

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENERGY NUCLEAR VERMONT YANKEE, LLC)
AND ENTERGY NUCLEAR OPERATIONS, INC.) Docket No. 50-271-LA-3
)
(Vermont Yankee Nuclear Power Station))

NRC STAFF'S ANSWER TO ENTERGY'S MOTION TO WITHDRAW

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer to the motion by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, Entergy or the licensee) to withdraw, without prejudice and without conditions,¹ its September 4, 2014 license amendment request (LAR)² for the Vermont Yankee Nuclear Power Station (Vermont Yankee or VY). The Staff supports Entergy's position that its Motion to Withdraw should be granted without prejudice because this proceeding is at an extremely early stage and because no determinations on the merits of any of the arguments admitted for hearing have been made. The Staff also largely supports Entergy's position that its Motion to Withdraw should be granted without conditions. This is because the result of the withdrawal is simply that Entergy will be required to continue to comply with its existing license conditions, the very same license conditions that Vermont had sought to

¹ Entergy's Motion to Withdraw its September 4, 2014 License Amendment Request, at 1 (Sept. 22, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15265A583) (Motion to Withdraw).

² Letter from Christopher Wamser, Entergy, to NRC, Proposed Change No. 310 - Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405) (LAR).

require Entergy to maintain.³ Therefore, the withdrawal maintains the *status quo* and does not implicate any legal harm necessitating the imposition of substantive withdrawal conditions. However, with respect to the intervenor, the State of Vermont (Vermont), the grant of the withdrawal without prejudice does have the effect of requiring Vermont to have to request a hearing again if Entergy were to submit to the NRC an application substantively similar to the instant LAR in the future. Although this effect does not provide the requisite quantum of legal harm to warrant dismissal with prejudice, it has been found in an NRC proceeding to warrant procedurally conditioning the withdrawal on the requirement that the applicant notify the intervenor of the submittal of a substantively similar license amendment request in the future. Therefore, in order to ensure adequate notice to Vermont, the Board should grant Entergy's Motion to Withdraw but with the single procedural condition that Entergy be required to provide written notice to Vermont of any filing of a new license amendment application substantively similar to the instant LAR at the time such application is submitted to the NRC.

BACKGROUND

On September 4, 2014, Entergy submitted to the NRC its LAR seeking, pursuant to 10 C.F.R. § 50.75(h)(4)-(5), to delete from the VY operating license all of its conditions related to the VY decommissioning trust fund (DTF)⁴ so that the Commission's regulations related to DTFs at 10 C.F.R. § 50.75(h)(1)-(3) would apply to VY instead of these preexisting license conditions.⁵

³ See *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC __, __ (Aug. 31, 2015) (slip op. at 13) (acknowledging that Vermont seeks to require Entergy "to maintain the existing license conditions.").

⁴ 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 7-8 (Mar. 21, 2011) (ADAMS Accession No. ML052720265) (providing "Decommissioning Trust" license conditions at 3.J).

⁵ LAR at 1. The VY DTF license conditions were imposed as part of the NRC order approving the transfer of the VY operating license to Entergy on May 17, 2002. See Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (TAC No. MB3154) at Enclosure 1, p. 4-6, Enclosure 2, p. 8, Enclosure 3, p.7-8 (May 17, 2002) (ADAMS Accession No. ML020390198) (VY License Transfer Order). Shortly thereafter, on December 24, 2002, the Commission issued a final rule promulgating similar regulatory requirements at

Separately, on January 6, 2015, Entergy submitted to the NRC an exemption request pursuant to 10 C.F.R. § 50.12.⁶ The Exemption Request sought exemptions for VY from three provisions of the Commission's regulations. It sought to exempt VY from 10 C.F.R. § 50.82(a)(8)(i)(A) so as to allow Entergy to be able to make withdrawals from the VY DTF for certain irradiated fuel management costs.⁷ It also sought two exemptions from 10 C.F.R. § 50.75(h)(1)(iv) in the event that Entergy's prior-filed LAR were to be granted and, thus, that 10 C.F.R. § 50.75(h)(1)(iv) were to become applicable to VY.⁸ Specifically, it sought an exemption from the requirement of 10 C.F.R. § 50.75(h)(1)(iv) that "[d]isbursements . . . from the [DTF] . . . are restricted to decommissioning expenses . . . until final decommissioning has been completed." The exemption from this provision, if it were to become applicable to VY, combined with the requested exemption from 10 C.F.R. § 50.82(a)(8)(i)(A) would allow Entergy to be able to make withdrawals from the VY DTF for certain irradiated fuel management costs. Entergy also sought an exemption from the 10 C.F.R. § 50.75(h)(1)(iv) requirement, if it were to become applicable to VY, to provide 30-days' notice of these disbursements.⁹

