UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN OPPOSITION TO THE STATE OF VERMONT'S APPEAL OF LBP-15-18

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July 7, 2015

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this brief in opposition to the appeal filed by the State of Vermont, through the Vermont Department of Public Service (Vermont),[1] of the Atomic Safety and Licensing Board's (Board's) Memorandum and Order LBP-15-18.[2]

In LBP-15-18, the Board denied Vermont's petition to intervene and request for hearing on a license amendment request (LAR) filed by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, Entergy or the licensee). In the LAR, Entergy sought to amend the operating license for the Vermont Yankee Nuclear Power Station (Vermont Yankee or VY) to change the VY emergency plan and emergency action level (EAL) scheme[3] to

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[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) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15163A333) (Notice of Appeal); 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) (ADAMS Accession No. ML15163A334) (Appeal).

[2] *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-18, 81 NRC __ (May 18, 2015) (slip op.).

[3] An EAL is defined as "[a] pre-determined, site-specific, observable threshold for an Initiating Condition that, when met or exceeded, places the plant in a given emergency classification level." Nuclear Energy Institute (NEI) 99-01, Rev. 6, *Development of Emergency Action Levels for Non-Passive Reactors*, at 7 (Nov. 2012) (ADAMS Accession No. ML12326A805) (NEI 99-01, Rev. 6).

a permanently defueled emergency plan (PDEP) and a permanently defueled EAL scheme, respectively.[4] The purpose of the LAR was to reduce the scope of offsite and onsite emergency planning at VY commensurate with the facility's permanently defueled condition and to conform the license to the Commission's regulations as they would apply if the NRC were to approve an exemption from portions of 10 C.F.R. § 50.47 and 10 C.F.R. Part 50, Appendix E, that Entergy had previously requested.[5] Vermont proffered two contentions on this LAR.[6] The Board found neither of the contentions admissible and denied the Hearing Request.[7] Vermont then filed this appeal of the Board decision before the Commission.

As explained below, none of Vermont's arguments on appeal demonstrate that the Board made an error of law or abused its discretion in denying Vermont's Hearing Request. Therefore, the Commission should deny Vermont's Appeal.

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[4] *See* 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, at 1-2 (June 12, 2014) (ADAMS Accession No. ML14168A302) (LAR).

[5] *Id*. at Attachment 1, p. 1 (citing 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) (Exemption Request)).

[6] *See* State of Vermont's Petition for Leave to Intervene, and Hearing Request (Feb. 9, 2015) (Hearing Request) (available in a single package at ADAMS Accession No. ML15040A723 along with: "Comments and Declarations of the Vermont Department of Public Service Regarding Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme License Amendment Request BVY 14-033" (Feb. 9, 2015) (Leshinskie Declaration); Anthony R. Leshinskie *curriculum vitae* (Leshinskie CV); "Comments and Declarations of the Vermont Division of Emergency Management and Homeland Security on BVY 14-033 Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme" (Feb. 9, 2015) (Bornemann Declaration); Erica M. Bornemann *curriculum vitae* (Bornemann CV); "Comments and Declarations of the Vermont Department of Health on Entergy Vermont Yankee's License Amendment Request for the Emergency Planning Zone in Letter BVY 14-033 dated June 12, 2014 and SECY-14-0125 Dated November 14, 2014" (Feb. 9, 2015) (Irwin Declaration); William E. Irwin *curriculum vitae* (Irwin CV)).

[7] *Vermont Yankee*, LBP-15-18, 81 NRC at __ (slip op. at 1).

BACKGROUND

Vermont Yankee is a boiling-water reactor located in the Town of Vernon, Windham County, Vermont.[8] On September 23, 2013, Entergy informed the NRC that it had decided to permanently cease operations at VY in approximately the fourth quarter of 2014.[9] On January 12, 2015, pursuant to 10 C.F.R. § 50.82(a)(1)(i) and (ii), Entergy certified that VY had permanently ceased operations and that fuel had been permanently removed from the VY reactor vessel and placed in the VY spent fuel pool (SFP).[10] Consequently, pursuant to 10 C.F.R. § 50.82(a)(2), the VY 10 C.F.R. Part 50 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel.

I. Emergency Planning at Permanently Shut Down and Defueled Facilities

The Commission's emergency planning (EP) regulations do not distinguish between operating facilities and permanently shut down and defueled facilities, such as VY.[11] However, the risk of an offsite radiological release is significantly lower and the types of possible accidents are significantly fewer at permanently shut down and defueled facilities than at operating facilities. This is because, for operating facilities, a large number of different event sequences make significant contributions to risk, but, for permanently shut down and defueled facilities, the most severe accident is a loss of SFP water inventory and the subsequent heatup of the spent

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[8] *See* Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Renewed Facility Operating License, Renewed Operating License No. DPR-28, at 2 (Mar. 21, 2011) (ADAMS Accession No. ML052720265).

[9] Letter from Michael Perito, Senior Vice President, Chief Operating Officer, Entergy, to the NRC, Notification of Permanent Cessation of Power Operations, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Sept. 23, 2013) (ADAMS Accession No. ML13273A204).

[10] Letter from Christopher J. Wamser, Site Vice President, Entergy, to the NRC Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan. 12, 2015) (ADAMS Accession No. ML15013A426).

[11] *See* 10 C.F.R. § 50.54(q)(2) (providing that a holder of an operating license "shall follow and maintain the effectiveness of an emergency plan that meets the requirements in appendix E to [10 C.F.R. Part 50] and . . . the planning standards of [10 C.F.R.] § 50.47(b).").

fuel stored therein to the point of rapid oxidation (*i.e.,* a zirconium fire).[12] The event sequences important to this risk are limited to large earthquakes and cask drop events.[13] Essentially, the risks for permanently shut down and defueled facilities with spent fuel in their SFPs are limited to the risks for SFPs,[14] which technical studies spanning from 1975 to 2014 have demonstrated to be very low.[15] Consequently, the Staff concluded that it can grant exemptions from certain of the Commission's EP requirements with an acceptably small change in risk for permanently shut down and defueled facilities so long as those facilities meet specific design and operational characteristics.[16]

Based on this technical foundation, the NRC has exempted permanently shut down and defueled facilities with spent fuel stored in their SFPs from certain EP regulations, allowing them to stop maintaining formal offsite radiological emergency plans and to reduce the scope of their

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[12] *See* NUREG-1738, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants*, at 3-1 (Feb. 2001) (ADAMS Accession No. ML010430066) (NUREG-1738). The purpose of NUREG-1738 was to "support development of a risk-informed technical basis for reviewing [EP] exemption requests [at decommissioning nuclear power plants] and a regulatory framework for integrated rulemaking." *Id*. at ix. *See also* SECY-00-0145, *Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning* (June 28, 2000) (ADAMS Accession No. ML003721626). This proposed rulemaking was later deferred in light of higher priority work after the terrorist attacks of September 11, 2001.

[13] NUREG-1738 at x.

[14] *See id*. at 1-1. *See also* SECY-99-168, *Improving Decommissioning Regulations for Nuclear Power Plants*, at 2 (June 30, 1999) (ADAMS Accession No. ML992800087); NEI 99-01, Rev. 6, at C-1.

