREG-1437) never took that site-specific factor into account, nor did the 2007 Supplemental GEIS.[27]

Likewise, differences in the structural design of facilities that have been granted similar exemptions and VY justify comprehensive NEPA review. The facilities cited by the NRC Staff and the Commissioners themselves in approving the Exemption Request—Kewaunee, Zion,

[26] *See* Exhibit 1.
[27] NUREG-1437, Supplement 30, at 7-2.

etc.—were Pressure Water Reactors ("PWR"), versus VY's Boiling Water Reactor ("BWR") design. PWR spent fuel pools are completely enclosed within a reinforced concrete containment building, whereas the VY spent fuel pool is not protected by concrete above the fuel. This lack of protection makes the VY pool more susceptible to an emergency situation, particularly in the event of a terrorist attack, and increases the risk and scope of environmental impacts for a BWR.

At a minimum, NRC must evaluate the Exemption Request and LAR for compliance with 10 C.F.R. § 51.92, which requires a supplemental environmental impact statement in situations such as this where new information has not previously been analyzed.[28]

A comprehensive analysis is also required here in part to avoid segmenting environmental analyses into discrete parts without ever looking at their full combined effects—an approach that NEPA does not allow.[29] The NRC has previously underscored the value of a comprehensive NEPA analysis: "While NEPA does not require agencies to select particular options, it is intended to foster both informed decision-making and informed public participation, and thus to ensure that the agency does not act upon incomplete information, only to regret its decision after it is too late to correct."[30]

The lack of public participation leading up to the March 2, 2015 decision is, by itself, a violation of NEPA. As the U.S. Court of Appeals for the Second Circuit recently held in a

[28] *See also, e.g., Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989) (noting that when an agency receives new and significant information casting doubt on a previously issued environmental analysis, the agency must reevaluate the earlier analysis).

[29] *See* e.g. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) ("The justification for the rule against segmentation is obvious: it prevents agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." (quotation and alteration marks omitted)); *see also*, e.g., *NRDC v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) (NEPA is meant to provide "a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration" (emphasis added)).

[30] *In Re Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units and 2*), CLI-02-17, 56 N.R.C. 1, 10 (2002).

directly analogous case, "public scrutiny [is] an 'essential' part of the NEPA process."[31] In *Brodsky*, the Second Circuit vacated the NRC's granting of an exemption without the NEPA-required public comment or participation. The NRC has made the same error here. To date, the NRC has not solicited public comment, held a hearing, or made any other effort at public participation, even though the NRC must know the public is greatly concerned with this matter.

Nor is this something that can be fixed as the process moves forward. While Entergy has stated in a recent filing that it expects that the NRC will publish an "Environmental Assessment and Finding of No Significant Impact in the *Federal Register*" in the near future,[32] NRC Staff has made clear that the March 2, 2015 Commission decision is complete and binding, and that the NRC Staff is already "preparing the exemption *for issuance*."[33] The future publication of an environmental analysis—after the relevant decision has already been made—does not comply with NEPA, which requires the analysis *before* a decision is made on the major federal action:

> NEPA should not become an after-the-fact process that justifies decisions that have already been made.
>
> ***
>
> [A]n agency shall prepare an EIS so that it can inform the decisionmaking process in a timely manner "and will not be used to rationalize or justify decisions already made."[34]

As the D.C. Circuit has held, "Congress did not intend [NEPA] to be such a paper tiger."[35]

B. The Commission Should Review Existing Obligations Entergy Has to the State When Reconsidering Its Approval of the Exemption Request

The Commission should review all information relevant to a decision on an exemption request. Here, Entergy has agreed to a number of safety planning and response obligations to the State beyond those required by NRC regulation. Entergy and the State have agreed, through a

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[31] *Brodsky v. NRC*, 704 F.3d 113, 120 (2d Cir. 2013) (quoting 40 C.F.R. § 1500.1(b)).
[32] Entergy's Answer at 13.
[33] NRC Staff's Answer at 15 (emphasis added).
[34] Commission on Environmental Quality Guidance, 77 Fed. Reg. at 14476-77 (footnotes and citations omitted).
[35] *Calvert Cliffs' Coordinating Cmtee.. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

number of memoranda of understanding and letters of agreement to provide for a 10-mile emergency planning zone and a 15 minute notification protocol to the State in the event of an emergency – precisely the kinds of obligations Entergy seeks to avoid as a result of the requested exemptions. Examples of these agreements are attached here as Exhibit 2. Any NRC action on the exemptions and directly related LAR do not relieve Entergy of these obligations. The Commission has "inherent supervisory authority over adjudications and rulemakings."[36] That authority certainly confers the ability review these agreements while reconsidering its actions.

CONCLUSION

Based on the foregoing the State of Vermont, through the Vermont Department of Public Service, respectfully requests the U.S. Nuclear Regulatory Commission grant this petition for reconsideration, and withdraw the March 2, 2015 decision to grant Entergy's Exemptions Request. The Commission should exercise its inherent supervisory authority here and grant the relief the State seeks.

Dated at Montpelier, Vermont this 12th of March, 2015

Respectfully submitted,

/Signed (electronically) by/
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[36] *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 N.R.C. 260 (2002).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the forgoing State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests, dated March 12, 2015, have been served upon the following via electronic mail, in the above-captioned proceeding, this 12th day of March, 2015.

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Dated at Montpelier, Vermont
this 12th day of March, 2015