10 C.F.R. §§ 50.75(h)(1)-(4). See Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002) (Final rule).

⁶ Letter from Christopher Wamser, Entergy, to NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan. 6, 2015) (ADAMS Accession No. ML15013A171) (Exemption Request).

⁷ *Id.* at 1-2.

⁸ *Id.* (acknowledging that Entergy had previously submitted an LAR seeking VY to be bound by 10 C.F.R. § 50.75(h)(1)-(3) and, therefore, requesting exemptions from 10 C.F.R. § 50.75(h)(1)(iv) "[s]ince approval of [the LAR] would result in 10 [C.F.R. §] 50.75(h)(1) through (h)(3) being applicable to [VY] . . ."). See also *Vermont Yankee*, LBP-15-24, 82 NRC at ___ (slip op. at 5) ("The two exemptions from 10 C.F.R. § 50.75(h)(1)(iv)—which allow Entergy to use the decommissioning trust fund for spent fuel management without providing a 30-day notification—have no practical effect because, unless the LAR is approved, 10 C.F.R. § 50.75(h) does not currently apply to Entergy.").

⁹ See *Vermont Yankee*, LBP-15-24, 82 NRC at ___ (slip op. at 40) (providing a chart explaining the practical effects of the LAR and the Exemption Request).

With respect to the LAR, Entergy requested that it be granted by March 1, 2015, with a 60-day implementation period.¹⁰ With respect to the Exemption Request, Entergy requested that it be granted by June 1, 2015.¹¹

On January 12, 2015, pursuant to 10 C.F.R. § 50.82(a)(1)(i) and (ii), Entergy certified to the NRC 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.¹² Consequently, pursuant to 10 C.F.R. § 50.82(a)(2), the VY operating license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel and the Commission's decommissioning regulations at 10 C.F.R. § 50.82 now apply to VY.¹³

On February 17, 2015, the NRC published in the *Federal Register* a notice of opportunity to request a hearing and petition for leave to intervene on the LAR.¹⁴ On April 20, 2015, Vermont filed a Hearing Request proffering four contentions.¹⁵ An Atomic Safety and Licensing

¹⁰ LAR at 2.

¹¹ Exemption Request at 3.

¹² Letter from Christopher Wamser, Entergy, to 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).

¹³ See Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,278-79 (July 29, 1996) (Final rule) (stating that, upon the docketing of these certifications, the "operating stage" of the reactor's lifecycle ends and its "decommissioning stage" begins and 10 C.F.R. § 50.82 then applies to the licensee).

¹⁴ Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8,355, 8,356 (Feb. 17, 2015).

¹⁵ See State of Vermont's Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) (Hearing Request) (available as a package at ADAMS Accession No. ML15110A484 along with: Declaration of Anthony R. Leshinskie (Apr. 20, 2015) (Leshinskie Declaration); Anthony R. Leshinskie *curriculum vitae* (Leshinskie CV); Declaration of William Irwin, Sc.D, CHP (Apr. 20, 2015) (Irwin Declaration); William E. Irwin, Sc.D., CHP *curriculum vitae* (Irwin CV); Exhibit 1, Comments of the State of Vermont [on the Vermont Yankee Post-Shutdown Decommissioning Activities Report (PSDAR)] (Mar. 6, 2015) (Vermont's PSDAR Comments); Exhibit 2, Entergy Nuclear Vermont Yankee, LLC Master Decommissioning Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002) (MTA)).