[15] *See* NUREG-75/014, *Reactor Safety Study, An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants* (Oct. 1975) (ADAMS Accession No. ML070610293); NUREG-1353, *Regulatory Analysis for the Resolution of Generic Issue 82, "Beyond Design Basis Accidents in Spent Fuel Pools"* (Apr. 1989) (ADAMS Accession No. ML082330232); NUREG-1738; Sandia Report, MELCOR 1.8.5 Separate Effect Analyses of Spent Fuel Pool Assembly Accident Response (Jun. 2003) (Sandia Report) (ADAMS Accession No. ML062290362) (redacted); NUREG-2161, *Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor* (Sept. 2014) (ADAMS Accession No. ML14255A365); NUREG-2157, Vol. 1, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel* (Sept. 2014) (ADAMS Accession No. ML14196A105) (demonstrating that "the probability-weighted impacts, or risk, from a spent fuel pool fire for the short-term storage timeframe are SMALL because, while the consequences from a spent fuel pool fire could be significant and destabilizing, the probability of such an event is extremely remote.").

[16] NUREG-1738 at ix-x, 3-5 – 3-6, 4-12; NSIR/DPR-ISG-02, *Interim Staff Guidance; Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants* at 9-10, Table 1 (May 11, 2015) (ADAMS Accession No. ML14106A057).

onsite EP activities.[17] Historically, these exemptions have been granted after determining that the licensee has demonstrated through site-specific analyses reasonable assurance that: (1) for the design basis accidents (DBAs) at the permanently shut down and defueled facility, an offsite radiological release would not exceed the U.S. Environmental Protection Agency's (EPA's) Protective Action Guides (PAGs)[18] of 1 rem at the facility's exclusion area boundary (EAB); and (2) in the unlikely event of a beyond DBA resulting in a loss of all SFP cooling, there would be sufficient time (*i.e.,* at least ten hours) to initiate appropriate mitigating actions onsite and, if a

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[17] *See* Exemption, 58 Fed. Reg. 52,333, 52,333-34 (Oct. 7, 1993) (granting EP exemptions for the permanently shut down and defueled Trojan Nuclear Power Plant); Connecticut Yankee Atomic Power Company and Haddam Neck Plant; Exemption, 63 Fed. Reg. 47,331, 47,332 (Sept. 4, 1998) (granting EP exemptions for the permanently shut down and defueled Connecticut Yankee Nuclear Power Plant); Maine Yankee Atomic Power Company, Maine Yankee Atomic Power Station; Exemption, 63 Fed. Reg. 48,768, 48,770 (Sept. 11, 1998) (granting EP exemptions for the permanently shut down and defueled Maine Yankee Nuclear Power Plant); Consumers Energy Company; Big Rock Point Nuclear Plant; Exemption, 63 Fed. Reg. 53,940, 53,942-43. (Oct. 7, 1998) (granting EP exemptions for the permanently shut down and defueled Big Rock Point Nuclear Power Plant); Commonwealth Edison Company; (Zion Nuclear Power Station, Units 1 and 2); Exemption, 64 Fed. Reg. 48,856, 48,856-57 (Sept. 8, 1999) (granting EP exemptions for the permanently shut down and defueled Zion Nuclear Power Station); Dominion Energy Kewaunee, Inc.; Kewaunee Power Station, 79 Fed. Reg. 65,715 (Nov. 5, 2014) (granting EP exemptions for the permanently shut down and defueled Kewaunee Power Station); Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Station, 80 Fed. Reg. 19,358 (Apr. 10, 2015) (granting EP exemptions for the permanently shut down and defueled Crystal River Unit 3 Nuclear Generating Plant); Southern California Edison Company; San Onofre Nuclear Generating Station, Units 1, 2, and 3, and Independent Spent Fuel Storage Installation, 80 Fed. Reg. 33,558 (June 12, 2015) (granting EP exemptions for the permanently shut down and defueled San Onofre Nuclear Generating Station, Units 1, 2, and 3); SRM-SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements* (Mar. 2, 2015) (ADAMS Accession No. ML15061A516) (granting EP exemptions for the permanently shut down and defueled Vermont Yankee Nuclear Power Station).

[18] PAGs represent triggers which warrant pre-selected protective actions if the projected dose received by an individual in the absence of protective action exceeds the PAGs. NUREG-0396, *Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants*, at 3 (Dec. 1978) (ADAMS Accession No. ML051390356). The PAGs for radiological incidents begin at 1 rem. *See* U.S. EPA, PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents, at 7, Table 1-1 (Mar. 2013), *available at http://www.epa.gov/rpdweb00/docs/er/pag-manual-interim-public-comment-4-2-2013.pdf* (2013 PAG Manual). Offsite planning is not necessary if PAGs cannot be exceeded offsite. *See* NUREG-0396 at 5 ("The Task Force concluded that the objective of emergency response plans should be to provide dose savings for a spectrum of accidents that could produce offsite doses in excess of the PAGs."); Manual of Protective Action Guides and Protective Actions for Nuclear Incidents, at 2-3 (May 1992), *available at http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=00000173.txt* (1992 PAG Manual) ("However, since it will usually not be necessary to have offsite planning if PAGs cannot be exceeded offsite, [emergency planning zones (EPZs)] need not be established for such cases."); 2013 PAG Manual at 22 ("EPZs are not necessary at those facilities where it is not possible for PAGs to be exceeded off-site.").

release were projected to occur, to take actions offsite that are protective of the public health and safety through the use of a comprehensive emergency management plan (CEMP),[19] instead of a formal offsite radiological emergency preparedness plan.[20]

Once an EP exemption request is approved, the licensee may implement the Commission's EP regulations, as exempted, by changing its emergency plan and EAL scheme to a PDEP and permanently defueled EAL scheme, respectively.[21] The adequacy of a PDEP is determined using guidance and criteria developed by the NRC and the Federal Emergency Management Agency (FEMA)[22] as modified to reflect the exemptions from the Commission's EP regulations.[23] The adequacy of a permanently defueled EAL scheme is determined using the NRC-endorsed[24] guidance developed by the Nuclear Energy Institute (NEI).[25]

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[19] A CEMP, also referred to as an emergency operations plan (EOP), is addressed in the Federal Emergency Management Agency's (FEMA) Comprehensive Preparedness Guide (CPG) 101, Ver. 2, *Developing and Maintaining Emergency Operations Plans* (Nov. 1, 2010), *available at* http://www.fema.gov/media-library-data/20130726-1828-25045-0014/cpg_101_comprehensive_preparedness_guide_developing_and_maintaining_emergency_operations_plans_2010.pdf. CPG 101 is the foundation for state, territorial, tribal, and local emergency planning in the United States. *Id*. at Announcement of Release of Version 2.0 by W. Craig Fugate, Administrator, FEMA. It promotes a common understanding of the fundamentals of risk-informed planning and decisionmaking to help planners at all levels of government in their efforts to develop and maintain viable, all-hazards, all-threats emergency plans. *Id*. An EOP is flexible enough for use in all emergencies. It describes how people and property will be protected; details who is responsible for carrying out specific actions; identifies the personnel, equipment, facilities, supplies, and other resources available; and outlines how all actions will be coordinated. *Id*. at B-4.

