

March 23, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
ENTERGY NUCLEAR VERMONT YANKEE, LLC,) Docket No. 50-271-LA-2
and ENTERGY NUCLEAR OPERATIONS, INC.)
)
(Vermont Yankee Nuclear Power Station))

NRC STAFF ANSWER TO VERMONT PETITION FOR RECONSIDERATION
OF THE COMMISSION DECISION APPROVING ENTERGY'S EXEMPTIONS REQUESTS

INTRODUCTION

On March 2, 2015, in a Staff Requirements Memorandum (SRM),¹ the Commission approved Commission Paper (SECY) 14-0125, which requested that the Commission authorize the staff of the NRC (Staff) to “process and grant, as appropriate” exemptions to the Vermont Yankee Nuclear Power Station (VY) from regulatory requirements in 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50, Appendix E regarding emergency planning and response.² The State of Vermont’s (Vermont) petition³ asking the Commission to reconsider its decision in SRM-SECY-14-0125 should be denied: the Commission’s SRM is not subject to a 10 C.F.R. § 2.345 petition for reconsideration because it is not a final decision in a 10 C.F.R. Part 2, Subpart C adjudicatory proceeding. Regardless, Vermont has not demonstrated compelling circumstances sufficient for Commission reconsideration because exemptions do not give rise to hearing rights and the NRC has not yet issued or granted the exemptions.

¹ SRM-SECY-14-0125, *Request by Entergy Nuclear Operations, Inc. for Exemptions from Certain Emergency Planning Requirements* (Mar. 2, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15061A516).

² SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements*, at 4 (Nov. 14, 2014) (ADAMS Accession No. ML14227A711)

³ State of Vermont’s Petition of Commission Decision Approving Entergy’s Exemption Requests (Mar. 12, 2015) (ADAMS Accession No. ML15075A048) (Petition).

BACKGROUND

On March 14, 2014, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Entergy) filed a request for exemptions from the application of certain emergency planning requirements to Vermont Yankee, to be implemented in the Spring of 2016, approximately 15.4 months after plant shutdown and permanent defueling.⁴ The Commission has delegated to the Staff authority to approve or deny proposed emergency plan (EP) changes that represent decreases in the effectiveness of a licensee's EP. However, the Staff must request Commission approval for any reduction in the effectiveness of a licensee's EP that requires an exemption from the requirements of 10 C.F.R. § 50.47(b) and Appendix E to 10 CFR Part 50.⁵ On November 14, 2014, the Staff submitted SECY-14-0125, asking that the Commission authorize the Staff to "process and grant, as appropriate, [Entergy's] requested exemptions."⁶ On March 2, 2015, the Commission approved SECY-14-0125, authorizing the Staff to issue exemptions from certain EP requirements upon the completion of the Staff's review process.⁷ The Staff is currently completing its review process of Entergy's exemptions request and has not yet issued the exemptions to Vermont Yankee.

⁴ Letter from Christopher J. Wamser, Site Vice President, Entergy, to the NRC, Request for Exemptions from Portions of 10 CFR 50.47 and 10 CFR 50, Appendix E, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Mar. 14, 2014) (ADAMS Accession No. ML14080A141) (VY EP Exemption Request). "The requested exemptions would allow VY to reduce emergency planning requirements and subsequently revise the VY Emergency Plan consistent with the anticipated permanently defueled condition of the station." *Id.* at 1. Specifically, Entergy sought exemption from certain standards of 10 C.F.R. § 50.47(b) regarding onsite and offsite emergency response plans, certain requirements of 10 C.F.R. § 50.47(c) regarding the establishment of plume exposure and ingestion pathway emergency planning zones, and certain requirements of 10 C.F.R. Part 50, Appendix E regarding the contents of emergency plans. *Id.* at Attachment 1, p. 1.

⁵ SRM-SECY-08-0024, *Delegation of Commission Authority to Staff to Approve or Deny Emergency Plan Changes that Represent a Decrease in Effectiveness* (May 19, 2008) (ADAMS Accession No. ML081400510).