Board (Board) was established to rule on the Hearing Request.¹⁶ The Staff and Entergy opposed the admission of all four proffered contentions.¹⁷

On June 17, 2015, the NRC granted the Exemption Request.¹⁸ The NRC determined that, consistent with 10 C.F.R. § 50.12: the requested exemptions were authorized by law, did not present an undue risk to the public health and safety, and were consistent with the common defense and security; the application of the regulations in the particular circumstances would not serve the underlying purpose of the regulations; and compliance with the regulations would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulations were adopted.¹⁹ With respect to the requirement to provide 30-days' notice of irradiated fuel management withdrawals, the NRC determined that it was not necessary in order to ensure the public health and safety.²⁰ This finding was based on a site-specific cost estimate and cash flow analysis.²¹ It was also based on the fact that, during decommissioning, numerous provisions of the Commission's decommissioning regulations already serve to ensure decommissioning funding assurance, such as the requirements of 10 C.F.R. § 50.82(a)(8)(i)(B)-(C) that withdrawals are prohibited from reducing the value of the DTF below that necessary to complete decommissioning and the requirements of 10 C.F.R.

¹⁶ Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board, 80 Fed. Reg. 26,301, 26,301-02 (May 7, 2015).

¹⁷ See NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request (May 15, 2015) (ADAMS Accession No. ML15135A523) (Staff Answer); Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request (May 15, 2015) (ADAMS Accession No. ML15135A498) (Entergy Answer). See also The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (May 22, 2015) (ADAMS Accession No. ML15142A902) (Vermont Reply).

¹⁸ See Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992 (June 23, 2015).

¹⁹ *Id.* at 35,993-94.

²⁰ *Id.* at 35,993. See also *Vermont Yankee*, LBP-15-24, 82 NRC at ___ (slip op. at 4) (stating that the NRC determined that "providing 30-day notice of planned spent fuel cost disbursements is unnecessary to ensure adequate funds.").

²¹ 80 Fed. Reg. at 35,993.

§ 50.82(a)(8)(v)-(vii) for annual reporting on the status of funding for decommissioning and irradiated fuel management.²² Substantively identical exemption requests have previously been granted for Kewaunee Power Station,²³ San Onofre Nuclear Generating Station, Units 2 and 3,²⁴ and Crystal River Unit 3 Nuclear Generating Plant.²⁵ Additionally, the Commission has recognized that, in the absence of specific Commission regulations regarding the transition of a nuclear power plant from operating to decommissioning status, case-by-case exemptions may be necessary to facilitate the decommissioning process.²⁶

Subsequently, on July 6, 2015, after the April 20, 2015 deadline for filings in this proceeding, Vermont filed a motion seeking the admission of a new proposed Contention V in light of the NRC's grant of the Exemption Request.²⁷ The Staff and Entergy opposed this

²² *Id.*

²³ See License Exemption Request for Dominion Energy Kewaunee, Inc., 79 Fed. Reg. 30,900 (May 29, 2014).

²⁴ See Southern California Edison Company; San Onofre Nuclear Generating Station, Units, 2 and 3, 79 Fed. Reg. 55,019 (Sept. 15, 2014).

²⁵ See Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 5,795 (Feb. 3, 2015).

²⁶ See SRM-SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements* (Mar. 2, 2015) (ADAMS Accession No. ML15061A516) ("The Commission continues to support the current practice of approving appropriately justified exemptions from certain emergency planning requirements while plants are transitioning to decommissioning based on site-specific evaluations.").

²⁷ State of Vermont's Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV, at 1-2 (July 6, 2015) (ADAMS Accession No. ML15187A350) (Vermont New Contention).

motion.²⁸ The Board then held an oral argument on Vermont's Hearing Request on July 7, 2015.²⁹

On August 13, 2015, Vermont filed a challenge to the NRC's grant of the Exemption Request with the U.S. Court of Appeals for the District of Columbia Circuit.³⁰

On August 31, 2015, the Board issued LBP-15-24, which found that Vermont had standing and which admitted Vermont's Contentions I and V, thus, granting Vermont's Hearing Request.³¹

On September 17, 2015, the parties to this proceeding filed a joint motion to the Board regarding the mandatory disclosures and schedule for the granted hearing.³² In this motion, Entergy notified the Board that it had decided to withdraw its LAR.³³ Shortly thereafter, the Board issued a Notice of Hearing stating that a hearing will be conducted in this proceeding at a time and place that will be fixed by subsequent order.³⁴

On September 21, 2015, the Board issued an Initial Scheduling Order, which provided hearing procedures and directions regarding scheduling.³⁵ Specifically, the Board directed that

²⁸ See NRC Staff's Answer to the State of Vermont's Motion for Leave to File New and Amended Contentions (July 31, 2015) (ADAMS Accession No. ML15212A281) (Staff Answer to New Contention); Entergy's Answer Opposing State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV (July 31, 2015) (ADAMS Accession No. ML15212A825) (Entergy Answer to New Contention). See also State of Vermont's Reply in Support of Motion for Leave to File a New Contention and Add Bases and Support to Existing Contentions (Aug. 7, 2015) (ADAMS Accession No. ML15219A712) (Vermont Reply to New Contention).