The State of Vermont's CEMP currently has an annex specifically for "Nuclear/Radiological" incidents. *See* State of Vermont Emergency Operations Plan 2013, Incident Annex 9 – Nuclear/Radiological Incident, Radiological Emergency Plan (Apr. 30, 2008), *available at* http://vem.vermont.gov/sites/vem/files/Incident%20Annex%209%20-%20Nuclear%20Radiological%20Incident.pdf.

[20] NSIR/DPR-ISG-02 at 4-5. NSIR/DPR-ISG-02 is used by the Staff to determine whether to grant EP exemptions. It lists the analyses that the Staff expects a licensee to perform as well as the specific EP provisions that the Commission has previously approved for exemption. *Id.* at 9-10, Table 1.

[21] *Id*. at 10.

[22] *See* NUREG-0654/FEMA-REP-1, Rev. 1, *Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants*, at Section II (Nov. 1980) (ADAMS Accession No. ML040420012).

[23] *See* NSIR/DPR-ISG-02 at 3, Attachment 1.

[24] Letter from NRC to NEI, "U.S. Nuclear Regulatory Commission Review and Endorsement of NEI 99-01, Revision 6, Dated November, 2012 (TAC No. D92368)" (Mar. 28, 2013) (ADAMS Accession

II. The VY EP Exemption Request

Entergy submitted its EP Exemption Request to the NRC on March 14, 2014, in anticipation of the planned permanent shutdown of VY. The Exemption Request sought exemptions from portions of 10 C.F.R. § 50.47 and 10 C.F.R. Part 50, Appendix E, that, pertinent to the instant proceeding, address: maintaining offsite emergency response plans and emergency planning zones (EPZ);[26] providing for onsite protective actions during hostile action;[27] maintaining the capability to assess, classify, and declare an emergency condition within 15 minutes and notifying responsible State and local government agencies within 15 minutes after declaring an emergency;[28] disseminating information to the public;[29] and maintaining an onsite technical support center and offsite emergency operations facility.[30] In support of its request, Entergy provided a technical evaluation that demonstrated that the bounding DBA for VY in its permanently shut down and defueled condition is a fuel handling accident (FHA) and that, 17 days after shutdown, the dose at the VY EAB from such an FHA would be less than 1 rem, which is below the EPA PAGs limit of 1 rem for recommended evacuation.[31] Entergy also provided an analysis that showed that the bounding beyond DBA for

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(footnote continued)

No. ML12346A463). *See also* NSIR/DPR-ISG-02 at 3 ("[NEI 99-01, Rev. 6,] should be used by staff as an acceptable means for reviewing the adequacy of EAL scheme changes for permanently shut down and defueled power reactors.").

[25] NEI 99-01, Revision 6, at Appendix C.

[26] Exemption Request at Attachment 1, p. 3-4, 8.

[27] *Id*. at Attachment 1, p. 10, 15.

[28] *Id*. at Attachment 1, p. 19-20. Instead, Entergy proposes to notify responsible State and local government agencies within 60 minutes after any declaration of an emergency. *Id*. at Attachment 1, p. 20.

[29] *Id*. at Attachment 1, p. 19-20.

[30] *Id*. at Attachment 1, p. 23.

[31] *Id*. at Attachment 1, p. 41.

VY in its permanently shut down and defueled condition is the adiabatic heatup[32] of the hottest fuel assembly stored in the VY SFP.[33] Entergy calculated that, at 15.4 months after shutdown, following a loss of all cooling to the spent fuel, the time for this hottest fuel assembly to heat up from 30°C to 900°C (the temperature at which a zirconium fire and the accompanying release of fission products is assumed to occur) would be 10 hours, which Entergy stated would provide ample time for mitigative actions.[34] Based on these bounding DBA and beyond DBA scenarios, Entergy concluded that, at 15.4 months after shutdown, the spent fuel in the VY SFP would have decayed to the extent that the requested exemptions could be implemented at VY without any compensatory actions.[35] Therefore, Entergy requested that the Exemption Request be granted with an effective date of April 15, 2016, or 15.4 months after the planned permanent shutdown of VY.[36]

On November 14, 2014, the Staff sent SECY-14-0125 to the Commission seeking approval for the Staff to grant the Exemption Request.[37] On March 2, 2015, the Commission approved the Staff's recommendation to grant the Exemption Request and stated that, "[t]he Commission continues to support the current practice of approving appropriately justified exemptions from certain emergency planning requirements while plants are transitioning to

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[32] An adiabatic heatup is a heatup that occurs without the transfer of heat between a system and its surroundings.

[33] Exemption Request at Attachment 1, p. 41.

[34] *Id*. at Attachment 1, p. 41-42.

[35] *Id*. at Attachment 1, p. 1.

[36] *Id*. at 1-2.

[37] SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements*, at 1 (Nov. 14, 2014) (ADAMS Accession No. ML14227A711). Commission approval is required for any reduction in effectiveness of a licensee's emergency plan that requires an exemption from the requirements of 10 C.F.R. § 50.47(b) and Appendix E to 10 C.F.R. Part 50. 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).

decommissioning based on site-specific evaluations."[38] In accordance with this Commission direction, the Staff is preparing the exemption for issuance.[39]

III. The VY EP License Amendment Request

Approximately three months after it had submitted its Exemption Request, Entergy submitted an LAR that proposed to change the VY emergency plan and EAL scheme to a PDEP and a permanently defueled EAL scheme, respectively.[40] In support of the LAR, Entergy stated (1) that the PDEP addresses the regulations in 10 C.F.R. § 50.47 and 10 C.F.R. Part 50, Appendix E, as they would apply if the Exemption Request were granted, and in a manner consistent with the guidance in NUREG-0654/FEMA-REP-1, Revision 1,[41] and (2) that the permanently defueled EAL scheme is consistent with the NRC-approved guidance in NEI 99-01, Revision 6.[42] According to Entergy, the PDEP would also provide that notification of an emergency declaration will be made to State authorities within 60 minutes of an emergency declaration instead of 15 minutes.[43]

The Staff has not yet made a decision on Entergy's LAR and its proposed PDEP and permanently defueled EAL scheme.

IV. The Procedural History of LBP-15-18

Vermont filed the Hearing Request at issue in LBP-15-18 in response to the Staff's publication in the *Federal Register* of a notice of opportunity to request a hearing on Entergy's

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[38] SRM-SECY-14-0125.

[39] *See, e.g.,* Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 24,291, 24,291 (Apr. 30, 2015) (issuing a draft environmental assessment and finding of no significant impact associated with the Exemption Request, which requested the submission of comments by June 1, 2015).

[40] LAR at 1-2.

[41] Entergy also stated that it had developed its PDEP considering the guidance in Attachment 1 to the draft of NSIR/DPR-ISG-02. *Id*. at Attachment 1, p. 6. The final NSIR/DPR-ISG-02 was not published until after Entergy's submission of its LAR.

[42] LAR at Attachment 1, p. 6-7.

[43] *Id*. at Attachment 1, p. 6. Entergy has requested that it be exempted from the 15-minute notification requirement. *See* Exemption Request at Attachment 1, p. 20-21.

