

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	
In the Matter of:)	
ENTERGY NUCLEAR VERMONT)	Docket No. 50-271-LA-2
YANKEE, LLC and)	
ENTERGY NUCLEAR OPERATIONS, INC.)	July 7, 2015
)	
(Vermont Yankee Nuclear Power Station))	
_____)	

**ENTERGY’S ANSWER OPPOSING THE STATE OF VERMONT’S APPEAL OF THE
ATOMIC SAFETY AND LICENSING BOARD’S MAY 18, 2015 MEMORANDUM AND
ORDER DENYING PETITION FOR LEAVE TO INTERVENE AND HEARING
REQUEST**

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I. INTRODUCTION AND SUMMARY

In accordance with 10 C.F.R. § 2.311(b), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) submit this answer opposing the Appeal of the Atomic Safety and Licensing Board’s (“Board”) May 18, 2015 Memorandum and Order (LBP-15-18) filed by the State of Vermont (“State”).¹ The State seeks review of the Board’s decision in LBP-15-18² to deny the State’s February 9, 2015 Petition for Leave to Intervene and Hearing Request (“Petition”).³ The State’s Petition included two proposed

¹ The State of Vermont’s Notice of Appeal of Atomic Safety and Licensing Board’s May 18, 2015 Memorandum and Order Denying Petition for Leave to Intervene and Hearing Request (June 12, 2015), *available at* ADAMS Accession No. ML15163A333; The State of Vermont’s Brief in Support of Notice of Appeal of Atomic Safety and Licensing Board’s May 18, 2015 Memorandum and Order Denying Petition for Leave to Intervene and Hearing Request (June 12, 2015) (“Appeal”), *available at* ADAMS Accession No. ML15163A334.

² *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-15-18, 81 NRC ___, slip op. (May 18, 2015) (“LBP-15-18”).

³ State of Vermont’s Petition for Leave to Intervene, and Hearing Request (Feb. 9, 2015) (“Petition”), *available at* ADAMS Accession No. ML15040A726.

contentions related to Entergy’s June 12, 2014 license amendment request (“LAR”)⁴ for the Vermont Yankee Nuclear Power Station (“Vermont Yankee”) to revise the site emergency plan and Emergency Action Level (“EAL”) scheme to reflect the plant’s permanently defueled condition. The LAR referenced a separate Exemption Request filed by Entergy related to certain specified requirements in 10 C.F.R. §§ 50.47(b), 50.47(c)(2), and Part 50, Appendix E, which would allow the plant “to reduce emergency planning requirements and subsequently revise” the Vermont Yankee emergency plan.⁵ Contention 1 alleged that Entergy’s LAR was not ready for review because the Exemption Request “has not been ruled upon by the Nuclear Regulatory Commission and/or Atomic Safety and Licensing Board.”⁶ Contention 2 alleged certain deficiencies in the LAR, “if approved along with the predicate requested exemptions”⁷

For the reasons discussed below, the State’s Appeal fails to demonstrate that the Board committed an error of law or abused its discretion in rejecting the State’s proposed contentions. First, as the Commission has already approved the Staff’s recommendation to issue the requested exemptions, the Board did not err in ruling that Contention 1 is moot. Second, the Board did not err by limiting the State’s hearing rights to the LAR and not expanding them to include the separate Exemption Request. The Board’s actions were fully consistent with Commission precedent governing the scope of this proceeding. Third, contrary to the State’s claims, the Board did not err in rejecting Contention 2 for failing to demonstrate a genuine dispute with the LAR. Further, the State’s re-characterization of its arguments in Contention 2 as claims of omission

⁴ BVY 14-033, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme (June 12, 2014) (“LAR”), *available at* ADAMS Accession No. ML14168A302.

⁵ BVY 14-009, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Request for Exemptions from Portions of 10 CFR 50.47 and 10 CFR 50, Appendix E (Mar. 14, 2014) (“Exemption Request”), *available at* ADAMS Accession No. ML14080A141.

⁶ Petition at 3.

⁷ *Id.* at 6.

should be rejected as untimely. Nonetheless, the State fails to identify any regulatory requirements for any alleged omitted information. Finally, even if the State could show that the Board erred or abused its discretion in LBP-15-18—which it cannot—Contention 2 should be rejected for failure to satisfy other contention admissibility requirements. Accordingly, the Commission should deny the Appeal and affirm the well-reasoned decision by the Board in LBP-15-18 to reject the State’s Petition.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Entergy’s Exemption Request and LAR

By letter dated September 23, 2013, Entergy informed the NRC that Vermont Yankee would permanently cease operations at the end of its current operating cycle, which was expected to occur in the fourth quarter of 2014.⁸ Consistent with the anticipated permanently defueled condition of the plant, on March 14, 2014, Entergy filed the Exemption Request.⁹

The basis for the Exemption Request is that the application of certain regulations to Vermont Yankee, once shutdown and permanently defueled for a sufficient period of time, would no longer be necessary to ensure adequate emergency response capability, and therefore, to protect the public health and safety.¹⁰ Consistent with NRC guidance in Draft NSIR/DPR-ISG-02, Interim Staff Guidance, “Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants” (“Draft ISG”),¹¹ the Exemption Request included a detailed evaluation of the potential consequences of design basis and beyond design basis events

⁸ BVY 13-079, Letter from M. Perito, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Sept. 23, 2013), *available at* ADAMS Accession No. ML13273A204.

