

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
) Docket No. 50-271-LA-3
ENTERGY NUCLEAR VERMONT)
YANKEE, LLC AND ENTERGY) October 2, 2015
NUCLEAR OPERATIONS, INC.)
) **ORAL ARGUMENT REQUESTED**
(Vermont Yankee Nuclear Power Station)

**STATE OF VERMONT’S RESPONSE TO ENTERGY’S
MOTION TO WITHDRAW**

After extensive litigation over the last six months encompassing hundreds of pages of filings, an hour-and-a-half-long oral argument with the three members of the Board and five participating attorneys, and a 45-page written decision from the Board, Entergy now seeks to withdraw its application without prejudice and “without conditions.”¹

Under 10 C.F.R. § 2.107(a), the Board has broad authority to impose conditions on Entergy’s withdrawal of its License Amendment Request (LAR). Once a Notice of Hearing has been issued, as has occurred here,² any withdrawal from the proceeding “shall be on such terms as the presiding officer may prescribe.”³ Conditions are appropriate whenever “there is legal harm to the intervenors or the

¹ Entergy’s Motion to Withdraw Its September 4, 2014 License Amendment Request, at 1 (Sept. 22, 2015) (ADAMS Accession No. ML15265A583) (Motion).

² Notice of Hearing (Sept. 18, 2015).

³ 10 C.F.R. § 2.107(a).

public.”⁴ And the regulation specifically mentions the possibility of dismissal “with prejudice.”⁵ As the Commission has noted, “licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances.”⁶

The Board should deny Entergy’s request for unconditional withdrawal because it would subject the State of Vermont and the public to legal harm and prejudice in at least two ways. First, an unconditional withdrawal would injure the State and public by creating a significant risk that at some point over the next 60 years the State will have to relitigate matters already decided by the Board’s August 31, 2015 opinion (LBP-15-24).⁷ This concern is heightened by the fact that a withdrawal without prejudice may well lead to vacatur of that opinion.⁸ Second, it would injure the State and the public by preventing disclosure of the most basic information about how Entergy is actually spending money from the Vermont Yankee Nuclear Decommissioning Trust (NDT) Fund. This is particularly

⁴ *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), LBP-82-81, 16 NRC 1128, 1134 (1982).

⁵ *Id.*; see also, e.g., *S. California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-13-10, slip op. at 6 (2013) (in response to motion to withdraw, Commission may “place terms and conditions on the withdrawal, deny the application, or dismiss the application with prejudice”).

⁶ *U.S. Dep’t of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 624 (2010).

⁷ *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC __ (Aug. 31, 2015).

⁸ See, e.g., *S. California*, CLI-13-10, slip op. at 8 (when a “proceeding became moot while . . . still subject to a potential appeal” Commission’s “established and customary practice” is to “grant the Staff’s motion and vacate”).

problematic because although Entergy claims its withdrawal would simply return the parties to the status quo, Entergy has reduced the amount of information provided in its most recent 30-day notice letter.

The State respectfully requests that the Board, at a minimum, impose the following two conditions on Entergy's withdrawal:

- (1) The Board's ruling on the admissibility of the State's Contentions I and V in LBP-15-24 resolves the admissibility of those contentions with prejudice and the decision shall not be vacated; and
- (2) Entergy shall provide the State all supporting documentation for the specific expenses for which Entergy has filed 30-day notices from the Vermont Yankee Nuclear Decommissioning Trust Fund, and shall continue to provide that information for future withdrawals.

Both of these conditions are well within the Board's authority, and imposing them would be appropriate here to avoid injury to the State and the public.

- I. The Board should impose a condition that the Board's ruling on the admissibility of the State's Contentions I and V in LBP-15-24 resolves the admissibility of those contentions with prejudice and the decision shall not be vacated.**

An unconditional withdrawal is inappropriate here because it would allow Entergy to resubmit its LAR next month, next year, or even 59 years from now, and all parties and this tribunal would be starting over again from scratch, without the benefit of the large amount of resources expended to in this proceeding. And once

the LAR is withdrawn, the next step will almost certainly be a motion by Entergy or NRC Staff to vacate the Board's decision in this matter. So the parties and the Board would be back to square one. Although Entergy apparently believes that is the proper outcome, since "there has been no decision on the merits in this proceeding,"⁹ this ignores the fact that the admissibility of Contentions I and V have been extensively litigated and addressed by the Board's decision.