²⁹ Transcript of Teleconference in the Matter of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) (July 7, 2015) (ADAMS Accession No. ML15190A150) (Tr.).

³⁰ Petition for Review, State of Vermont, et al. v. NRC, No. 15-1279 (D.C. Cir. Aug. 13, 2015).

³¹ *Vermont Yankee*, LBP-15-24, 82 NRC at ___ (slip op. at 1).

³² Joint Motion on Mandatory Disclosures and Schedule (Sept. 17, 2015) (ADAMS Accession No. ML15260B278).

³³ *Id.* at 1.

³⁴ Notice of Hearing, at 2 (Sept. 18, 2015) (unpublished) (ADAMS Accession No. ML15261A723) (Notice of Hearing).

³⁵ Initial Scheduling Order (Sept. 21, 2015) (unpublished) (ADAMS Accession No. ML15264A886).

the hearing would be resolved in a bifurcated manner, with an initial decision on Contention V issued before addressing Contention I, that initial briefs on Contention V would be due on October 20, 2015, and that mandatory disclosures on both Contentions I and V would be due November 2, 2015.³⁶

On September 22, 2015, Entergy filed its Motion to Withdraw with the Board seeking to withdraw the LAR, without conditions, and to dismiss this proceeding without prejudice.³⁷

Vermont has stated that it intends to file a response opposing the unconditional withdrawal of the LAR.³⁸ Also on September 22, 2015, Entergy submitted a letter to the Staff stating that it is withdrawing the LAR because it has determined that “maintaining the existing license conditions represents a manageable administrative burden and is allowed by the regulations so long as [Entergy] does not elect to amend those license conditions, as set forth by the provisions of 10 [C.F.R. §] 50.75(h)(5).”³⁹

The NRC’s determination on the LAR is still pending.⁴⁰

DISCUSSION

I. Legal Standards

The Commission’s regulations at 10 C.F.R. § 2.107(a) provide that, prior to the issuance of a “notice of hearing,” the Commission may permit an applicant to withdraw an application on such terms and conditions as the Commission may prescribe or may deny the application or dismiss it with prejudice. On the other hand, after the issuance of a notice of hearing, withdrawal of an application “shall be on such terms as the presiding officer may prescribe.”⁴¹

³⁶ *Id.* at 2-5.

³⁷ Motion to Withdraw at 1.

³⁸ *See id.*

³⁹ *See id.* at Attachment A.

⁴⁰ *See* Initial Scheduling Order at 5.

⁴¹ 10 C.F.R. § 2.107(a).

The purpose of this Commission regulation allowing a presiding officer to condition the withdrawal of applications is “primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.”⁴² Parties may seek such curative conditions to the “exact extent that they may be exposed to legal harm by a dismissal.”⁴³ Thus, a party seeking the imposition of conditions has an “affirmative duty to demonstrate a legal injury to a private or public interest.”⁴⁴ Such a duty is not satisfied by “[m]ere allegations” of legal harm.⁴⁵ Instead, the claimed legal harm must find support in the record.⁴⁶ Additionally, “the prospect of a second lawsuit [or license application] does not provide the requisite quantum of legal harm to warrant dismissal with prejudice.”⁴⁷ Taken together, although licensing boards have “substantial leeway in defining the circumstances in which an application may be voluntarily withdrawn”; licensing boards “may not abuse this discretion by exercising their power in an arbitrary manner” such as by imposing conditions that do not bear a “rational relationship” to a legal harm that a party has demonstrated is supported by the record.⁴⁸

⁴² *Sequoyah Fuels Corp.* (Source Material License, No. Sub-1010), LBP-93-25, 38 NRC 304, 315 (1993), *aff'd* CLI-95-2, 41 NRC 179 (1995) (quoting *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961)).

⁴³ *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), LBP-82-81, 16 NRC 1128, 1137 (1982).

⁴⁴ *Energy Fuels Nuclear, Inc.* (Source Material License No. SUA-1358), LBP-95-20, 42 NRC 197, 198 (1995) (citing *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), CLI-95-2, 41 NRC 179, 192-93 (1995)).