⁶ SECY-14-0125. In SECY-14-0125, the Staff stated that it had reviewed the technical basis for Entergy's requested exemptions and requested authority to "process and grant, as appropriate, [Entergy's] requested exemptions." The Staff noted that the risk of an offsite radiological release is significantly lower and that the types of possible accidents are significantly fewer at a nuclear power reactor that has permanently ceased operations and removed fuel from the reactor vessel. *Id.* at 4-6.

⁷ SRM-SECY-14-0125.

Separately, and subsequent to Vermont Yankee's exemptions request, on June 12, 2014, Entergy submitted a license amendment request (LAR) that presumes approval of its exemptions request.⁸ The request seeks NRC approval of changes to Vermont Yankee's EP and emergency action levels scheme consistent with the exemptions. On December 9, 2014, the NRC published a *Federal Register* notice of an opportunity to request a hearing on Entergy's LAR.⁹ On February 9, 2015, Vermont requested a hearing, alleging (1) that the LAR was not ready for review because no exemptions had been granted; and (2) that the LAR failed to account for all credible emergency scenarios, and that approval of the LAR and exemptions request would undermine the effectiveness of the site emergency plan and off-site emergency planning.¹⁰ On March 6, 2015, Entergy¹¹ and the NRC Staff¹² filed answers in opposition to Vermont's petition to intervene.

On March 12, 2015, in lieu of filing a reply to those answers, Vermont filed a Petition for Reconsideration of SRM-SECY-14-0125 at issue here, and moved to stay the license amendment proceedings before the Atomic Safety and Licensing Board (Board).¹³ The Board denied Vermont's Motion to Stay because Vermont did not consult with either the Staff or

⁸ Letter from Christopher J. Wamser, Site Vice President, Entergy, to the NRC, Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (June 12, 2014) (ADAMS Accession No. ML14168A302).

⁹ Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 73,106, 73,109 (Dec. 9, 2014).

¹⁰ State of Vermont's Petition for Leave to Intervene, and Hearing Request, at 3-5, 6-9 (Feb. 9, 2015) (ADAMS Accession No. ML15040A726).

¹¹ Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) (ADAMS Accession No. ML15065A300).

¹² NRC Staff's Answer to State of Vermont's Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) (ADAMS Accession No. ML15065A364).

¹³ State of Vermont's Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration (Mar. 12, 2015) (ADAMS Accession No. ML15071A487).

Entergy before filing.¹⁴ On March 13, 2015, Vermont refiled its Motion to Stay and requested a seven day extension to file its reply brief.¹⁵ On March 16, 2015, the Board rejected Vermont's Motion to Stay and its request for extension of time to reply.¹⁶ Vermont submitted its Reply to the Board on March 17, 2015.¹⁷

DISCUSSION

I. Vermont May Not Petition the Commission for Reconsideration of SRM-14-0125 Because it Is Not an Adjudicatory Decision

Vermont challenges the Commission's SRM pursuant to 10 C.F.R. § 2.345. Section 2.345 authorizes parties to petition the Commission for reconsideration of final decisions in 10 C.F.R. Part 2, subpart C adjudicatory proceedings. The regulation at 10 C.F.R. § 2.300 defines the scope of Subpart C, stating that the "provisions of [Subpart C] apply to all adjudications conducted under the authority of the Atomic Energy Act of 1954"¹⁸

As a general matter, the regulations do not provide members of the public the opportunity to challenge an SRM where the Commission is exercising its inherent authority to provide direction to the Staff. In SECY-14-0125, the Staff provided the Commission with its technical review of Entergy's exemptions request and asked for Commission approval to "process and grant, as appropriate" Entergy's exemptions request. The Commission's SRM-SECY-14-0125 authorized the Staff to issue the exemptions and directed the Staff to complete

¹⁴ Order (Denying Motion to Stay the Proceeding) (Mar. 13, 2015) (ADAMS Accession No. ML15072A182) (unpublished).