⁹ *See* Exemption Request at 1.

¹⁰ *See id.* Absent the exemption, there would also be an unnecessary burden on Entergy and on the Vermont Yankee Decommissioning Trust Fund. *See id.*

¹¹ Draft Interim Staff Guidance (ISG) NSIR/DPR-ISG-02, Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants (“Draft ISG”), *available at* ADAMS Accession No. ML13304B442; *see* Exemption Request, Attach. 1 at 1.

for the permanently shutdown and defueled condition. The evaluation demonstrated that, after a certain period following shutdown, there is no credible accident scenario that will result in radiological releases requiring offsite protective action.¹² Specifically, Entergy's evaluation of a beyond-design basis event conservatively established that the time for the hottest Vermont Yankee fuel assembly to reach the applicable NRC criterion of 900 °C in an adiabatic heatup scenario will be ten hours at 15.4 months after shutdown; this is predicted to occur in mid-April, 2016.¹³ Accordingly, Entergy requested that the exemptions be approved with an effective date of April 15, 2016.¹⁴ On November 14, 2014, the NRC Staff issued SECY-14-0125, recommending that the Commission approve the issuance of the requested exemptions.¹⁵ On March 2, 2015, the Commission approved issuance of the exemptions, as recommended by the Staff.¹⁶

Separately, on June 12, 2014, Entergy submitted the LAR, seeking NRC approval to revise the Vermont Yankee site emergency plan and EAL scheme to reflect the plant's permanently defueled condition. The LAR is predicated on approval of the Exemption Request, meaning that the NRC must first issue the requested exemptions before the LAR can be approved. Accordingly, the LAR provides background on the accident analyses presented in the Exemption Request and other technical issues related to the safety of the spent fuel pool ("SFP")

¹² See Exemption Request, Attach. 1 at 41-44.

¹³ See Exemption Request at 2; *id.*, Attach. 1 at 41-44; *see also id.*, Attach. 2, Sargent & Lundy, Vermont Yankee Maximum Cladding Temperature Analysis for an Uncovered Spent Fuel Pool with no Air Cooling (Dec. 11, 2013). Adiabatic heatup refers to the conservative assumption that there is zero heat transfer from the uncovered fuel.

¹⁴ See Exemption Request at 2.

¹⁵ SECY-14-0125, Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements (Nov. 14, 2014) ("SECY-14-0125"), *available at* ADAMS Accession No. ML14227A711.

¹⁶ See SRM-SECY-14-0125 – Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements (Mar. 2, 2015) ("SRM-SECY-14-0125"), *available at* ADAMS Accession No. ML15061A516.

during the decommissioning period,¹⁷ and presents the permanently defueled emergency plan (“PDEP”) and revised EAL scheme for NRC review and approval.¹⁸

Entergy developed the PDEP based on the Draft ISG, Attachment 1, “Guidance for Evaluation of Decommissioning Emergency Plans.”¹⁹ The permanently defueled EAL scheme is also consistent with the NRC-approved guidance in Nuclear Energy Institute (“NEI”) 99-01.²⁰ The NRC accepted the LAR for docketing, and issued the Hearing Notice on December 9, 2014.²¹ Entergy’s submission of a separate Exemption Request and LAR is consistent with standard, Commission-endorsed practice for decommissioning plants.²²

On December 29, 2014, Vermont Yankee permanently ceased power operations, and the fuel has been permanently removed from the Vermont Yankee reactor vessel and placed in the SFP.²³

¹⁷ See LAR, Attach. 1 at 3-6.

¹⁸ See *id.* at 8.

¹⁹ See *id.* at 6. The NRC Staff has since finalized its ISG. See Interim Staff Guidance NSIR/DPR-ISG-02, Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants (May 11, 2015), available at ADAMS Accession No. ML14106A057.

²⁰ NEI 99-01, Rev. 6, Development of Emergency Action Levels for Non-Passive Reactors (Nov. 2012), available at ADAMS Accession No. ML12326A805. The NRC endorsed NEI-99-01 in 2013. See Letter from M. Thaggard, Acting Director, Division of Preparedness and Response, NRC, to S. Perkins-Grew, Director, Emergency Preparedness, NEI, U.S. Nuclear Regulatory Commission Review and Endorsement of NEI-99-01, Revision 6, Dated November, 2012 (Mar. 28, 2013), available at ADAMS Accession No. ML12346A463.

²¹ See Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 73,106, 73,108-109 (Dec. 9, 2014) (“Hearing Notice”).

²² See, e.g., Letter from Chairman Macfarlane to Senator Markey, *et al.* at 1 (June 26, 2014) (“Macfarlane Letter to Markey”), available at ADAMS Accession No. ML14147A108 (“The practice of considering exemptions [for decommissioning plants from emergency planning and security requirements] . . . is a well-established part of the NRC’s regulatory process . . .”).

²³ BVY-15-001, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel (Jan. 12, 2015), available at ADAMS Accession No. ML15013A426.