LAR.[44] In its Hearing Request, Vermont proffered two contentions along with the unsworn declarations of three of its employees.[45] Vermont's Contention 1 stated that the LAR was not ready for review because it 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."[46] Vermont's Contention 2 stated that the LAR "along with the predicate [Exemption Request], 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[.]"[47]

The Staff and Entergy opposed Vermont's Hearing Request.[48] The Staff and Entergy argued that Contention 1 was moot because the Commission had, since the filing of Vermont's Hearing Request, directed the Staff to grant Entergy's Exemption Request.[49] The Staff and Entergy also argued that Contention 2 was inadmissible. First, to the extent that Contention 2 challenged the Exemption Request, it raised an issue beyond the scope of this proceeding.[50] In addition, Contention 2 was inadmissible for failing to show that a genuine dispute exists with Entergy's LAR on a material issue of law or fact and because the contention was not adequately supported.[51]

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[44] *See* Hearing Request at 1; 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).

[45] *See* Leshinskie Declaration; Bornemann Declaration; Irwin Declaration.

[46] Hearing Request at 3.

[47] *Id*. at 6.

[48] *See* NRC Staff's Answer to State of Vermont's Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) (ADAMS Accession No. ML15065A364) (Staff Answer); Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) (ADAMS Accession No. ML15065A300) (Entergy Answer).

[49] Staff Answer at 21-22; Entergy Answer at 16-17.

[50] Staff Answer at 22-25 (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 96 (2000)); Entergy Answer at 3.

[51] Staff Answer at 32-35; Entergy Answer at 28-29.

Vermont also filed a Petition for Reconsideration with the Commission, in which it asked the Commission to reconsider its approval of the Staff's recommendation to grant the Exemption Request.[52] The Staff and Entergy opposed the petition,[53] which is still pending. Vermont then filed with the Board a motion to stay the LAR proceeding pending the Commission's disposition of the Petition for Reconsideration.[54] The Board denied the motion on March 13, 2015.[55] Oral argument regarding contention admissibility was held on April 8, 2015[56] and the Board issued its decision denying intervention on May 18, 2015.

V. The Board Decision in LBP-15-18

In LBP-15-18, the Board denied Vermont's Hearing Request for failing to proffer a contention that satisfied the Commission's admissibility requirements at 10 C.F.R. § 2.309(f)(1).[57] Specifically, the Board held that Contention 1 was moot because it was premised on the assumption that the Commission had not yet ruled upon the Exemption Request, and "the Commission has now approved the pertinent regulatory exemptions[.]"[58] The Board also ruled Contention 2 inadmissible because the arguments in support of the contention were either challenges to the Exemption Request or, to the extent that they challenged the LAR,

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[52] State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests (Mar. 12, 2015) (ADAMS Accession No. ML15075A048) (Petition for Reconsideration).

[53] NRC Staff Answer to Vermont Petition for Reconsideration of the Commission Decision Approving Entergy's Exemptions Requests (Mar. 23, 2015) (ADAMS Accession No. ML15082A326); Entergy's Answer Opposing State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests (Mar. 23, 2015) (ADAMS Accession No. ML15082A393).

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

[55] Order (Denying Motion to Stay the Proceeding and Extending Deadline for Reply), at 2 (Mar. 16, 2015) (unpublished) (ADAMS Accession No. ML15075A306).

[56] Transcript of Teleconference in the Matter of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) (Apr. 8, 2015) (ADAMS Accession No. ML15104A384) (Tr.).

[57] *Vermont Yankee*, LBP-15-18, 81 NRC at __ (slip op. at 1).

[58] *Id*. at 4-7 (citing SRM-SECY-14-0125).

they did not set forth sufficient factual support or raise a genuine dispute.[59] The Board noted that, unlike the *Private Fuel Storage* case where "the NRC Staff granted an exemption from a regulation in the midst of an adjudicatory proceeding concerning compliance with that very regulation," in this case, "the Commission *itself* has already reviewed and approved the requested exemptions[.]"[60] Consequently, the Board did not consider Vermont's arguments to the extent that they challenged the Exemption Request. Instead, it determined that the relevant question was 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."[61] Finding that Vermont had failed to support its contention and demonstrate a genuine issue with the LAR alone, the Board held Contention 2 inadmissible. Because neither of Vermont's contentions were admissible, the Board denied the petition for intervention and request for hearing.

DISCUSSION

I. Legal Standards

A. Interlocutory Review of Contention Admissibility Rulings

Pursuant to 10 C.F.R. § 2.311(c), an order denying a hearing request is appealable by the requestor on the question of whether the request should have been granted. However, on threshold matters such as contention admissibility, the Commission gives Boards "substantial deference" and regularly affirms their determinations unless the petitioner "points to [an] error of law or abuse of discretion which might serve as grounds for reversal of the Board's decision."[62]

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[59] *Id*. at 7-8.

[60] *Id*. at 5 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 463 (2001) (emphasis in original)).

[61] *Id*. at 7.

[62] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Private Fuel Storage, L.L.C.* (Private Fuel Storage Facility), CLI-00-21, 52 NRC 261, 265 (2000).

Accordingly, an appeal of a threshold determination that does not point to an error of law or abuse of discretion by the Board but simply restates the contention with additional support will not meet the requirements for an appeal.[63] In addition, an argument made before the presiding officer but not reiterated or explained on appeal is considered abandoned.[64]

B. Contention Admissibility

In order to be admissible, a contention must meet all of the applicable requirements of 10 C.F.R. § 2.309(f)(1) such as scope, materiality, factual support, and genuine dispute.[65] Thus, a properly formulated contention must focus on the application in question, challenging either specific portions of, or alleged omissions from, the application so as to establish that a genuine dispute exists with the application on a material issue of law or fact.[66] Any contention that fails directly to controvert the application, or that mistakenly asserts that the application does not address a material issue of law or fact, must be dismissed.[67] Moreover, a contention of omission is inadmissible if it alleges the omission of information that is not required by law or regulation.[68]

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[63] *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

[64] *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001). *See also Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 466 n.25 (1982) (citing *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB–636, 13 NRC 312, 329 n.32 (1981)) (stating that, on appeal, there is no obligation to rule on every discrete point adjudicated below, so long as a decision may be rendered on other grounds that effectively dispose of the appeal).

[65] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999) ("A failure to comply with any of these requirements is grounds for dismissing the contention.").

[66] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-12-27, 76 NRC 583, 595 (2012) (citing 10 C.F.R. § 2.309(f)(1)(vi)).

[67] *Id*. *See also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.").

[68] *See Exelon Nuclear Texas Holdings, LLC* (Victoria County Station Site), LBP-11-16, 73 NRC 645, 696 (2011) (holding that a contention alleging an omission of a cost-benefit analysis in a specific

II. Vermont's Appeal Should Be Denied Because it Does Not Demonstrate that the Board Committed Error or Abused its Discretion

Vermont does not demonstrate that the Board erred in rejecting Vermont's contentions but instead raises issues that are beyond the scope of this proceeding and proffers arguments that are contrary to the Commission's approval of the Exemption Request and contrary to established case law. Vermont also fails to demonstrate that the Board erred when it found that Contention 2 lacked the specificity and support required to raise a genuine dispute on a material issue. Accordingly, Vermont's Appeal should be denied.[69]

A. Vermont Fails To Show that the Board Erred in Holding that Contention 1 Is Moot

Contention 1 reads:

> 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.[70]

The Board ruled that, when the Commission gave approval to the Staff to issue the exemption, Contention 1, by its own terms, was moot.[71]

On appeal, Vermont argues that the Board erred when it (1) denied Vermont a hearing on the Exemption Request,[72] (2) relied on the Commission's approval of the Exemption

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(footnote continued)

section of an environmental report was inadmissible because the Commission's regulations state that cost-benefit analyses are not required in the report); *Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-04, 69 NRC 170, 190 (2009) ("To satisfy [the Commission's contention admissibility requirements], the contention of omission must describe the information that should have been included in the ER and provide the legal basis that requires the omitted information to be included.").