⁴⁵ *Philadelphia Elec. Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981).

⁴⁶ *Id.* at 974. *See also* *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 54 (1999) (denying litigation expenses to intervenors where the record did not provide substantial support for allegations of intentional forum shopping or other misconduct by the applicant).

⁴⁷ *Fulton*, ALAB-657, 14 NRC at 979 (citing *Jones v. SEC*, 298 US 1, 19 (1936)).

⁴⁸ *Id.* at 974 (citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); James Wm. Moore et al., 5 Moore's Federal Practice ¶41.05[1] at 41-58 (2d ed. 1981)).

II. The Board Has the Jurisdiction to Address Entergy's Motion to Withdraw

Before discussing the Motion to Withdraw, it is necessary to determine whether the Board has the jurisdiction over the Motion to Withdraw in the first place. As explained by the Commission's regulations at 10 C.F.R. § 2.107 and the Commission itself in *Vermont Yankee*, CLI-93-20, jurisdiction is dependent on the issuance of a "notice of hearing" such that, prior to the issuance of this notice, the Commission, or the NRC Staff, by delegation of authority, has exclusive jurisdiction to address withdrawals whereas, after the issuance of this notice, the licensing board assumes the jurisdiction to address withdrawals.⁴⁹ Therefore, in the situation in which a notice of hearing has not been issued but a hearing request has been referred to the Atomic Safety and Licensing Board Panel, the Staff has the jurisdiction to approve the withdrawal after which the licensing board assigned to the matter "should issue an order indicating both that the Commission (or its Staff) has previously approved the withdrawal of an application and that the proceeding is being terminated, therefore, on grounds of mootness."⁵⁰

In the instant proceeding, the Board granted Vermont's Hearing Request on August 31, 2015,⁵¹ was notified by Entergy on September 17, 2015 that Entergy had decided to withdraw the LAR,⁵² and issued a Notice of Hearing on September 18, 2015. Consistent with 10 C.F.R. § 2.312, the Notice of Hearing stated the nature of the planned hearing, that the hearing would be conducted "at a time and place that will be fixed by subsequent order," and that the hearing would be in accordance with the procedures of 10 C.F.R. Part 2, Subpart L.⁵³ Thereafter, on September 22, 2015, Entergy filed both its Motion to Withdraw with the Board and a letter requesting withdrawal with the Staff. Despite the fact that Entergy filed with both the Board and

⁴⁹ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-93-20, 38 NRC 83, 84-85 (1993).

⁵⁰ *Id.* at 85.

⁵¹ *Vermont Yankee*, LBP-15-24, 82 NRC at ___ (slip op. at 1).

⁵² Joint Motion on Mandatory Disclosures and Schedule, at 1.

⁵³ Notice of Hearing at 1-3.

the Staff regarding the withdrawal of its LAR, since these filings were made after the Board's issuance of a notice of hearing, the Board has the jurisdiction to address Entergy's Motion to Withdraw.

III. The Board Should Grant Entergy's Motion to Withdraw with the Single Procedural Condition that Entergy Notify Vermont of Any Future Submittal of an Application Substantively Similar to the LAR

Due to its prior issuance of a notice of hearing and pursuant to 10 C.F.R. § 2.107, although the Board does not have the discretion to deny Entergy's Motion to Withdraw,⁵⁴ the Board can impose terms or conditions on the withdrawal to the "exact extent" that a party has demonstrated, based on the record, that it may be exposed to a legal harm by the withdrawal.⁵⁵ At the most drastic extreme, such conditions could include precluding Entergy from filing substantively similar license amendment requests in the future through a Board dismissal of this proceeding with prejudice.⁵⁶ However, the standard for dismissal with prejudice is not satisfied in the instant proceeding because this proceeding has not involved any determinations on its merits. With respect to other, less drastic, substantive conditions, they too are not warranted in this proceeding because the withdrawal of the LAR will not result in a legal harm; instead, it will simply result in Entergy being required to continue to comply with its existing license conditions, the very same license conditions that Vermont had sought to require Entergy to maintain. With respect to Vermont, the only potential effect stemming from Entergy's withdrawal would be the possibility that, in the future, Entergy may submit to the NRC a substantively similar license amendment request. Although such a prospect does not provide the requisite quantum of legal

⁵⁴ *Sequoyah Fuels Corp*, LBP-93-25, 38 NRC at 317. See also *id.* at 319 (stating that a presiding officer should not require a licensee to continue an unwilling involvement in a licensing action because to do so would "minimize and perhaps negate the NRC Staff's regulatory role in approving and overseeing current decommissioning activities.").