B. The State's Petition

On February 9, 2015, the State filed the Petition and its attachments, proposing two contentions. Contention 1 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.²⁴

Contention 2 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 50.²⁵

Both Entergy and the NRC Staff filed answers on March 6, 2015 opposing the State's Petition.²⁶ Entergy argued that Contentions 1 and 2 are impermissible challenges to the NRC's regulations and regulatory process and improperly challenge the Exemption Request rather than the LAR, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).²⁷ Entergy further argued that Contention 1 is moot because the Commission had already approved the Staff's recommendation to issue the requested exemptions; the contentions allege no substantive reason why the LAR should be denied; and the contentions misinterpret or mischaracterize the LAR and other

²⁴ Petition at 3.

²⁵ *Id.* at 6.

²⁶ Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015), *available at* ADAMS Accession No. ML15065A300 ("Entergy Answer to Petition"); NRC Staff's Answer to State of Vermont's Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) ("Staff Answer to Petition"), *available at* ADAMS Accession No. ML15065A364. The State filed its reply on March 17, 2015. The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (Mar. 17, 2015), *available at* ADAMS Accession No. ML15076A546.

²⁷ *See* Entergy Answer to Petition at 3, 17-25.

technical documents referenced by the State, contrary to 10 C.F.R. §§ 2.309(f)(1)(ii), (v), and (vi).²⁸ The Board held oral argument on the State’s Petition on April 8, 2015.²⁹

C. Additional Developments Since the Filing of the State’s Petition

As noted above, on March 2, 2015, the Commission approved issuance of the exemptions requested by Entergy.³⁰ On March 12, 2015, while the Petition remained pending before the Board, the State requested that the Commission reconsider its approval.³¹ The State argued that the Commission’s approval of the Exemption Request “interferes with the State’s rights under the directly related [LAR] and was made without any apparent consideration of the State’s interests in the matter” and violates the National Environmental Policy Act (“NEPA”).³² Both Entergy and the Staff opposed the Reconsideration Request on both procedural and substantive grounds.³³ That request remains pending before the Commission.

On April 30, 2015, the NRC published its draft environmental assessment (“EA”) and finding of no significant impact (“FONSI”) for the Exemption Request.³⁴ The NRC also

²⁸ See *id.* at 3, 16-17, 25-37. The Staff similarly opposed the admissibility of the two contentions because the State challenged the Exemption Request rather than the LAR, and the contentions are unsupported, fail to raise genuine disputes with the LAR, raise issues beyond the scope of this proceeding, and are not material to the findings the NRC must make to grant the LAR. See Staff Answer to Petition at 1-2, 21-43.

²⁹ See Official Transcript of Proceedings, Atomic Safety and Licensing Board Panel Hearing, *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) (Apr. 8, 2015), available at ADAMS Accession No. ML15104A384.

³⁰ See SRM-SECY-14-0125.

³¹ State of Vermont’s Petition for Reconsideration of Commission Decision Approving Entergy’s Exemption Requests (Mar. 12, 2015) (“Reconsideration Request”), available at ADAMS Accession No. ML15071A485.

³² See *id.* at 1-9.

³³ See Entergy’s Answer Opposing State of Vermont’s Petition for Reconsideration of Commission Decision Approving Entergy’s Exemption Requests (Mar. 23, 2015) (“Entergy Answer to Reconsideration Request”), available at ADAMS Accession No. ML15082A393; NRC Staff Answer to Vermont Petition for Reconsideration of the Commission Decision Approving Entergy’s Exemption Requests (Mar. 23, 2015), available at ADAMS Accession No. ML15082A326.

³⁴ Draft Environmental Assessment and Finding of No Significant Impact; Request for Comment, 80 Fed. Reg. 24,291 (Apr. 30, 2015).

provided interested parties with an opportunity to submit comments on the draft EA and FONSI.³⁵ The State did so, submitting its comments on June 1, 2015.³⁶

On May 18, 2015, the Board issued LBP-15-18, denying the State’s Petition and ruling that proposed Contention 1 was moot and proposed Contention 2 failed to identify a genuine dispute with the LAR.³⁷ Given these rulings, the Board did not address several alternative objections asserted by Entergy and the NRC Staff. The State now appeals the Board’s ruling.

III. STANDARD OF REVIEW

An order denying a petition to intervene and/or request for hearing is appealable pursuant to 10 C.F.R. § 2.311. As required by Section 2.311(c), the Appeal must demonstrate that the “request and/or petition should have been granted.” The Commission reviews Board decisions on contention admissibility under a standard of “substantial deference.”³⁸ Indeed, the Commission “will disturb a licensing board’s contention admissibility ruling only if there has been an error of law or an abuse of discretion.”³⁹ Under the abuse of discretion review standard, “the appellant faces a substantial burden,” and it is not enough for the State to establish that the Board *could have* reached the same conclusion as the State.⁴⁰ Rather, the State must persuade

³⁵ *Id.* at 24,291.

³⁶ See Comments of the State of Vermont (June 1, 2015), available at ADAMS Accession No. ML15159A183.

³⁷ See LBP-15-18, slip op. at 6-9.

³⁸ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986)). The contention admissibility standards are set forth in 10 C.F.R. § 2.309(f)(1).

³⁹ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-7, 75 NRC 379, 386 (2012) (citing *Progress Energy Fla., Inc.* (Levy Cnty. Nuclear Power Plant, Units 1 & 2), CLI-10-2, 71 NRC 27, 29 (2010); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-11-9, 74 NRC 233, 237 (2011)).