[69] Because the Staff opposes the Appeal, it also opposes Vermont's request that the Commission consolidate the Appeal with Vermont's previously-filed Petition for Reconsideration.

[70] Hearing Request at 3.

[71] *Vermont Yankee*, LBP-15-18, 81 NRC at ___ (slip op. at 6-7).

[72] Appeal at 9-12.

Request,[73] and (3) refused to withhold its decision pending the Commission's resolution of Vermont's Petition for Reconsideration.[74] As discussed below, none of these arguments establish error or abuse of discretion on the part of the Board because (1) there was no right to a hearing on the Exemption Request, (2) the Board properly ruled in a manner consistent with the Commission's approval of the Exemption Request, and (3) withholding a decision would have been tantamount to a stay and would have been contrary to the regulations that govern NRC adjudications.

1. No Hearing Rights Attach To the VY EP Exemption Request

The Atomic Energy Act of 1954, as amended (AEA), expressly identifies the matters that are subject to an opportunity for hearing and the granting of exemptions is not among them. Section 189a. of the AEA provides that the Commission will grant a hearing upon request

> [i]n any proceeding for the granting, suspending, revoking, or amending of any license . . . 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, or royalties . . . .[75]

Thus, as a general matter, exemption requests do not trigger hearing rights.[76] As the Commission wrote in *Zion*, an exemption "is not one of those actions for which section 189a of the AEA provides a right to request a hearing."[77] In reaching this conclusion, the Commission examined the legislative history behind section 189a. and found that "Congress intentionally

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[73] *Id*. at 6-7.

[74] *Id*. at 9.

[75] 42 U.S.C. § 2239(a)(1)(A).

[76] *Brodsky v. NRC,* 578 F.3d 175, 180 (2d Cir. 2009); *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516, 1522 (1st Cir. 1989); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 94-98 (2000).

[77] *Zion,* CLI-00-5, 51 NRC at 98.

limited the opportunity for a hearing to certain designated agency actions – that do *not* include exemptions."[78]

However, there is an exception to this general rule, which Vermont argues applies in this case. Where an exemption is a required element of the license application process, the Commission has held that a hearing encompassing both the license application and the exemption is appropriate.[79] In *PFS,* the Commission explained that, where "resolution of the exemption request directly affects the licensability of the proposed [project], the exemption raises material questions directly connected to an agency licensing action" and, therefore, the exemption triggers an opportunity for a hearing.[80] Contrary to Vermont's argument, the *PFS* exception does not apply here.

PFS is distinguishable from the instant proceeding in several ways, the most important of which is the difference in the relationship between the exemption and the licensing action. In the midst of its independent spent fuel storage installation license application proceeding, the applicant in *PFS* requested an exemption from the regulations that required it to use a deterministic seismic hazard analysis.[81] The Commission found that this seismic analysis was a required element of the application and held that, because the application depended on the exemption in order to be granted, the exemption should be subject to a hearing.[82] Therefore, in *PFS*, the exemption request was in furtherance of the issuance of a license.[83] In VY, on the contrary, the license amendment merely reflects or implements the requested exemptions. In

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[78] *Id*. at 96 (emphasis in original).

[79] *PFS,* CLI-01-12, 53 NRC at 467.

[80] *Id.*; *cf. Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013) (Staff did not object to a hearing that encompassed both the license amendment and the exemption where a materials licensee requested the exemption "as part of its license renewal application").

[81] *PFS,* CLI-01-12, 53 NRC at 463.

[82] *Id.* at 467.

[83] *Id*.

PFS, the application was filed first and, when it became clear that an exemption was needed, then the exemption was sought.[84] In VY, the Exemption Request was filed 3 months prior to the LAR and the Exemption Request served as a predicate for the LAR. In *PFS*, the applicant needed the exemption in order to obtain the license. In VY, the licensee needs the license amendment only to conform the license to the regulatory framework, as exempted.

In *PFS*, the Commission remarked on the fact that the applicant was "not an already-licensed facility asking for relief from performing a duty imposed by NRC regulations" and noted that "exemptions of that kind ordinarily do not trigger hearing rights."[85] VY, though, presents exactly this case. VY is an already-licensed facility that is seeking relief from regulatory requirements that are no longer applicable to it as a permanently shutdown and defueled facility.[86]

This proceeding is also distinguishable from *PFS* because, in this proceeding the Commission has already approved the Staff's recommendation to grant the Exemption Request. In *PFS,* the exemption request was filed during the adjudicatory proceeding and the issue whether the exemption should be heard by the ASLB was squarely before the board.[87] As the VY Board acknowledged, the Commission's approval of the recommendation to issue the VY exemption removed the question from the Board.[88]

Finally, *PFS* involved a singular and facility-specific exemption – "an exemption from otherwise controlling seismic regulations[.]"[89] In the case of VY, the Staff's recommendation to

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[84] *Id*. at 463.

[85] *Id.* at 467.

[86] *See supra* at 5, n.17; *Vermont Yankee*, LBP-15-18, 81 NRC at ___ (slip op. at 3-4).

[87] *PFS,* CLI-01-12, 53 NRC at 463; *Private Fuel Storage, L.L.C*. (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 100 (2001) (certifying to the Commission the question "whether these exemption-related matters should be considered in the context of this adjudicatory proceeding.")

[88] *Vermont Yankee*, LBP-15-18, 81 NRC at ___ (slip op. at 5).

[89] *PFS,* CLI-01-12, 53 NRC at 466.

issue the exemption regarding emergency planning requirements at a permanently shutdown and defueled facility and the Commission's approval of that recommendation are consistent with the previous issuance of exemptions in similar circumstances for other permanently shutdown and defueled facilities.[90] In conclusion, *PFS* does not apply here and Vermont cannot use *PFS* to make its case that the Board erred.

2. The Effect of the Commission's Approval of the Exemption Request

Given the Commission's approval of the Exemption Request, the Board rejected Vermont's Contention 1 as moot. On appeal, Vermont states that "the Board assumes the correctness of the Commission's decision'" and that its "assumption of Commission correctness was arbitrary[.]"[91] This argument is without merit because the Commission is the ultimate authority within the agency on exemptions.[92] The Commission delegated authority to the Staff to issue exemptions from the regulations governing emergency planning, subject to Commission approval where the exemption reduces the effectiveness of the licensee's emergency response plan.[93] It did not delegate this authority to the ASLB.[94] Accordingly, the Board did not have authority to consider the correctness of the Commission's decision and, therefore, Vermont has not established error on the part of the Board.

3. Vermont's Pending Petition for Reconsideration Did Not Stay the Board

Vermont also asserts on appeal that the Board was required to "withhold a decision" on Vermont's Hearing Request until after the Commission had ruled on Vermont's Petition for Reconsideration.[95] Vermont cites no authority in support of this argument, which is tantamount

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[90] *See supra* at 5, n.17.