¹⁵ State of Vermont's Second Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration (Mar. 13, 2015) (ADAMS Accession No. ML15072A460).

¹⁶ Order (Denying Motion to Stay the Proceeding and Extending Deadline for Reply) (Mar. 16, 2015) (ADAMS Accession No. ML15075A306). However, the Board did provide Vermont the opportunity to file its Reply by no later than March 17, 2015. *Id.* at 2.

¹⁷ In its reply, Vermont raises many of the same issues that are discussed in the Petition for Reconsideration that it has filed with the Commission. The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (Mar. 17, 2015) (ADAMS Accession No. ML15076A546).

¹⁸ 10 C.F.R. § 2.300.

its review process of Entergy's request. The SRM communicates the Commission's policy to the Staff and does not constitute the resolution of any adjudication. Therefore, the SRM is not subject to section 2.345 petitions, and Vermont's Petition should be denied.

In any event, exemptions are not 10 C.F.R. Part 2, Subpart C adjudications. Section 189.a. of the Atomic Energy Act (AEA) "dictates when the NRC must hold [adjudicatory] hearings," and thus defines the scope of Subpart C:¹⁹

In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award of royalties, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any person as a party to such proceeding.²⁰

AEA Section 189a.'s list of Commission actions subject to hearing opportunities does not include exemptions. In *Brodsky I*, the Second Circuit ruled that exemptions from regulations are not NRC adjudications, holding that "the plain language of [Section 189.a]" and the AEA's legislative history demonstrate "that Congress intended to have exemptions treated different from the orders mentioned in [Section 189.a]."²¹ Thus, exemptions do not fall within the scope of 10 C.F.R. Part 2, Subpart C. Only final decisions in Subpart C adjudicatory proceedings are subject to 10 C.F.R. § 2.345 petitions for reconsideration.²² Therefore, Vermont may not petition the Commission to reconsider SRM-SECY-14-0125, which authorized the Staff to issue exemptions for Vermont Yankee upon the completion of the Staff's review process.²³

¹⁹ *Brodsky v. NRC*, 578 F.3d 175, 180 (2d Cir. 2009), *citing* 42 U.S.C. § 2239(a)(1)(A) (*Brodsky I*).

²⁰ Atomic Energy Act of 1954, as amended, § 189.a.(1)(A), 42 U.S.C. § 2239(a)(1)(A) (1996).

²¹ *Brodsky I* at 181.

²² Whether Vermont's exemption-related contention is admissible in the ongoing license amendment proceeding is a separate question currently before the Board, and discussed below.

²³ Vermont's challenge was also procedurally deficient. "A petition for reconsideration may not be filed except upon leave of the adjudicatory body that rendered the decision." *Virginia Elec. & Power Co.* (North Anna Power Station, Unit 3), CLI-12-17, 76 NRC 207, 209 (2012). *See also* 10 C.F.R. § 2.323(e) ("Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission."). The Commission has held that "[t]his procedural deficiency is reason enough to deny the

II. There Is No Basis for Reconsideration of SRM-SECY-14-0125

“A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid.”²⁴ Reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification. Petitions for reconsideration should not be used merely to re-argue matters that the Commission already has considered but rejected.²⁵

Vermont argues that NEPA required the Commission to consider public comments related to environmental concerns before issuing SRM-SECY-14-0125. In SRM-SECY-14-0125, the Commission approved “the staff’s recommendation to grant Entergy[’s] request for exemptions . . . to be implemented as stipulated in SECY-14-0125” and expressed its continued support of “the current practice of approving appropriately justified exemptions from emergency planning requirements while plants are transitioning to decommissioning based on site-specific evaluations.”²⁶ The Commission simply endowed the Staff with authority to issue the exemptions and resolved several safety-related issues raised in SECY-14-0125. The Staff has not yet exercised that authority by issuing the exemptions. Rather, the Staff is completing its review of Entergy’s exemptions request. The Staff will comply with the requirements imposed by NEPA, as appropriate, before issuing Vermont Yankee’s requested emergency planning exemptions.

request.” *North Anna*, CLI-12-17, 76 NRC at 209 n.7 (citing *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 252 (2010)). Vermont did not receive leave from the Commission to file this Petition. Therefore, Vermont’s Petition should be denied on procedural grounds.