⁴⁰ *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 715 (2006) (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 532 (1991), *aff’d in part and overruled in part*, CLI-91-13, 34 NRC 185 (1991)).

the Commission “that a reasonable mind could reach no other result.”⁴¹ When considering an appeal under 10 C.F.R. § 2.311 or a petition for review, the Commission may affirm a Board decision on any ground finding support in the record, whether or not relied on by the Board.⁴²

Moreover, the State “bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.”⁴³ In that regard, “[a] mere recitation of an appellant’s prior positions in a proceeding or a statement of his or her general disagreement with a decision’s result ‘is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.’”⁴⁴

IV. THE COMMISSION SHOULD DENY THE STATE’S APPEAL

As discussed in detail below, the State’s Appeal fails to demonstrate any abuse of discretion or error of law in the Board’s decision to reject the State’s contentions as moot or failing to satisfy the Commission’s contention admissibility standards in 10 C.F.R. § 2.309. Contention 2 also failed to meet several other admissibility criteria. Therefore, the Commission should deny the Appeal and affirm LBP-15-18.

⁴¹ *Id.* (quoting *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983)).

⁴² *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision) (citing federal court precedent).

⁴³ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-06, 39 NRC 285, 297 (1994)).

⁴⁴ *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993) (quoting *Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-91-5, 33 NRC 238, 240-41 (1991)).

A. The State Has Failed to Demonstrate that the Board Committed an Error of Law or Abused Its Discretion in Denying the Petition

1. The Board Did Not Err in Concluding that Contention 1 Is Moot

The State submitted Contention 1 on February 9, 2015, claiming that the LAR is not ready for review, because the Exemption Request “has not been ruled upon by the [NRC] and/or the [Board].”⁴⁵ As explained by the Board, however, the Commission approved the Exemption Request on March 2, 2015.⁴⁶ Therefore, the Board succinctly ruled that “[b]ecause the Commission has now approved the pertinent regulatory exemptions, this contention is moot.”⁴⁷

The State asserts that “[t]his analysis is deficient at best and no analysis at all at worst, but it certainly violates the [Atomic Energy Act (“AEA”)] and [Administrative Procedure Act (“APA”)].”⁴⁸ The State fails, however, to identify any requirement within the AEA or APA that requires a more detailed analysis of Contention 1. Furthermore, the Board’s level of analysis is consistent with the simplicity of this issue. Contention 1 is solely based on the lack of NRC approval of the Exemption Request, but the Commission subsequently approved issuance of the requested exemptions. Therefore, Contention 1 is moot. The Commission imposed no conditions on that approval—it approved the exemptions as requested by Entergy and as recommended by the NRC Staff.⁴⁹ Thus, the Board did not err in ruling Contention 1 moot.

⁴⁵ Petition at 3.

⁴⁶ LBP-15-18, slip op. at 3 (citing Commission Voting Record, Request by Entergy Nuclear Operations, Inc. for Exemptions from Certain Emergency Planning Requirements, SECY-14-0125 (Mar. 2, 2015), *available at* ADAMS Accession No. ML15062A135); *see also* SRM-SECY-14-0125.

⁴⁷ LBP-15-18, slip op. at 7.

⁴⁸ Appeal at 7.

⁴⁹ *See* SRM-SECY-14-0125.

The State also argues that the Board erred because the Commission has not yet ruled on the State’s pending request to reconsider approval of the exemptions and the Board did not consider all of the possible outcomes of that request.⁵⁰ To the contrary, the Board had no obligation, and the State has not identified any, to await resolution of the Reconsideration Request or predict potential outcomes prior to ruling on Contention 1. Indeed, the State’s request did not seek reconsideration of any action within the scope of this proceeding or within the Board’s jurisdiction.⁵¹

The Board also did not err in concluding that “[e]ven if the Commission were to grant reconsideration, this contention would remain moot because the Commission would have yet again addressed the exemptions.”⁵² In this regard, if the Commission rejects the Reconsideration Request, then Contention 1 certainly would remain moot. But even if the Commission were to deny the Exemption Request upon reconsideration, as hypothesized by the State, Contention 1 would again remain moot, because it alleges that the Exemption Request “has not been ruled upon.”⁵³ Furthermore, if the Commission were to “rule that the exemption request should be included for review as part of a related LAR proceeding,”⁵⁴ another possibility suggested by the State, then Contention 1 would still be moot. Under those circumstances, the State could no longer claim that the LAR is not ready for review (as it does in Contention 1), because the Commission would have directed that the LAR and Exemption

⁵⁰ Appeal at 7-9.

⁵¹ Entergy also explained in its response to the Reconsideration Request that the Request is procedurally defective because it seeks reconsideration of an issue that is not subject to an adjudicatory proceeding and it does not address, much less satisfy, the reconsideration standard in the NRC regulations. *See* Entergy Answer to Reconsideration Request at 2-5.

⁵² LBP-15-18, slip op. at 7 n.30.

⁵³ Petition at 3.

⁵⁴ Appeal at 8.

Request be considered together. Thus, even under all of the “possible outcomes”⁵⁵ posited by the State, Contention 1 would remain moot.