[91] Appeal at 6-7.

[92] 10 C.F.R. § 50.12; *Honeywell*, CLI-13-1, 77 NRC at 9, n.33.

[93] SRM-SECY-08-0024.

[94] *Honeywell*, CLI-13-1, 77 NRC at 33; *Toledo Edison Co. and Cleveland Elec. Illuminating Co.* (Davis-Besse Nuclear Power Station), ALAB-32, 4 AEC 698, 700 (1971).

[95] Appeal at 8.

to requiring a stay. On the contrary, the Commission's regulations do not allow a petition for reconsideration to act as a stay. Section 2.345(c), which governs reconsideration, provides that, "[n]either the filing nor the granting of the petition stays the decision unless the Commission orders otherwise." Similarly, subsection (e) of 10 C.F.R. § 2.341, which governs reviews of board decisions and reconsideration of Commission decisions, provides that, "[n]either the filing nor the granting of a petition under this section stays the effect of the decision or action of the presiding officer, unless the Commission orders otherwise." The Commission did not order otherwise in this instance and, therefore, the Board was free to proceed to address contention admissibility.

Alternatively, Vermont asserts that the Board was required to address all possible outcomes related to the Petition for Reconsideration.[96] Vermont cites no authority in support of this argument and does not explain how a speculative discussion by the Board regarding the Commission's grant, conditional grant, or denial of the Petition for Reconsideration would have made a difference to the resolution of Contention 1. Furthermore, Vermont did not raise this issue before the Board even though it could have done so in its Reply brief, and Vermont is thus precluded from raising it now.[97]

For the reasons given above, Vermont has not established that the Board erred when it decided the issue of contention admissibility while Vermont's Petition for Reconsideration was pending.

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[96] *Id*.

[97] The Commission granted the Exemption Request on March 2, 2015. Vermont asked the Commission to reconsider its approval in a filing on March 12, 2015 and then filed its Reply Brief on March 17, 2015, in which it proffered substantial argument with respect to the Commission's granting of the Exemption Request. *See* State of Vermont's Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration (Mar. 12, 2015) (ADAMS Accession No. ML15071A487) (Petition for Reconsideration) and Reply Brief at 2, 5-6. Thus, in its Reply Brief, Vermont could have raised the argument that the Board should address all possible outcomes on the Petition for Reconsideration, but Vermont did not do so. The Board had no opportunity to consider or address the issue and, therefore, the issue should not be considered on appeal. *See, e.g., Public Serv. Elec. & Gas Co.* (Salem Nuclear Generating Station, Unity 1), ALAB-650, 14 NRC 43, 69 (1981).

B. Vermont Fails To Show that the Board Erred in Ruling that Contention 2 Did Not Satisfy Contention Admissibility Requirements

In Contention 2, Vermont asserts that:

> 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 C.F.R. § 50.54(q)(4) and Appendix E to Part 50.[98]

The Board found that Vermont had not provided sufficient support for Contention 2 and that it failed to raise a genuine dispute with the LAR as required by 10 C.F.R. § 2.309(f)(1).[99] The Board stated that the issues Vermont raised in Contention 2 rest "squarely on the adequacy of Entergy's exemption request and associated analyses, and not on any alleged deficiencies in the LAR itself" and, therefore, are inadmissible.[100] However, the Board noted that Vermont claimed that some of its arguments apply independently to the LAR.[101] Thus, the Board examined Vermont's arguments that (1) the LAR should have included implementing procedures and (2) the LAR should have included high-burnup fuel[102] in its FHA analysis.[103] The Board found that both arguments lacked sufficient specificity and support.[104] On appeal, Vermont reargues the position that it took in its Hearing Request with respect to these two arguments, pointing to statements by two State officials as support for its claims.[105] Since

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[98] Hearing Request at 6.

[99] *Vermont Yankee*, LBP-15-18, 81 NRC at ___ (slip op. at 8-9 and nn. 39, 42) (citing §2.309(f)(1)(v) –(vi)). These regulations require a petitioner to provide facts, opinions or other information that supports its position and to show a genuine dispute exists with the applicant (or licensee) on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(v), (vi).

[100] *Vermont Yankee*, LBP-15-18, 81 NRC at ___ (slip op. at 7).

[101] *Id*. at 8.

[102] High-burnup fuel is fuel that has been in the reactor core longer or at higher power levels. *Vermont Yankee*, LBP-15-18, 81 NRC at __ (slip op. at 9) (citation omitted).

[103] *Vermont Yankee*, LBP-15-18, 81 NRC at ___ (slip op. at 9).

[104] *Id.* at 8-9.

[105] *See* Appeal at 12-17.

Vermont's Appeal, thus, does not demonstrate any error on the part of the Board[106] and since the Board correctly held that Vermont did not demonstrate that these arguments were sufficiently supported or genuinely disputed the LAR, Vermont's Appeal regarding Contention 2 should be denied.

1. Implementing Procedures

On appeal, Vermont argues that it stated, in both its Hearing Request and the Bornemann Declaration, that without the implementing procedures for VY emergency planning, Vermont would be unable to execute its own Radiological Emergency Response Plan (RERP). Vermont asserted that "it would be 'impossible for those agencies and governmental [entities] identified [in 10 C.F.R. §§ 50.47(b) and Part 50 Appendix E] to provide supplemental support to the licensee to understand how and when that support will be needed.'"[107] The Board, however, rejected this portion of Contention 2 because it found that Vermont had not explained the significance of the implementation procedures and that "without further explanation and support, [Vermont's] allegations do not genuinely dispute the LAR's compliance with the regulations that remain in place notwithstanding approval of the exemption request."[108]

First, Vermont simply restates its arguments about implementing procedures and, thus, does not demonstrate that the Board made an error as Vermont is required to do on appeal.[109] Second, Vermont's arguments do not raise a genuine dispute concerning a deficiency in the LAR independent of the Exemption Request. In its Hearing Request, Vermont argued that

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[106] *Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

[107] Appeal at 15 (quoting Bornemann Declaration at 5). Vermont does not brief, and thus abandons on appeal, its concerns regarding the absence of PDEP Support Plans. *See* Bornemann Declaration at 5; *General Pub. Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 7-8 (1990).

[108] *Vermont Yankee*, LBP-15-18, 81 NRC at ___ (slip op. at 9).

[109] *Shieldalloy*, CLI-07-20, 65 NRC at 503-05 (An appeal of a threshold determination that does not point to an error of law or abuse of discretion by the Board but simply restates the contention with additional support will not meet the requirements for an appeal).

procedures were missing from the Exemption Request, not the LAR.[110] While Vermont is correct that the Bornemann Declaration stated that the LAR did not include the licensee implementing procedures listed in Appendix E of the PDEP,[111] Vermont did not adequately particularize and support its assertions that it could not effectively execute its own plan or show that local organizations identified in the PDEP[112] could not respond without such procedures.

