

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, 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-2

ASLBP No. 15-937-02-LA-BD01

May 18, 2015

MEMORANDUM AND ORDER
(Denying Hearing Request)

The State of Vermont, through the Vermont Department of Public Service, seeks to challenge a license amendment request (LAR) by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Entergy) to reduce emergency planning requirements at the Vermont Yankee Nuclear Power Station.¹ Although Vermont submitted a timely hearing petition and has standing,² neither of Vermont's two proffered contentions satisfies the admissibility criteria of 10 C.F.R. § 2.309(f). Accordingly, the Board denies Vermont's hearing request.

¹ State of Vermont's Petition for Leave to Intervene, and Hearing Request (Feb. 9, 2015) [hereinafter Petition].

² Vermont has standing because Vermont Yankee is "located within the boundaries of the State" and "no further demonstration of standing is required." 10 C.F.R. § 2.309(h)(2).

I. BACKGROUND

On June 12, 2014, Entergy submitted an LAR to revise the site emergency plan and emergency alert scheme to reflect Vermont Yankee's permanently defueled status.³ In the analysis supporting its request, Entergy concluded that the risk of offsite radiological releases will be significantly lower once the spent fuel has cooled for 15.4 months after final defueling, making it unnecessary to maintain the same level of emergency planning as when the plant was operating.⁴ Among other changes, Entergy seeks to increase the time for providing emergency alerts to the State from 15 minutes to an hour and requests reduction of the Emergency Planning Zone to the site boundary.⁵ Because the current levels of emergency planning are required by regulation, Entergy cannot make the changes contemplated in its LAR without first receiving certain regulatory exemptions.⁶

The NRC Staff accepted the LAR for review and informed the public of the opportunity to petition for a hearing in a Federal Register notice on December 9, 2014.⁷ The Secretary of the Commission referred Vermont's timely petition to the Atomic Safety and Licensing Board Panel, and this Licensing Board was established on February 19, 2015.⁸

³ Letter from Christopher J. Wamser, Site Vice President, Entergy, to Document Control Desk, 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) [hereinafter LAR].

⁴ LAR, attach. 1, Description and Evaluation of Proposed Changes, at 1.

⁵ Id. at 3, 6.

⁶ Id. at 1 (citing Letter from Christopher J. Wamser, Site Vice President, Entergy, to Document Control Desk, NRC, Request for Exemptions from Portions of 10 CFR 50.47 and 10 CFR 50, Appendix E, Vermont Yankee Nuclear Power Station (Mar. 14, 2014) (ADAMS Accession No. ML14080A141)); see also 10 C.F.R. § 50.12(a)(2)(ii).

⁷ Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 73,106 (Dec. 9, 2014).

⁸ Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board, 80 Fed. Reg. 10,165 (Feb. 25, 2015).

On March 2, 2015, the Commission approved Entergy's requested regulatory exemptions related to Vermont Yankee's emergency planning requirements.⁹ These exemptions eliminate the need for offsite emergency planning, extend the time for providing emergency notifications, and remove the requirement to prepare for "hostile action."¹⁰ On March 12, 2015, Vermont submitted a petition for reconsideration, which remains pending before the Commission.¹¹

Meanwhile, Entergy and the NRC Staff submitted answers opposing Vermont's hearing request on March 6,¹² and Vermont filed its reply on March 17, 2015.¹³ The Board heard oral argument regarding the admissibility of Vermont's contentions on April 8, 2015.¹⁴

II. DISCUSSION

The NRC has never promulgated comprehensive regulations governing the decommissioning of nuclear power reactors.¹⁵ Nor do NRC emergency planning regulations

⁹ Commission Voting Record, Request by Entergy Nuclear Operations, Inc. for Exemptions from Certain Emergency Planning Requirements, SECY-14-0125 (Mar. 2, 2015) (ADAMS Accession No. ML15062A135).

¹⁰ Memorandum from Mark Satorius, Executive Director for Operations, to the Commissioners, SECY-14-0125, encl. at 1-2, 7 (Nov. 14, 2014) (ADAMS Accession No. ML14227A711).

¹¹ State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests (Mar. 12, 2015).

¹² Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) [hereinafter Entergy's Answer]; NRC Staff's Answer to State of Vermont's Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) [hereinafter NRC Staff's Answer].

¹³ The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (Mar. 17, 2015) [hereinafter Reply]; see Licensing Board Order (Denying Motion to Stay the Proceeding and Extending Deadline for Reply) (Mar. 16, 2015) (unpublished).