Finally, the State’s claim that the Board should have awaited a Commission decision on the Reconsideration Request runs counter to the Commission’s long-standing commitment to efficient and expeditious processing of applications and associated hearings.⁵⁶ The unnecessary postponement of licensing adjudications and decisions “contravenes the Commission’s interest in ‘regulatory finality’ and ‘sound case management.’”⁵⁷

For these reasons, the Board did not err in ruling that Contention 1 is moot. Therefore, the Commission should uphold the rejection of Contention 1.

2. The Board Did Not Err by Limiting the State’s Hearing Rights to the LAR

In LBP-15-18, the Board correctly explained that petitioners cannot seek hearings on exemption requests, except under limited exceptions.⁵⁸ Nonetheless, the Board concluded that “as a practical matter,” the Board need not test the boundaries of this case law, because “the Commission itself has already reviewed and approved the requested exemptions.”⁵⁹

Therefore, the Board explained its role as limited to determining whether the State had submitted admissible contentions related to whether “Entergy’s LAR is consistent with NRC’s regulations as exempted.”⁶⁰

⁵⁵ *Id.* at 6.

⁵⁶ *See, e.g., Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 18, 24 (1998).

⁵⁷ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390-91 (2001) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 24); *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001)). In addition, under 10 C.F.R. § 2.309(j), the Board was required to issue a ruling within 45 days of the pre-hearing conference, or issue a notice advising the Commission and the parties of the expected date of a decision.

⁵⁸ LBP-15-18, slip op. at 4-5.

⁵⁹ *Id.* at 5 (emphasis in original).

⁶⁰ *Id.* at 6 (emphasis in original).

The State claims that the Board erred by misinterpreting applicable NRC precedent.⁶¹ The State first claims that “[t]he Commission’s disposition [of] the exemption request itself does not affect the NRC’s established test to determine whether a hearing right is triggered.”⁶² The State is incorrect. The Commission’s approval of the Exemption Request has a direct impact on the question of whether there is a hearing opportunity on the Exemption Request tied to the LAR. The Commission did not place any limitations on its approval of the Exemption Request, such as conditioning its approval subject to providing an opportunity to request a related hearing. Therefore, the Board had no authority to rule that a hearing right exists *after* the Commission had approved issuance of the exemptions.

Even if NRC precedent governing requests for hearings on exemptions is considered, the current circumstances still would not result in hearing rights on the Exemption Request. The State claims that the Exemption Request is necessary for Entergy to amend its license, and that this by itself triggers a hearing opportunity.⁶³ The State’s interpretation of the precedent on this issue is oversimplified and incorrect.

As a general matter, under the AEA and NRC regulations and precedent, there is no right to an adjudicatory hearing on an exemption request.⁶⁴ The Commission applied this statutory restriction in a decision involving the Zion plant, in which the Commission denied petitions to intervene challenging an exemption from physical security-related regulations to reflect the

⁶¹ See Appeal at 9-12.

⁶² *Id.* at 9.

⁶³ See *id.* at 9-12.

⁶⁴ See 42 U.S.C. § 2239(a)(1)(A) (limiting NRC adjudicatory proceedings and hearings to “the granting, suspending, revoking, or amending of any license”); see also 10 C.F.R. § 2.1(a) (limiting the scope of 10 C.F.R. Part 2 to proceedings involving “[g]ranting, suspending, revoking, amending, or taking other action with respect to any license . . .” and specified other proceedings, but not the review of exemptions from regulations); *Kelley v. Selin*, 42 F.3d 1501, 1517 (6th Cir. 1995) (“[T]he grant of an exemption from a generic requirement does not constitute an amendment to the reactor’s license that would trigger hearing rights.”).

permanently shutdown status of the plant.⁶⁵ The Commission held that the exemption request was not effectively an amendment of the facility's license and that "there is no right to request a hearing in this case because the action involves an exemption from NRC regulations and not one of those actions for which section 189a. of the AEA provides a right to request a hearing."⁶⁶

The Commission's legal authority to distinguish between exemptions and licensing proceedings is well settled, and subject to only very limited, discretionary exceptions. For example, in the *PFS* Independent Spent Fuel Storage Installation ("ISFSI") proceeding referenced by the State, the Commission chose, in its discretion, to allow a hearing to be held on a challenge to an exemption request when the applicant sought the exemption in the midst of an ongoing, contested initial licensing proceeding.⁶⁷ That situation, however, is distinct from the circumstances surrounding the Vermont Yankee Exemption Request.

First, in *PFS*, the applicant sought a unique exemption on its own initiative during the course of a contested initial licensing proceeding.⁶⁸ As the Commission explained, "PFS is in the midst of a licensing proceeding; it is asking to be excused from otherwise applicable . . . regulations In this context, PFS's 'exemption' cannot remove a matter germane to a licensing proceeding from consideration in a hearing"⁶⁹ Here, as the Board explained, the Commission has already reviewed and approved the Exemption Request, following an

⁶⁵ See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-05, 51 NRC 90 (2000).

⁶⁶ *Id.* at 98; see also *id.* at 96-97.

⁶⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001) ("*PFS*"). There can be a right to a hearing on an exemption request filed *as part of* a license amendment request. See *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013) (finding that "[a]n exemption standing alone does not give rise to an opportunity for hearing under [NRC] rules," but also noting that "when a licensee *requests an exemption in a related license amendment application*, [the Commission will] consider the hearing rights on the amendment application to encompass the exemption request as well.") (citations omitted) (emphasis added). But Entergy submitted its Exemption Request first and subsequently filed a separate LAR, so the *Honeywell* decision is inapplicable.