Neither the Hearing Request nor the Bornemann Declaration explained what *required* State response could not be accomplished under the proposed PDEP or EAL scheme. On the contrary, if approved consistent with the Exemption Request, the proposed PDEP and EAL scheme would simply reflect the elimination of offsite emergency planning requirements commensurate with the reduced risk posed by VY in its permanently defueled condition and Vermont did not explain how this would affect local emergency response. Similarly, Vermont did not explain why the absence of "details" available in the VY implementing procedures would render the response of local police, fire, and ambulance services and medical facilities to onsite emergencies "impossible."[113] Such conclusory assertions, even by an expert, are not sufficient to support contention admission.[114]

In fact, there is no regulatory requirement that an emergency planning LAR include implementing procedures.[115] The regulation at 10 C.F.R. § 50.54(q)(4) only requires that an

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[110] Hearing Request at 7.

[111] *See* Bornemann Declaration at 5.

[112] The PDEP listed the local responders and noted opportunities to participate in exercises and drills to the extent their participation would be expected. *See, e.g.,* PDEP at 21, 33, 36, 72.

[113] *See* Bornemann Declaration at 5. The Staff argued below that Vermont did not address Entergy's continuing obligation, per 10 C.F.R. Part 50, Appendix E.IV.F.1, to make radiological orientation training available to local emergency services and law enforcement, or, per 10 C.F.R. § 50.47(b)(15), to make radiological emergency response training available to those called on to assist in an emergency, and why the local response would be "impossible." *See* Staff Answer at 37-38.

[114] *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[115] The contents of applicant emergency plans are set forth in 10 C.F.R. Part 50, Appendix E.IV, which only provides in Paragraph G that "[p]rovisions be employed to ensure that the emergency plan, its

LAR include "emergency plan pages affected by" changes that reduce the effectiveness of an emergency plan; it does not require the submission of licensee emergency plan implementing procedures.[116] Vermont cited no NRC regulation or case law to support its position to the contrary.[117] Thus, the fact that the PDEP listed, rather than included, licensee implementing procedures,[118] does not in and of itself demonstrate that there is a deficiency in the LAR that supports admission of the contention.[119] Therefore, Vermont does not adequately support the admission of this claim.

Case law also does not support Vermont's claim that emergency planning LARs should include implementing procedures. For instance, the *Waterford* Appeal Board ruled that an applicant for a nuclear power plant operating license is not required to submit emergency plan implementing procedures for consideration in a licensing hearing for the Commission to make its reasonable assurance finding.[120] The Appeal Board reasoned (1) that the timing of

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(footnote continued)

implementing procedures and emergency equipment and supplies are maintained up to date[.]" An applicant or a licensee is required to submit emergency plan implementing procedures "no less than 180 days before scheduled issuance of a power reactor operating license or a license to possess nuclear material." 10 C.F.R. Part 50, Appendix E.V. Licensees who are authorized to operate a nuclear power facility are required to submit "any changes to the emergency plan or procedures within 30 days of such changes." This provision would not require Entergy to submit its implementing procedures with the LAR inasmuch as no changes would be made until after the NRC approves the requested license amendment. *Id.*

[116] A reduction in effectiveness is defined as "a change in an emergency plan that results in reducing the licensee's capability to perform an emergency planning function in the event of a radiological emergency. 10 C.F.R. § 50.54(q)(1)(iv).

[117] Entergy similarly argued that Vermont did not assert that the LAR must attach these implementing procedures and that Vermont had not identified an NRC requirement. *See* Entergy Answer at 25 n.122; Kuyler, Tr. 26-27.

[118] NRC guidance recommends that each plan shall "contain . . . an appendix listing, by title, procedures required to implement the plan." NUREG-0654, FEMA-REP-1, Rev. 1, at 79 (Evaluation Criteria II.P.7). The Board noted that Bornemann cited the PDEP pages where the listing appears. LBP-15-18 at 9 n. 41 (citing Bornemann Declaration at 5 (citing LAR, Attachment 2, at 52-53).

[119] *See Victoria County Station Site*, LBP-11-16, 73 NRC at 696 (stating that a contention that alleges the omission of information, where that information is not required by the regulations, "raises an issue that is outside the scope of the proceeding and is not material to any finding the NRC must make").

[120] *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983).

submission required by Appendix E.V "convinces us that the Commission never intended the implementing procedures to be required for the 'reasonable assurance' finding and thus to be prepared and subject to scrutiny during a hearing" and (2) that the focus should be whether the emergency plan itself satisfies NRC requirements.[121] Vermont has not explained why this same reasoning does not apply to emergency planning LARs.[122]

Vermont also argues that the Board should have addressed the question of whether the approval of the PDEP without companion implementing procedures would reduce the plan's effectiveness or the protection of the public health and safety.[123] However, the issue below was not whether the LAR's proposed revisions to the VY emergency plan and EAL scheme would reduce the effectiveness of the VY emergency plan. Instead, as required by the last sentence of the emergency planning regulation at 10 C.F.R. § 50.54(q)(4) and as identified by the Board, the issue was whether the proposed PDEP and revised EAL scheme would continue to meet the requirements of 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50, Appendix E, as exempted.[124] Thus, Vermont's statements that the LAR reduced the effectiveness of the VY emergency plan are not germane to the issue presented by the LAR and, thus, are not sufficient to support the admission of a contention.

2. Accident Analyses and High-Burnup Fuel

The Board also ruled that Vermont did not adequately support its challenge to the LAR regarding high-burnup fuel and "heightened" accident risks during the transfer of spent fuel to dry cask storage because Vermont did not dispute any specific portion of Entergy's FHA

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[121] *Id*. at 1107.

[122] *See, e.g.,* 10 C.F.R. § 50.92 ("In determining whether an amendment to a license . . . will be issued to the applicant, the Commission will be guided by the considerations which govern the issuance of initial licenses . . . .").

[123] *See* Appeal at 15.

[124] *See Vermont Yankee*, LBP-15-18, 81 NRC at __ (slip op. at 7-8).

analysis.[125] On appeal, Vermont argues that it did indeed dispute a specific portion of the LAR and again alleges that Entergy's FHA analysis gives "no consideration . . . to the existence of high burnup fuel."[126] Vermont argues that it satisfied the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) because: (1) the regulation allows Vermont to identify information missing from an application, along with its supporting reasons for this belief, and both the Hearing Request and the Leshinskie Declaration identified Entergy's alleged failure to provide an adequate analysis of credible accident scenarios and the reason for that belief;[127] (2) Mr. Leshinskie identified with specificity the accident scenario and FHA analysis sections that should contain additional information;[128] and (3) the FHA analysis cited by the Board did not consider high-burnup fuel.[129] These arguments do not demonstrate that the Board committed an error of law or fact or abused its discretion and, therefore, do not support Vermont's Appeal.

First, Vermont's argument that high-burnup fuel was not considered in the FHA analysis is without merit. The section of the LAR cited by the Board[130] states that the postulated DBA that will remain applicable to VY in its permanently defueled condition is an FHA, which was analyzed in support of a proposed Technical Specifications change previously submitted to the NRC.[131] This referenced FHA analysis (Reference 7 in LAR section 5.1.1) includes a table that

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[125] *Id.* at 8-9 (citing Leskinskie Declaration at 3).

[126] Appeal at 12-14,16.

[127] *Id*. at 16 (citing Hearing Request at 8; Leshinskie Declaration at 1-4).

[128] *Id*. at 16.