²⁴ 10 C.F.R. § 2.345(b).

²⁵ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 NRC 1 (2002).

²⁶ SRM-SECY-14-0125.

Vermont further argues that the Commission should have granted Vermont a hearing before issuing SRM-SECY-14-0125. However, no hearing rights attach to the exemption. Section 189.a. of the AEA requires the Commission to grant hearing requests by any party whose interest may be affected by certain designated actions.²⁷ Exemptions are not included in the list of actions for which hearings must be granted.²⁸ Third parties are not entitled to hearings to challenge exemptions. Citing the Commission's decision in *Private Fuel Storage*, Vermont argues that it is entitled to an adjudicatory hearing on the exemption.²⁹ However, Vermont misconstrues the Commission's holding in *PFS*. That case, as the Commission made clear, involved an exemption-related contention in an ongoing licensing proceeding, and not a hearing request challenging the exemption itself.³⁰ Whether Vermont's exemption related contention is admissible in the ongoing license amendment proceeding is a separate question currently before the Board.³¹

CONCLUSION

The AEA and the implementing NRC regulations do not require the Commission to consider 10 C.F.R. § 2.345 petitions for reconsideration of SRMs because SRMS are not final

²⁷ See *supra* n. 18-20.

²⁸ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 98 (2000). See also *Brodsky I* at 181 (citing the plain meaning of the text and legislative history).

²⁹ Petition at 4-5 (stating "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 subject to a hearing.").

³⁰ *Private Fuel Storage*, LLC (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 465-466 (2001) ("[Speaking] in terms of a hearing on PFS's exemption is a convenient shorthand, which we ourselves use in today's Order. It is important to recognize at the outset, though, that the certified question does not focus directly on the exemption itself, but, as the Board said, on 'exemption-related matters.' At bottom, what [intervenor] proposes to litigate is whether PFS's ISFSI design, which is dependent on an exemption from otherwise controlling seismic regulations, is adequate to withstand plausible earthquake risks. Viewed this way, [the intervenor's] proposed revised Contention . . . plainly puts into play safety issues that are material to licensing and suitable for consideration at an NRC hearing.").

³¹ While neither the AEA nor NRC regulations require that the Commission grant Vermont a hearing to challenge Entergy's exemptions request, the Commission may grant Vermont a hearing by exercising its inherent supervisory authority over adjudicatory proceedings. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

decisions in 10 C.F.R. Part 2, Subpart C adjudicatory proceedings. Yet Vermont has filed such a petition. In doing so, Vermont has not provided regulatory authority that supports its Petition for Reconsideration. In any event, Vermont has not demonstrated compelling circumstances that warrant granting the request; the issues Vermont raises are not supported in law and are subject to an ongoing licensing proceeding before the Board. The Commission should therefore deny Vermont's Petition or Reconsideration.

Respectfully submitted,

/Signed (electronically) by/

Beth Mizuno
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-3122
E-mail: Beth.Mizuno@nrc.gov

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NUCLEAR REGULATORY COMMISSION

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ENTERGY NUCLEAR VERMONT YANKEE, LLC,) Docket No. 50-271-LA-2
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(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO VERMONT PETITION FOR RECONSIDERATION OF THE COMMISSION DECISION APPROVING ENTERGY'S EXEMPTIONS REQUESTS," dated March 23, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 23rd day of March, 2015.

/Signed (electronically) by/

Beth Mizuno
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-3122
E-mail: Beth.Mizuno@nrc.gov

Dated at Rockville, Maryland
this 23rd day of March, 2015