¹⁴ Tr. at 1. After oral argument the Board received three additional submissions. See State of Vermont's Notice of Supplemental Authority (May 4, 2015); Entergy's Response to the State of Vermont's Notice of Supplemental Authority (May 11, 2015); NRC Staff's Answer to Vermont's Notice of Supplemental Authority (May 11, 2015).

¹⁵ See NRC Staff's Answer at 6 n.19 (explaining that NRC Staff prepared draft decommissioning regulations, but later deferred the rulemaking "in light of higher priority work after the terrorist attacks of September 11, 2001").

distinguish between the risks at operating reactors and those associated with reactors that have been permanently shut down and defueled.¹⁶ Absent such regulatory distinctions, the NRC has historically granted regulatory exemptions for permanently decommissioned reactors.¹⁷

Under the Atomic Energy Act of 1954,¹⁸ a petitioner such as Vermont may request a hearing to challenge an LAR.¹⁹ The extent to which Vermont can challenge exemption-related issues is less clear. Because the Act does not list exemption requests as agency actions subject to a hearing, the Commission has concluded that petitioners generally cannot seek hearings on exemptions.²⁰ As the Commission has explained, exemptions “ordinarily do not

¹⁶ 10 C.F.R. § 50.54(q)(2) (requiring all 10 C.F.R. Part 50 licensees to meet the emergency planning requirements, regardless of whether the facility is operating or has been permanently shut down and defueled); see Letter from Allison M. Macfarlane, Chairman, NRC, to Senator Edward J. Markey, at 1 (June 26, 2014) (ADAMS Accession No. ML14147A108) (“The practice of considering exemptions [for decommissioning plants] acknowledges this regulatory construct and is a well-established part of the NRC’s regulatory process that allows licensees to address site-specific situations or implement alternative approaches for circumstances not necessarily contemplated in the regulations for operating reactors.”).

¹⁷ See Memorandum from Annette L. Vietti-Cook, Office of the Secretary, to Mark A. Satorius, Executive Director for Operations, SRM-SECY-14-0144 (Mar. 2, 2015) (ADAMS Accession No. ML15061A521) (approving certain emergency planning exemptions for San Onofre Nuclear Generating Station); Memorandum from Annette L. Vietti-Cook, Office of the Secretary, to Mark A. Satorius, Executive Director for Operations, SRM-SECY-14-0118 (Dec. 30, 2014) (ADAMS Accession No. ML14364A111) (same for Crystal River Nuclear Generating Plant, Unit 3); Memorandum from Annette L. Vietti-Cook, Office of the Secretary, to Mark A. Satorius, Executive Director for Operations, SRM-SECY-14-0066 (Aug. 7, 2014) (ADAMS Accession No. ML14219A366) (same for Kewaunee Power Station); see also Commonwealth Edison Company; (Zion Nuclear Power Station, Units 1 and 2); Exemption, 64 Fed. Reg. 48,856, 48,857 (Sept. 8, 1999); Consumers Energy Company; Big Rock Point Nuclear Plant; Exemption, 63 Fed. Reg. 53,940, 53,943 (Oct. 7, 1998); Maine Yankee Atomic Power Company, Maine Yankee Atomic Power Station; Exemption, 63 Fed. Reg. 48,768, 48,770 (Sept. 11, 1998); Connecticut Yankee Atomic Power Company and Haddam Neck Plant; Exemption, 63 Fed. Reg. 47,331, 47,332 (Sept. 4, 1998); Exemption, 58 Fed. Reg. 52,333, 52,334 (Oct. 7, 1993) (granting emergency planning exemptions for Trojan Nuclear Plant).

¹⁸ 42 U.S.C. § 2011 et seq.

¹⁹ 42 U.S.C. § 2239(a)(1)(A) (granting the right to request a hearing on agency licensing actions including “granting, suspending, revoking, or amending of any license or construction permit”).

²⁰ Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 94–98 (2000) (“Congress intentionally limited the opportunity for a hearing to certain

trigger hearing rights” when “[a]n already-licensed facility [is] asking for relief from performing a duty imposed by NRC regulations.”²¹ The Commission recognized an exception to this rule, however, in Private Fuel Storage, CLI-01-12, where it ruled a hearing on exemption-related matters was necessary insofar as “resolution of the exemption request directly affect[ed] the licensability of the proposed” fuel storage site and “the exemption raise[d] material questions directly connected to an agency licensing action.”²²

In this case, as a practical matter, the Board need not test the boundaries of the Commission’s Private Fuel Storage decision. There, the NRC Staff granted an exemption from a regulation in the midst of an adjudicatory proceeding concerning compliance with that very regulation.²³ Here, the Commission itself has already reviewed and approved the requested exemptions,²⁴ and by reason of Vermont’s pending petition for reconsideration has the opportunity to review them again. Does the Commission wish its Licensing Boards to conduct evidentiary hearings on the wisdom of the Commission’s decisions? We think not: “It is for the Commission, not licensing boards, to revise its rulings.”²⁵

designated agency actions—that do not include exemptions.”) (citing 42 U.S.C. § 2239(a)(1)(A)); see also Massachusetts v. NRC, 878 F.2d 1516 (1st Cir. 1989).