While dismissal with prejudice is "reserved for unusual situations," it is appropriate to prevent "substantial prejudice to an opposing party or to the public interest in general."¹⁰ This is not a situation "where the withdrawal will leave the Intervenor in precisely the same position in any subsequent proceeding as if they had prevailed . . . on the subsequent merits portion of this proceeding."¹¹ If the State prevailed on the merits, it would have binding precedent on the LAR. But if Entergy is able to withdraw without prejudice, the parties and the Board will be starting from scratch next time, especially if it leads to vacatur of LBP-15-24.¹²

Withdrawal without prejudice is particularly inappropriate with regard to Contention V. Although the Board's ruling on Contention V was at the contention

⁹ Motion at 5.

¹⁰ *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-33 (1981); *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (1981).

¹¹ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

¹² See *supra* note 8 and accompanying text (explaining that a withdrawal without prejudice at this stage may well lead to vacatur of LBP-15-24).

admissibility stage, the Board correctly recognized that this was a purely “legal issue.”¹³ And although the Board ordered additional briefing, the matter was briefed in depth by all of the parties when the State moved to admit Contention V. After reviewing that briefing, the Board held that the State had raised a “serious legal question” regarding Entergy’s failure to even mention the related exemption requests in its LAR.¹⁴ The Board’s ruling “agree[d] with Vermont that the approval of the exemptions is material to the Staff’s LAR review process and its resulting findings.”¹⁵ The Board correctly noted that the State “has adequately supported its statement that the LAR is legally deficient in light of the granted exemptions.”¹⁶ The Board rejected Staff’s position as “ignoring the actual, substantive effect of the granted exemptions.”¹⁷ And the Board appropriately reminded Entergy that “those ‘dealing with their government must turn square corners.’”¹⁸

Most importantly, the Board specifically noted “agree[ment] with Vermont that an applicant *must* describe the changes desired by noting planned exemptions directly relevant to the LAR.”¹⁹ It is undisputed that Entergy’s LAR does not do that here. The Board further held that “the approval of the exemptions is material to the

¹³ *Entergy*, LBP-15-24, slip op. at 43.

¹⁴ *Id.* at 44.

¹⁵ *Id.* at 39.

¹⁶ *Id.* at 42.

¹⁷ *Id.* at 40-41.

¹⁸ *Id.* at 41 (citing *Gilmore v. Lujan*, 947 F.2d 1409, 1412 (9th Cir. 1991) (quoting *Rock Island, Ark., & La. Ry. Co. v. United States*, 254 U.S. 141, 143 (1920))).

¹⁹ *Id.* at 38 (emphasis added).

Staff’s LAR review process and its resulting findings.”²⁰ The Board then bifurcated this proceeding to allow for immediate resolution of Contention V since that “may obviate the need for a hearing.”²¹ In other words, far from being at a preliminary stage, Contention V—and potentially the entire LAR—is close to being resolved.²²

II. The Board should impose a condition that Entergy provide the State all supporting documentation for the specific expenses for which Entergy has filed 30-day notices from the Vermont Yankee Nuclear Decommissioning Trust Fund, and continue to provide that information for future withdrawals.

If Entergy is allowed to withdraw its LAR without prejudice, the Board should impose a condition to ensure that the State and the public are not harmed now and in potential future proceedings by Entergy’s choice to withdraw the LAR and withhold information about its expenditures from the NDT Fund. The on-the-ground effect of granting Entergy’s withdrawal is to prevent the State and members of the public from obtaining the most basic information about how Entergy is

²⁰ *Id.* at 39; *see also, e.g., id.* at 44 n.230 (holding that Entergy’s “exemptions raise material questions directly connected to an agency licensing action”).

²¹ *Id.* at 44-45.