⁵⁵ *Perkins*, LBP-82-81, 16 NRC at 1137.

⁵⁶ See *Fulton*, ALAB-657, 14 NRC at 974 ("There is no doubt that a licensing board is vested with the power to dismiss an application with prejudice" but this amounts to a "particularly harsh and punitive term imposed upon withdrawal.").

harm to warrant dismissal with prejudice,⁵⁷ it has been found to warrant procedurally conditioning the withdrawal of an application on the requirement that the applicant notify the intervenor of any similar submittal in the future.⁵⁸

Based on this precedent, and as fully explained below, the Board should grant Entergy's Motion to Withdraw with the single procedural condition that Entergy be required to provide written notice to Vermont of any filing of a new license amendment application substantively similar to the instant LAR at the time such application is submitted to the NRC.

A. The Board Should Not Dismiss this Proceeding with Prejudice Because No Determinations Have Been Made on its Merits

Dismissal with prejudice should be reserved for “unusual situations which involve substantial prejudice to the opposing party or to the public interest in general”⁵⁹ and it is a “particularly harsh and punitive term” to be imposed upon withdrawal.⁶⁰ Generally, a dismissal with prejudice suggests that a disposition has been made on the merits,⁶¹ whereas dismissals without prejudice are issued in proceedings where the merits have yet to be considered.⁶² Thus, “[d]ismissal with prejudice [amounts] to an adjudication on the merits of the admitted contentions.”⁶³ Based on this distinction, presiding officers have refused to order dismissals with prejudice in cases which “did not entail lengthy discovery, or proceed through the trial

⁵⁷ *Id.* at 979 (citing *Jones v. Securities and Exchange Commission*, 298 US 1, 19 (1936)).

⁵⁸ *Energy Fuels Nuclear, Inc.*, LBP-95-20, 42 NRC at 198-99.

⁵⁹ *Id.* at 198.

⁶⁰ *Fulton*, ALAB-657, 14 NRC at 974.

⁶¹ *Id.* at 973 (citing *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3d Cir. 1976); James Wm. Moore et al, 5 Moore's Federal Practice ¶41.05[2] at 41-75 (2d ed. 1981)).

⁶² *Puerto Rico Elec. Power Auth.* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1138 (1981) (affirming a licensing board's grant of a motion to withdraw an application without prejudice because the intervenors had not raised “a colorable claim that they or the public interest will be substantially prejudiced by according the [applicant] the usual disposition where an application is withdrawn without decision on the merits—a withdrawal without prejudice.”).

⁶³ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51 (1999) (citing *Perkins*, LBP-82-21, at 1135).

stage” and, thus, had “hardly got[ten] off the ground”⁶⁴ or which had involved a “lengthy discovery process” but were “nowhere near approaching a determination on the merits”⁶⁵

In the instant proceeding, not only has no disposition been made on any of its merits, but there have also not even been any pleadings on any of these merits nor has there been discovery. Instead, the parties’ first pleadings are not due until October 20, 2015 and these pleadings are only to be on the purely legal issue raised by Vermont’s Contention V.⁶⁶ Evidentiary filings on the merits of Vermont’s Contention I are not due until months thereafter, if at all.⁶⁷ Additionally, mandatory disclosures are not due until November 2, 2015.⁶⁸ The only ruling by the Board, to date, has been its admission of Contentions I and V. However, as the Board itself noted, the admission of these contentions involved no determination on their merits, it was only a determination that they had satisfied the Commission’s admissibility requirements at 10 C.F.R. § 2.309(f)(1).⁶⁹ The only actions that the Board has taken in this proceeding since its granting of Vermont’s Hearing Request were the issuances of a Notice of Hearing and an Initial Scheduling Order, both of which only have to do with the procedural process through which a determination on the merits will be made but do not address any merits themselves. Therefore, similar to previous instances in which presiding officers have refused to order

⁶⁴ *North Coast*, ALAB-662, 14 NRC at 1135 n.11.

⁶⁵ *Pacific Gas & Elec. Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 53 (1983).