²¹ Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001).

²² Id.; see also Honeywell Int’l, Inc. (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013) (“[W]hen a licensee requests an exemption in a related license amendment application, we consider the hearing rights on the amendment application to encompass the exemption request as well.”).

²³ Private Fuel Storage, CLI-01-12, 53 NRC at 463.

²⁴ Although the Commission has delegated to the NRC Staff authority to grant exemptions to some emergency planning regulations, Commission approval is still required for any exemption that reduces the effectiveness of a licensee’s emergency response plan. Memorandum from Annette L. Vietti-Cook, Office of the Secretary, to R. W. Borchardt, Executive Director for Operations, SRM-SECY-08-0024 (May 19, 2008) (ADAMS Accession No. ML 081400510).

²⁵ Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Servs., LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 184, aff’d, CLI-09-20, 70 NRC 911 (2009).

Absent contrary direction from the Commission,²⁶ the Board assumes the correctness of the Commission's decision. As Entergy and the NRC Staff contend,²⁷ the Board's role is therefore limited to determining whether Vermont has asserted admissible contentions concerning whether Entergy's LAR is consistent with NRC's regulations as exempted.

In making this determination, the Board applies the usual six criteria set forth in 10 C.F.R. § 2.309(f)(1). An admissible contention must (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 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 its position on the issue; 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.²⁸

A. Contention 1

Vermont's first contention, which was submitted before exemptions were approved by the Commission, states:

Entergy's license amendment request is not ready for review, as the amendment request is predicated upon and assumes approval of an exemption request that has not been ruled upon by the Nuclear Regulatory Commission and/or Atomic Safety and Licensing Board.²⁹

²⁶ Should the Commission reconsider its initial ruling in whole or in part, as Vermont has requested, the Commission could of course clarify, if it wishes, the issues (if any) that might then be appropriate for adjudication by a Licensing Board.

²⁷ Entergy's Answer at 11; NRC Staff's Answer at 22–23.

²⁸ 10 C.F.R. § 2.309(f)(1); see FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 395–96 (2012).

²⁹ Petition at 3.

Because the Commission has now approved the pertinent regulatory exemptions, this contention is moot.³⁰

B. Contention 2

Vermont's second contention states:

Entergy's license amendment request, if approved along with the predicate requested exemptions, fails to account for all credible emergency scenarios, undermines the effectiveness of the site emergency plan and off-site emergency planning, and poses an increased risk to the health and safety of Vermont citizens in violation of NRC regulatory requirements 10 CFR § 50.54(q)(4) and Appendix E to Part 50.³¹

Based on statements from three state employees, Vermont asserts that, in a variety of ways, the requested changes would hamper the state's ability to protect its residents during an emergency.³²

The focus of Vermont's petition and supporting statements, however, is squarely on the adequacy of Entergy's exemption request and associated analyses, and not on any alleged deficiencies in the LAR itself. As Vermont asserts, "[t]he LAR meets the requirements of § 50.54(q)(4) only in the event Entergy is exempted from material requirements of Part 50, Appendix E."³³ Neither Entergy nor the NRC Staff disagrees.

As the Board has concluded, however, the correctness of Commission-approved regulatory exemptions is not subject to review in a hearing before a Licensing Board. The relevant question, therefore, is whether Contention 2 embodies plausible and adequately supported allegations that the LAR still fails to comply with 10 C.F.R. § 50.54(q)(4), assuming the validity of the Commission-approved exemptions.

³⁰ Even if the Commission were to grant reconsideration, this contention would remain moot because the Commission would have yet again addressed the exemptions.

³¹ Petition at 6.

³² *Id.* at 6–10, *attaches.*, Statement of Anthony Leshinskie (Feb. 9, 2015) [hereinafter Leshinskie Statement]; Statement of Erica Bornemann (Feb. 9, 2015) [hereinafter Bornemann Statement]; Statement of Dr. William Irwin (Feb. 9, 2015).

³³ Petition at 9.