²² These circumstances are thus analogous to situations where federal courts have held that “[p]lain legal prejudice may occur when the plaintiff moves to dismiss a suit at a late stage of the proceedings or seeks to avoid an imminent adverse ruling in the case.” *Harris v. Devon Energy Prod. Co., L.P.*, 500 F. App’x 267, 268 (5th Cir. 2012); *see also, e.g., Minnesota Mining & Mfg. Co. v. Barr Labs., Inc.*, 289 F.3d 775, 783 (Fed. Cir. 2002) (“[A] party should not be permitted to avoid an adverse decision on a dispositive motion by dismissing a claim without prejudice.”). A “motion to voluntarily dismiss . . . *should be denied* when a plaintiff seeks to circumvent an expected adverse result.” *Jessup v. Daniels*, No. 1:13CV607, 2014 WL 1431728, at *5 (M.D.N.C. April 14, 2014) (emphasis added; quotation omitted). This is necessary to avoid “voluntary dismissals which unfairly affect the other side.” *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317 (5th Cir. 2002) (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364, at 165 (1971)).

actually spending money from the NDT Fund. The withdrawal does this in two ways. First, if Entergy's September 22, 2015 withdrawal motion is granted before the November 2, 2015 deadline for initial disclosures, Entergy will be relieved of its duty in this proceeding to provide the State with *any* information about what expenditures it has made from the NDT Fund to date. This is a legal harm to the State and to the public. The disclosures required by 10 C.F.R. § 2.336(a) would have provided further and more specific evidence that is directly relevant to the matters raised in this proceeding. Should Entergy seek a similar LAR in the future, the State will be prejudiced by not having the benefit of those disclosures to buttress any future contentions it may wish to file of the type it has filed in this proceeding regarding whether Entergy is in compliance with 10 C.F.R. § 50.82(a)(8).

Further, the State is legally harmed because it will lose the ability to retain these documents into the future—something that is critical given that many of the State's concerns over the NDT Fund relate to whether the Fund will be solvent many decades from now. The condition the State requests—providing information about what expenses Entergy is withdrawing from the NDT Fund—is nothing more than what Entergy should have been doing all along. In the particular circumstances of this case, allowing withdrawal without requiring disclosure of that information will harm both the State and the public.

Second, although Entergy claims its withdrawal is nothing more than a return to the status quo, it has recently changed from the status quo in a way that

harms both the State and the public. In particular, Entergy’s latest 30-day notice contains even *less* information than what Entergy has previously provided. Just a few months ago, while vigorously defending its right to not provide 30-day notice, Entergy told the Board that notice was a “significant burden.”²³ Entergy now claims the opposite—that it is “a manageable administrative burden.”²⁴ And Entergy cites the minimal nature of this burden as the *entire* basis for its withdrawal.

During the same week Entergy announced its intent to withdraw from this proceeding, it submitted the most minimal 30-day notice it has provided to date.²⁵ The latest notice is dated September 14, 2015. It provides a lump sum, rounded to the nearest million, and does not even identify whether the money will be used for decommissioning or any other category of expenses.²⁶ Notably, just one month earlier, Entergy filed a 30-day notice in which it specifically “confirmed” that all of the expenses “are for legitimate decommissioning and operational irradiated fuel management expenses.”²⁷ To be clear, it is the State’s position that both of these notices are deficient and do not comply with Entergy’s license requirements. But what is more problematic here is that Entergy has gone backwards in the amount of

²³ Entergy’s Answer Opposing Petition for Leave to Intervene and Hearing Request, at 34 (May 15, 2015) (ADAMS Accession No. ML15135A498).

²⁴ Motion at 2-3, 5.

²⁵ *See* Exhibit 1 (Pre-Notice of Disbursement from Decommissioning Trust (Sept. 14, 2015) (ADAMS Accession No. ML15265A038)).

²⁶ Exhibit 1 at 1.

²⁷ Exhibit 2 (Pre-Notice of Disbursement from Decommissioning Trust (Aug. 13, 2015) (ADAMS Accession No. ML15232A241)).

information it provides in its 30-day notices, and it has done so at the same time it decided its best legal course of action was to withdraw from this proceeding and continue providing those notices.

In these particular circumstances, the Board should exercise its authority to condition Entergy's withdrawal from this proceeding to protect both the State and the public.