⁶⁸ See *PFS*, CLI-01-12, 53 NRC at 467.

⁶⁹ *Id.*

established process and practice.⁷⁰ Unlike PFS, Entergy did not file its Exemption Request in the midst of the LAR proceeding to remove a matter germane to the proceeding from consideration in a hearing. It is the Commission—not the licensee or applicant, as in *PFS*—who has established a distinction between the emergency planning exemption and license amendment reviews for plants undergoing decommissioning, through its longstanding practice and precedent of reviewing and approving requests for exemption from emergency planning regulations for permanently shut-down and defueled plants, including its decision on the Vermont Yankee Exemption Request.⁷¹ In this regard, the Board rationally stated that it did not believe that the Commission would want the Board to hold an evidentiary hearing on the “wisdom of the Commission’s decisions.”⁷²

Second, the *PFS* decision involved the initial licensing of a proposed ISFSI, not the decommissioning of an already-licensed facility. The *Zion* decision, discussed above, involved a challenge to an exemption request regarding security regulations filed by the licensee of a plant undergoing decommissioning. In *PFS*, the Commission distinguished its decision in *Zion* on that basis, holding that “PFS is not an already-licensed facility asking for relief from performing a duty imposed by NRC regulations. Under *Zion* . . . , exemptions of that kind ordinarily do not

⁷⁰ See LBP-15-18, slip op. at 5 (citing *PFS*, CLI-01-12, 53 NRC at 463); see also, e.g., Macfarlane Letter to Markey at 1 (“The practice of considering exemptions [for decommissioning plants from emergency planning and security requirements] . . . is a well-established part of the NRC’s regulatory process . . .”).

⁷¹ In this respect, this proceeding is more akin to decisions in the *Prairie Island* and *Palisades* license renewal proceedings, rejecting proposed contentions that alleged a connection between a license renewal proceeding and later potential expansions of the ISFSI to accommodate spent fuel generated during the additional years of operation. In these cases, it was the Commission that established the distinction between the two licensing actions, not the applicant. See *N. States Power Co. (formerly Nuclear Mgmt. Co., LLC)* (Prairie Island Nuclear Generating Plant, Units 1 & 2), LBP-08-26, 68 NRC 905, 922-23 (2008) (rejecting a contention alleging a connection between the proposed license renewal and a later potential expansion of the ISFSI to accommodate additional spent fuel, because the ISFSI expansion was “a separate project, subject to a separate proceeding”); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 733 (2006) (“The current proceeding concerns the renewal of the reactor operating license pursuant to 10 C.F.R. Parts 51 and 54, and not the ISFSI, which is licensed pursuant to 10 C.F.R. Part 72.”).

⁷² LBP-15-18, slip op. at 5.

trigger hearing rights.”⁷³ Accordingly, the present circumstances are more analogous to the *Zion* decision than to *PFS*.⁷⁴ Thus, as in *Zion*, there is no hearing right for an exemption request unless the exemption is, in effect, an amendment to the license.⁷⁵ Here, the Exemption Request would clearly not amend the Vermont Yankee license. On the contrary, Entergy has submitted a separate request to obtain approval of changes to the emergency plan and EAL scheme through license amendment.

For these reasons, the Board did not abuse its discretion or err by limiting the State’s hearing rights to the LAR. Therefore, the Commission should uphold the rejection of Contentions 1 and 2.

3. The Board Did Not Err in Rejecting Contention 2 for Failing to Demonstrate a Genuine Dispute with the LAR

In LBP-15-18, the Board ruled that “[n]either 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.”⁷⁶ As examples, the Board concluded that statements about an out-of-date Letter of Agreement with the State, lack of implementing procedures, high burn-up fuel, and a fuel handling accident analysis did not provide adequate explanation and support and did not genuinely dispute Entergy’s LAR.⁷⁷

⁷³ *PFS*, CLI-01-12, 53 NRC at 467 (citing *Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1st Cir. 1989) and *Zion*, CLI-00-05, 51 NRC at 99).

⁷⁴ *Zion*, CLI-00-05, 51 NRC at 96.

⁷⁵ *See id.* at 96-98.

⁷⁶ LBP-15-18, slip op. at 8.

⁷⁷ *See id.* at 8-9.

The State claims that the Board erred in finding that Contention 2 failed to raise a genuine dispute with the LAR.⁷⁸ In particular, it claims that it satisfied the contention admissibility requirements with respect to its arguments about the need for implementing procedures and the analysis of a number of credible hostile action scenarios.⁷⁹ The State primarily argues that it was not able to identify specific sections of the LAR that it disputes, because these were claims of omission from the LAR.⁸⁰

As an initial matter, the State's claims of omission should be rejected as untimely, given that the State raises those claims for the first time on appeal.⁸¹ Although the State's Appeal repeatedly refers to its arguments as those claiming an "omission" from the LAR, the State never referred to its arguments as "omissions" in the Petition or supporting declarations. Similarly, neither the Board in LBP-15-18 nor the other participants interpreted the State's arguments as those of "omission." This belated attempt by the State to re-characterize its earlier arguments should be rejected.