Although the principal focus of Contention 2 concerns the effect of the “predicate requested exemptions,”³⁴ Vermont also claims that Entergy’s proposed reduction in emergency response capabilities violates the requirements of 10 C.F.R. § 50.54(q)(4) “even in the event that Entergy is exempted from portions [of] 10 CFR § 50.47 and Part 50, Appendix E.”³⁵ Vermont asserts that “[t]he lack of adequate safety analysis regarding credible accident scenarios applies independently to the LAR in addition to applying to the directly related exemption request.”³⁶

But Vermont fails to back up its position with sufficient clarity and support to satisfy 10 C.F.R. § 2.309(f)(1). Although expressly advised that the Board wished the parties to address at oral argument “whether Contention 2 is admissible regardless of whether the Commission reconsiders Entergy’s exemption request,”³⁷ Vermont’s counsel was essentially unable to do so.³⁸ Neither in its pleadings nor at oral argument was Vermont able to articulate a challenge to any aspect of the LAR—independent of Entergy’s exemption request—that set forth sufficient factual support or raised a genuine dispute with the application.³⁹

For example, although Erica Bornemann, the Chief of Staff for the Vermont Division of Emergency Management and Homeland Security, alleges in her statement that the LAR relies on an out-of-date Letter of Agreement with the State of Vermont,⁴⁰ she does not specify what

³⁴ Id. at 6.

³⁵ Reply at 7.

³⁶ Id.

³⁷ Licensing Board Notice and Order (Scheduling and Providing Instructions for Oral Argument) (Apr. 1, 2015) at 1 (unpublished).

³⁸ See Tr. at 10–12.

³⁹ See 10 C.F.R. § 2.309(f)(1)(v)–(vi).

⁴⁰ Bornemann Statement at 5 (citing LAR, attach. 2, app. D, Letters of Agreement, at 50); see generally Pub. Serv. Co. of N.H., et al. (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC

support the State will be unable to provide that is still required under 10 C.F.R. § 50.47(b)(3). Similarly, her assertion that the LAR lacks local response “Implementing Procedures and Support Plans” does not explain the significance of those implementation details.⁴¹ Without further explanation and support, her allegations do not genuinely dispute the LAR’s compliance with the regulations that remain in place notwithstanding approval of the exemption request.⁴²

The same is true of Vermont’s allegations concerning high burn-up fuel, which is fuel that has been in the core longer or at higher power levels.⁴³ Anthony Leshinskie, the State Nuclear Engineer and Decommissioning Coordinator, asserts that Entergy failed “to properly analyze the risks of an accident while transferring fuel from the spent fuel pool to dry casks.”⁴⁴ He further asserts that “this risk is heightened at Vermont Yankee because of the existence of high-burnup fuel at the site.”⁴⁵ But he has not disputed any specific portion of Entergy’s fuel handling accident analysis,⁴⁶ so this aspect of Contention 2 is likewise inadmissible for lack of a genuine dispute.⁴⁷

219, 232 (1990) (noting that arrangements for requesting and effectively using assistance resources should be “identified and supported by appropriate letters of agreement”).

⁴¹ See Bornemann Statement at 5 (citing LAR, attach. 2, app. E, Index of Emergency Plan Implementing Procedures and Support Plans, at 52–53).

⁴² 10 C.F.R. § 2.309(f)(1)(v)–(vi); see Seabrook, CLI-90-3, 31 NRC at 248 (upholding Board’s decision that lack of detail for sheltering option was not significant because size of sheltering population was very small).

⁴³ Office of Public Affairs, NRC, Backgrounder High Burnup Spent Fuel (Dec. 2013), available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/bg-high-burnup-spent-fuel.pdf>.

⁴⁴ Leshinskie Statement at 3.

⁴⁵ Id.

⁴⁶ LAR, attach. 1, at 3 (citing Letter from Christopher J. Wamser, Site Vice President, Entergy, to Document Control Desk, NRC (Nov. 14, 2013) (ADAMS Accession No. ML13323A516)).

⁴⁷ 10 C.F.R. § 2.309(f)(1)(vi); see Pac. Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 436–37 (2011).

III. ORDER

For the reasons stated, Vermont's hearing petition is denied and this adjudicatory proceeding is terminated.

An appeal of this Memorandum and Order may be filed within 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. 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/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

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Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 18, 2015

UNITED STATES OF AMERICA
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

I hereby certify that copies of the foregoing **LICENSING BOARD MEMORANDUM AND ORDER LBP-15-18 (Denying Hearing Request)** have been served upon the following persons by the Electronic Information Exchange.

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DOCKET NO. 50-271-LA-2

LICENSING BOARD MEMORANDUM AND ORDER LBP-15-18 (Denying Hearing Request)

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[Original signed by Brian Newell]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of May, 2015