[129] *Id*. at 17 (stating that a high-burnup fuel analysis is not in Entergy's Technical Specifications Proposed Change No. 306, Eliminating Certain ESF Requirements During Movement of Irradiated Fuel (Nov. 14, 2013) (BVY 13-097) (ML13323A516) (which includes Attachments 1-3 (ADAMS Accession No. ML13323A518) and Attachments 4-5 (ADAMS Accession No. ML13323A519).

[130] *Vermont Yankee*, LBP-15-18, 81 NRC ___ (slip op. at 9 n.46).

[131] *See* LAR at Attachment 1, p. 3 (citing Reference 7, Letter from Entergy to NRC, Technical Specifications Proposed Change No. 306, Eliminating Certain ESF Requirements during Movement of Irradiated Fuel (Nov. 14, 2013) (ADAMS Accession No. ML13323A516) (Proposed Change No. 306). Part 50 allows an application to incorporate information contained in previous applications, statements or reports filed with the NRC if the references are clear and specific. 10 C.F.R. § 50.32. The Staff's

indicates that the FHA analysis considered a core-average burnup that included high-burnup fuel.[132] Thus, contrary to Vermont's assertion, the FHA analysis the Board cited did consider high-burnup fuel.[133] Vermont's erroneous assertions failed to demonstrate a genuine dispute with the LAR and, on appeal, fail to demonstrate that the Board's ruling was erroneous. Thus, Vermont fails to provide a basis for the Commission to grant its appeal.[134]

Vermont's appeal also relies on other statements that fail to demonstrate that its contention was admissible. While Mr. Leshinskie identified LAR sections describing analyses of other accident scenarios, he speculated, without adequate support, that, in the event of a hostile action, a SFP fire could occur before the calculated 10-hour heat-up time.[135] Thus, he argued,

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(footnote continued)

evaluation of the FHA is in the Safety Evaluation accompanying Amendment No. 261, issued February 15, 2015 (ADAMS Accession No. ML14304A588).

[132] *See* Proposed Change No. 306, at Attachment 4, Table 3-2 (stating that it considers a "core-average burnup from 5 to 58 [gigawatt-day per metric ton of uranium (GWd/MTU)].") Burnup above 45 GWd/MTU is considered high-burnup. *See* 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.

[133] *See Vermont Yankee*, LBP-15-18, 81 NRC at __ (slip op. at 9 n.41). Neither the Hearing Request nor the Leshinskie Declaration cited to section 5.1.1 of the LAR, which summarized Entergy's FHA analysis. Vermont had an ironclad obligation to examine this information to frame its contentions concerning the LAR. *See Catawba*, ALAB-687, 16 NRC at 468.

[134] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-4-22, 60 NRC 125, 136 (2004).

[135] Vermont states, for the first time on appeal, that the LAR does not include an analysis of a hostile action scenario "that includes the use of an accelerant in the fuel pool." Appeal at 17 n. 52. However, Mr. Leshinkie only stated that the fuel heatup and zirconium fire scenario in LAR section 5.1.2 "ignores the NRC's conclusion in NUREG-1738, at x, 5-2, that fuel assembly and rack configuration . . . are subject to unpredicatable changes after an earthquake or cask drop that drains the pool." Leskinskie Declaration at 4. This conclusory assertion did not raise a genuine dispute as to adequacy of the LAR alone inasmuch as Mr. Leshinskie did not explain the significance of the alleged omission and indicated that the analysis was submitted in the Exemption Request.

In addition, Mr. Leshinskie's challenges to the adequacy of accident scenarios used to support in Commission-approved exemptions for defueled facilities did not address Commission determinations about the low probability of a zirconium fire and the remoteness of a successful hostile attack due to post-9/11 security and mitigation measures. *See* Staff Answer at 32-35 (citing The Attorney General of Commonwealth of Massachusetts, The Attorney General of California, Denial of Petitions for Rulemaking, 73 Fed Reg. 46,204, 46,206-208, 46, 211 (Aug. 8, 2008)); VY Renewed Operating License No. DPR-38, Condition 3.N, "Mitigation Strategy Condition" (addressing measures to mitigate large fires and explosions) (ADAMS Accession No. ML052720265); NUREG-2161 at iii, xxiii-xxiv. Thus, he did not

the PDEP and EAL scheme should require offsite planning. However, the FHA analysis and the analysis of a potential SFP fire scenario were bases for the Commission-approved exemption.[136] As such, these concerns raise issues with the exemption and not with the license amendment. Moreover, such issues are not relevant in a proceeding where the issue is whether the LAR meets the regulations, as exempted. Finally, Mr. Leshinskie's assertion that "[a]dditional information" is needed in the LAR to support the discussion of the loss of spent fuel cooling event[137] without further support or discussion, does not raise a genuine dispute on a material issue. The Board, therefore, correctly ruled that greater specificity was required to justify the admission of this portion of Contention 2. Nothing that Vermont has raised on appeal demonstrates that the Board erred in so ruling and, thus, Vermont's Appeal should be denied.

III. Vermont's Request To Consolidate and File Amended Contentions Should Be Denied

At the end of its Appeal Brief, Vermont asks the Commission to consolidate Vermont's Appeal with Vermont's pending Petition for Reconsideration and to allow Vermont to submit revised contentions.[138] Vermont explains that the revised contentions would address the LAR, the Exemption Request, and the Staff's environmental analysis and finding of no significant impact.[139]

Vermont's requests should be denied because, for the reasons set forth above, Vermont's Appeal should be denied and, for the reasons set forth in the Staff's opposition to

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(footnote continued)

provide information that genuinely disputed Commission determinations that the only credible beyond-design basis spent fuel pool accident is a loss of cooling due to a seismic event and about the robust nature of spent fuel pools, the impact of post-9/11 security and mitigation measures, the low probability of zirconium fires, and the remoteness of a successful hostile attack. *See Staff Answer at* 33-34.

[136] *See* SECY-14-0125 at 4-5 and Enclosure at 1-2, 7.

[137] Leshinskie Declaration at 4.

[138] Appeal at 17-18.

[139] *Id*.

Vermont's Petition for Reconsideration, reconsideration should be denied.[140] As both the appeal and the reconsideration should be denied, there will be nothing to consolidate. With respect to Vermont's request to file new and revised contentions, the request should be denied for failure to address the criteria in 10 C.F.R. § 2.309(c) for contentions filed after the original deadline.[141]

CONCLUSION

For the reasons stated above, Vermont has failed to demonstrate that the Board committed error or an abuse of discretion in LBP-15-18. Accordingly, the Commission should deny Vermont's Appeal of the Atomic Safety and Licensing Board's Memorandum and Order LBP-15-18.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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[140] NRC Staff Answer to Vermont Petition for Reconsideration of the Commission Decision Approving Entergy's Exemption Requests.

[141] The regulation provides that requests to file new or amended contentions after the *Federal Register* deadline, must demonstrate that the information that is the basis for the filing was not previously available, is materially different from information previously available, and that the filing has been submitted in a timely fashion based on the availability of subsequent information. 10 C.F.R. § 2.309(c).

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Dated at Rockville, Maryland
this 7th day of July, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC	)	
AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LA-2
	)	
(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'S BRIEF IN OPPOSITION TO THE STATE OF VERMONT'S APPEAL OF LBP-15-18," dated July 7, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 7th day of July, 2015.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 7th day of July, 2015