Furthermore, the State's new claims of omission fail because the State has not identified any legal requirements for the allegedly omitted information, and thus has not identified an error by the Board. Section 2.309(f)(1)(vi) states that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief" must be provided. The State has entirely failed to meet its burden in this regard.

With respect to the purported need for implementing procedures, the Board concluded that the State and its witness, Ms. Erica Bornemann, did not explain the significance of the

⁷⁸ See Appeal at 12-18.

⁷⁹ See *id.* at 12-13.

⁸⁰ See *generally id.* at 12-17.

⁸¹ See, e.g., *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 348 (1978) (noting that issues raised for the first time on appeal will ordinarily not be entertained).

implementing details in those procedures, and therefore did not genuinely dispute the LAR's compliance with NRC regulations.⁸² Although the State claims that the implementing procedures are necessary for it to "effectively execute its own Radiological Emergency Response Plan in harmony with the VY Emergency Plan in the event of an emergency," it does not identify any regulatory requirement for submitting any implementing procedures to the NRC with the LAR or as a prerequisite for obtaining approval of the LAR.⁸³ Nor do any such requirements exist.⁸⁴

In this regard, neither Ms. Bornemann nor the State have asserted that these implementing procedures are necessary for the NRC to evaluate the adequacy of the LAR against the regulations in 10 C.F.R. §§ 50.47(b), 50.47(c)(2), and Part 50, Appendix E, as exempted. Instead, their claims are general, theoretical concerns related to the State's implementation activities in support of the Vermont Yankee emergency plan. Such concerns raise no dispute over Entergy's compliance with the regulations, as exempted.⁸⁵ Entergy will review and revise any applicable procedures as part of its normal process to implement approved license amendments, and provide such procedures to the State and local agencies as appropriate. Thus, the Board correctly concluded that the availability of these procedures fails to raise a material issue regarding the LAR.

The State's second argument on its genuine dispute claim is that the Board erred in finding that the State's expert, Mr. Anthony Leshinskie, did not "dispute any specific portion

⁸² LBP-15-18, slip op. at 9.

⁸³ Appeal at 15-16.

⁸⁴ Indeed, it would be impractical for Entergy to finalize revised implementing procedures before the NRC's review of the LAR is complete and the final license amendment is issued.

⁸⁵ Again, while the State cites concerns about its ability "to effectively execute its own Radiological Emergency Response Plan," Appeal at 15, the requested exemptions would eliminate the NRC's requirements for formal offsite emergency plans at Vermont Yankee. *See* LBP-15-18, slip op. at 3; SECY-14-0125 at 1.

of Entergy's fuel handling accident analyses."⁸⁶ Here, the Board correctly concluded that the State and its expert failed to genuinely dispute any specific portion of Entergy's fuel handling accident analysis.⁸⁷ Although the State claims that this was unnecessary, because it was raising omission concerns,⁸⁸ the State once again has not identified an omission or a regulatory requirement for the omitted information.

As an initial matter, the State failed to raise a genuine dispute because there is no requirement for the LAR to provide an accident analysis, and the State has identified no such requirement. First, Entergy submitted and the NRC evaluated the consequences of a spent fuel-related accident as part of the Exemption Request, not the LAR.⁸⁹ The NRC documented its review of that accident analysis in SECY-14-0125. Accordingly, as the Board properly held, the question for the LAR is whether it is consistent with the NRC's regulations, as exempted, not whether the accident analysis in the Exemption Request or the evaluation in SECY-14-0125 was correct.⁹⁰

Importantly, as previously noted, the accident analysis in the Exemption Request was for a beyond-design basis, adiabatic heatup event (*i.e.*, the postulated heatup of uncovered fuel under assumed conditions of zero heat transfer).⁹¹ A fuel handling accident, however, is addressed separately as part of the Vermont Yankee design basis, and is therefore not subject to challenge in this proceeding.⁹² In fact, the NRC recently approved a license amendment

⁸⁶ See Appeal at 16-17.

⁸⁷ LBP-15-18, slip op. at 9.

⁸⁸ See Appeal at 16.

⁸⁹ See LAR, Attach. 1 at 4-5 (summarizing the analysis in the Exemption Request).

⁹⁰ See LBP-15-18, slip op. at 6.

⁹¹ See Exemption Request at 2.

⁹² See Hearing Notice, 79 Fed. Reg. at 73,107 ("Contentions shall be limited to matters within the scope of the amendment under consideration."); *Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2)*, LBP-82-88, 16 NRC 1335, 1342 (1982) (holding that a challenge to previously-approved design basis is inadmissible in a license amendment proceeding).

request revising the Vermont Yankee design basis fuel handling accident analysis.⁹³ The State may not challenge that approval here.⁹⁴

Moreover, even if a critique of the accident analyses in the recently-approved license amendment or the Exemption Request were somehow within the scope of this proceeding, to raise a genuine dispute on a material issue of law or fact, a petitioner must “read the pertinent portions of the license application . . . state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant.⁹⁵ Contrary to the State’s assertions, the accident analysis in the Exemption Request did consider high-burnup fuel,⁹⁶ as did the evaluation in the recently-approved fuel handling accident license amendment.⁹⁷ Mr. Leshinskie and the State ignore these facts rather than challenge them. Accordingly, Mr. Leshinskie’s claims regarding the purported failure to consider high-burnup fuel in Entergy’s accident analyses fail to raise a genuine dispute on a material issue of law or fact, as the Board correctly concluded.