⁶⁶ Initial Scheduling Order at 1, 5.

⁶⁷ *See id.* at 5-6.

⁶⁸ *Id.* at 3.

⁶⁹ *See Vermont Yankee*, LBP-15-24, 82 NRC at __ (slip op. at 42 n.223) (citing *Southern Nuclear Operating Co.* (Vogle Electric Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 221 (2011) (“[T]he evaluation of a contention that is performed at the contention admissibility stage should not be confused with the evaluation that is later conducted at the merits stage of a proceeding. At the contention admissibility stage, a Board evaluates whether a petitioner has provided sufficient support to justify admitting the contention for further litigation. The facts and issues raised in a contention are not ‘in controversy’ and subject to a full evidentiary hearing unless the proposed contention is admitted.”)).

dismissals with prejudice, this proceeding is “nowhere near approaching a determination on the merits”⁷⁰ and, thus, it cannot be dismissed with prejudice.

B. The Board Should Not Impose Substantive Conditions Because There is No Legal Harm as a Result of the Motion to Withdraw

A licensing board can only impose terms or conditions on a withdrawal to the “exact extent” that a party has demonstrated, based on the record, that it may be exposed to a “legal harm” by the withdrawal.⁷¹ However, in this proceeding, there will be no legal harm as a result of Entergy’s Motion to Withdraw.

Entergy’s LAR requested, pursuant to 10 C.F.R. § 50.75(h)(4)-(5), the deletion from the VY operating license of all of its conditions related to the VY DTF so that the Commission’s regulations related to DTFs at 10 C.F.R. § 50.75(h)(1)-(3) would apply to VY instead of these preexisting license conditions.⁷² Thus, with the withdrawal of its LAR, Entergy will simply continue to be required to comply with the VY DTF license conditions instead of with the Commission’s DTF regulations. These exact VY DTF license conditions were previously determined by the NRC, as part of its order approving the transfer of the VY operating license to Entergy, to be protective of the public health and safety.⁷³ Therefore, there can be no “legal harm” in requiring Entergy to continue to comply with the VY DTF license conditions that have already been found to be protective of the public health and safety. In fact, requiring Entergy to continue to comply with these license conditions is the exact relief that Vermont had sought in this proceeding.⁷⁴ Essentially, as a result of Entergy’s withdrawal, the *status quo* will be maintained and all of the parties will remain in the position that they were in before the

⁷⁰ *Stanislaus*, LBP-83-2, 17 at 53.

⁷¹ *Perkins*, LBP-82-81, 16 NRC at 1137.

⁷² LAR at 1.

⁷³ VY License Transfer Order at Enclosure 1, p. 2-3.

⁷⁴ See *Vermont Yankee*, LBP-15-24, 82 NRC at ___ (slip op. at 13) (acknowledging that Vermont seeks to require Entergy “to maintain the existing license conditions.”).

submission of the LAR. To the extent that Vermont is concerned with how Entergy will comply with these requirements rather than with the fact that Entergy will continue to be required to comply with these requirements, Vermont raises an issue outside the scope of this licensing proceeding and outside the Board's jurisdiction.⁷⁵ Also, to the extent that Vermont attempts to add new requirements or additional conditions to these existing license conditions, it is Vermont who would be seeking to amend the Vermont Yankee license, which would be contrary to the Commission's license amendment process at 10 C.F.R. §§ 50.90-50.92.

This proposition that a withdrawal that results in an applicant being required to comply with existing requirements does not amount to a legal harm was recognized in *Sequoyah Fuels Corp.* In that proceeding, the intervenors argued that the withdrawal of a renewal application would not moot the issue of, among others, the adequacy of decommissioning funding because, as a result of the withdrawal, the licensee would have to undertake decommissioning.⁷⁶ Thus, the intervenors sought to impose conditions on the withdrawal with respect to decommissioning, including the condition that the State be allowed to "review and comment on the financial assurances required."⁷⁷ The licensee opposed such conditions arguing that the intervenors had not demonstrated a legal harm and that, instead, the result of the withdrawal would be that the licensee would merely continue to be required to comply with the Commission's decommissioning regulations and that it is the Staff and not the presiding officer that has regulatory jurisdiction over such compliance issues.⁷⁸ The presiding officer ultimately denied the requested imposition of conditions on the withdrawal, finding that such an action would

⁷⁵ See *Omaha Pub. Power Dist.* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC __, __ (slip op. at 7, 13) (Mar. 9, 2015) (stating that "oversight activities normally conducted for the purpose of ensuring that licensees comply with existing NRC requirements and license conditions" do not trigger the opportunity for a hearing under the AEA and, instead, may be pursued by the 10 C.F.R. § 2.206 process, which "allows members of the public to raise and obtain review of safety concerns.").