For these reasons, the Board did not err in rejecting Contention 2 for failing to demonstrate a genuine dispute with the LAR. Therefore, the Commission should uphold the rejection of Contention 2.

⁹³ See Entergy Answer to Petition at 33 (citing Vermont Yankee Nuclear Power Station – Issuance of Amendment to Renewed Facility Operating License re: Eliminate Operability Requirements for Secondary Containment when Handling Sufficiently Decayed Irradiated Fuel or a Fuel Cask, Encl. 2, Safety Evaluation at 3, 6 (Feb. 12, 2015), available at ADAMS Accession No. ML14304A588; BVY 14-036, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Technical Specifications Proposed Change No. 306 Eliminate Certain ESF Requirements during Movement of Irradiated Fuel – Supplement 1 (TAC MF3068) (June 9, 2014) (explaining fuel burnup assumptions in accident analysis), available at ADAMS Accession No. ML14163A008)).

⁹⁴ See Hearing Notice, 79 Fed. Reg. at 73,107 (“Contentions shall be limited to matters within the scope of the amendment under consideration.”).

⁹⁵ Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

⁹⁶ See Exemption Request, Attach. 2 at 5-6 (discussing GNF2 and GE14 fuel).

⁹⁷ See Entergy Answer to Petition at 33.

B. The Commission Should Affirm the Board’s Decision to Reject Contention 2 Based on Additional Reasons Set Forth in the Record

As Entergy and the NRC Staff argued before the Board, Contention 2 fails to satisfy several other admissibility criteria. While the Board did not need to consider these alternative grounds, given its rejection of the contention for other, valid reasons, they provide an independent basis for the Commission to affirm LBP-15-18.⁹⁸

Specifically, Contention 2 failed to raise any material challenges to the LAR, contrary to 10 C.F.R. § 2.309(f)(1)(iv) and/or (vi).⁹⁹ The LAR proceeding involves an evaluation of whether the new proposed emergency plans and EAL scheme comply with the regulations, as exempted. In the limited areas in Contention 2 and its supporting declarations in which the State actually discusses the LAR, it does not assert, much less support, any material challenge. Some examples of these deficiencies include:

- Claims that the LAR must meet *all* Appendix E requirements, including those that would be made inapplicable to Vermont Yankee by the Exemption Request, fail to raise a genuine dispute.¹⁰⁰
- Challenges to the question of whether a license amendment involves no significant hazards consideration are outside scope and not material.¹⁰¹ 10 C.F.R. § 50.58(b)(6) states that “[n]o petition or other request for review of or hearing on the Staff’s significant hazards consideration determination will be entertained by the Commission.”

Further, Entergy identified numerous other topics proffered as part of Contention 2 that are unsupported and fail to raise a genuine dispute under 10 C.F.R. § 2.309(f)(1)(v) and (vi).¹⁰²

Some of those topics include: SFP fires in general; aircraft crashes/malevolent acts; treatment of

⁹⁸ See, e.g., *Private Fuel Storage*, CLI-05-1, 61 NRC at 166 (noting that when it is acting as an appellate body, the Commission is free to affirm a Board decision on any ground finding support in the record, whether previously relied on or not).

⁹⁹ See Entergy Answer to Petition at 25-28.

¹⁰⁰ See *id.* at 25 (citing Petition at 9).

¹⁰¹ See *id.* at 27-28 (citing Leshinskie Declaration at 5).

¹⁰² See *id.*

Vermont Yankee as if it were an ISFSI or monitored retrievable storage facility; sufficiency of notification procedures, public health consequences, and whether guidance used in developing the LAR is up to date. Even assuming that these issues are within the scope of the LAR, the State has not provided the requisite support or identified a genuine dispute with the LAR, as thoroughly demonstrated in the Entergy Answer to Petition.¹⁰³

. . . .

Accordingly, the Board could have found Contention 2 inadmissible for these additional reasons. These additional reasons provide an independent basis for upholding the Board's decision in LBP-15-18 to reject Contention 2.

¹⁰³ *See id.*

V. CONCLUSION

For the reasons discussed above, the State's Appeal fails to show that the Board erred as a matter of law or abused its discretion in denying the State's Petition in LBP-15-18. The State certainly has not shown "that a reasonable mind could reach no other result" than that argued in the Appeal.¹⁰⁴ Additionally, there are several other grounds that support affirmation of the Board's decision to reject Contention 2. Accordingly, the Commission should deny the Appeal and affirm the decision by the Board in LBP-15-18.

Respectfully submitted,

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Dated in Washington, D.C.
this 7th day of July 2015

¹⁰⁴ *Siemaszko*, CLI-06-16, 63 NRC at 715.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
)	
ENTERGY NUCLEAR VERMONT)	Docket No. 50-271-LA-2
YANKEE, LLC and)	
ENTERGY NUCLEAR OPERATIONS, INC.)	July 7, 2015
)	
(Vermont Yankee Nuclear Power Station))	
)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of “Entergy’s Answer Opposing the State of Vermont’s Appeal of the Atomic Safety and Licensing Board’s May 18, 2015 Memorandum and Order Denying Petition for Leave to Intervene and Hearing Request” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Raphael P. Kuyler

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