⁷⁶ *Sequoyah Fuels*, LBP-93-25, 38 NRC at 310-311.

⁷⁷ *Id.* at 311-12.

⁷⁸ *Id.* at 313-14.

amount to the litigation of decommissioning activities already permitted under the applicant's license, which was beyond the scope of the proceeding and the presiding officer's jurisdiction.⁷⁹

As with *Sequoyah Fuels Corp.*, the instant Motion to Withdraw will result in Entergy continuing to be required to comply with existing requirements. Therefore, the Motion to Withdraw does not warrant the imposition of substantive conditions because (1) the requirement to comply with existing requirements cannot give rise to a demonstrable legal harm and (2) any challenge to Entergy's compliance with existing requirements is either a challenge to the Commission's oversight of VY or a challenge to the requirements themselves, both of which are outside of the Board's jurisdiction.⁸⁰

C. The Board Should Exercise its Discretion to Impose the Procedural Condition that Entergy Notify Vermont of Any Future Submittal of an Application Substantively Similar to the LAR

Because of the extremely early stage of this proceeding and the lack of any determinations on its merits and because of the lack of any "legal harm" stemming from Entergy continuing to be required to comply with existing requirements, the Board should not impose substantive conditions on Entergy's withdrawal. However, in order to ensure adequate notice to Vermont, the Board should impose the procedural condition on Entergy's withdrawal that Entergy be required to provide written notice to Vermont of any filing of a new license amendment application substantively similar to the instant LAR at the time such application is submitted to the NRC.

Such a condition would be similar to the one imposed in *Energy Fuels Nuclear, Inc.*⁸¹ That case involved a 10 C.F.R. Part 2, Subpart L, proceeding on a license amendment request in which a hearing request had been granted.⁸² After the grant of the hearing request, the

⁷⁹ *Id.* at 321-22.

⁸⁰ See *Fort Calhoun*, CLI-15-5, 81 NRC at ___ (slip op. at 7, 13); 10 C.F.R. §§ 50.91-50.92.

⁸¹ See *Energy Fuels Nuclear, Inc.*, LBP-95-20, 42 NRC at 199.

⁸² *Id.* at 197.

licensee sought to withdraw the license amendment request “without prejudice or bias.”⁸³ In response, the intervenor did not come forward with any demonstration of legal harm to itself or its interests that would flow from the withdrawal.⁸⁴ Although the intervenor would be afforded the opportunity to petition to intervene if the licensee were to choose to refile a similar license amendment request in the future, the presiding officer found “meritorious” the Staff’s suggestion that the licensee be required to provide written notice to the intervenor of any such filing.⁸⁵ Therefore, the presiding officer ordered that “[a]s a condition of the Licensee’s withdrawal of its license amendment application, the Licensee shall provide written notice to [the intervenor] of any filing of a new license amendment application [substantively similar to the one being withdrawn] at the time such application is submitted to the NRC Staff”⁸⁶

Since the procedural posture of the instant proceeding is analogous to that of *Energy Fuels Nuclear, Inc.*, this Board should also find meritorious the Staff’s suggestion that Entergy’s withdrawal be procedurally conditioned on notifying Vermont of its future submittal of any application substantively similar to the LAR that is the subject of this proceeding.

⁸³ *Id.* at 198.

⁸⁴ *Id.*

⁸⁵ *Id.* at 199.

⁸⁶ *Id.*

CONCLUSION

For the foregoing reasons, the Board should grant Entergy's Motion to Withdraw with the single procedural condition that Entergy be required to provide written notice to Vermont of any filing of a new license amendment application substantively similar to the instant LAR at the time such application is submitted to the NRC.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 2nd day of October, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR VERMONT YANKEE, LLC)
AND ENTERGY NUCLEAR OPERATIONS, INC.) Docket No. 50-271-LA-3
)
(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 ANSWER TO ENTERGY'S MOTION TO WITHDRAW," dated October 2, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 2nd day of October, 2015.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 2nd day of October, 2015