The State's requested condition is particularly appropriate in light of Entergy's representation in its motion to withdraw that it will "be bound by its current license conditions regarding the decommissioning trust."²⁸ The State specifically argued to the Board that Entergy is currently making withdrawals for expenses that "are not legitimate decommissioning costs" and "not part of the granted exemptions."²⁹ And the Board correctly held that the State "provided the 'sound basis' and documentary support required to support a contention asserting that a licensee will contravene NRC's regulations."³⁰

Further, the State's requested condition is necessary to protect the State—and the public—from the potential loss or destruction of documents concerning Entergy's use of the NDT Fund. The Board has previously imposed as a condition of

²⁸ Motion at 5.

²⁹ *Entergy*, LBP-15-24, at 21.

³⁰ *Id.* at 23.

withdrawal an “obligation for preservation and retention of documents.”³¹ Although the preservation order in *Stanislaus* went only to discovery that had been completed at the time of withdrawal, the rationale for such a condition is to prevent the destruction of documents that may be of use in later proceedings. As it stands, if the Board does not condition Entergy’s withdrawal on providing the State with information about expenditures from the NDT Fund, that information will remain with Entergy alone. Given the potential for future relitigation of this proceeding years or decades from now if Entergy ever chooses to refile this LAR again, the State’s requested condition is appropriate to protect against potential loss or discarding of important information in the intervening years.

This case is readily distinguishable from the *Yankee* proceeding that Entergy cites to support its withdrawal without conditions. There, the Board stated that “contentions that we admitted were focused on the current [license termination plan] and alleged deficiencies and inadequacies therein,”³² and—most importantly—the licensee had specifically committed that its future submissions would be “substantially different” from the one being withdrawn.³³ The Board thus easily concluded that further discovery “could have no relevance to a future [proceeding]

³¹ *Pac. Gas & Elec. Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 52 (1983).

³² *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51(1999) (emphasis added).

³³ *Id.* at 47.

based on a differing survey methodology.”³⁴ Here, by contrast, Entergy has made no commitment that any future LAR would be anything other than a carbon-copy of the one it submitted in this proceeding. Consequently, the issues relevant to Contention I bear directly on all future proceedings regarding the NDT Fund and “raise[] health and environmental concerns about the license amendment because the decommissioning fund exists to ensure that companies will be able to decontaminate the site.”³⁵

Further, Entergy concedes that *Yankee* relied in part on the fact that in that case “the application [was] not likely to be refiled.”³⁶ Entergy then notes that it “*currently* has no plans to reinitiate this license amendment proceeding at a future date.”³⁷ But if Entergy is allowed to withdraw unconditionally anytime it receives an unfavorable ruling, it could refile again next week, next year, or 59 years from now. As the Board is well aware, Entergy believes it can reimburse itself for all of its legal fees from the NDT Fund.³⁸

³⁴ *Id.* at 51.

³⁵ *Entergy*, LBP-15-24, at 22.

³⁶ Motion at 3 (citing *Yankee*, 50 NRC at 54-55).

³⁷ *Id.* at 5 (emphasis added).

³⁸ *Entergy*, LBP-15-24, at 21-22, 29 (citing the State’s evidentiary support for this). If Entergy is granted unconditional withdrawal, and given Entergy’s view of what 30-day notice requires (*see* Exhibit 1), the State will not know if Entergy reimburses itself from the NDT Fund for the legal expenses *for this proceeding*. Transparency is thus essential here to prevent what may otherwise be a “legal injury sustained by the party or the public as a result of the applicant’s prosecution of the application.” Motion at 6 (citing *Sequoyah Fuels Corp.* (Source Materials License No. SUB-1010), LBP-93-25, 38 NRC 304, 315, *aff’d*, CLI-95-2, 41 NRC 179 (1995)).

While Entergy says that this type of concern should be directed toward an enforcement proceeding, this ignores the authority of the Board to “prescribe” the “terms” of withdrawal here.³⁹ Further, as noted earlier, Entergy has made a specific representation in its motion to withdraw that it will “be bound by its current license conditions regarding the decommissioning trust.”⁴⁰ Entergy cannot simultaneously claim that the State’s ability to test that assertion is outside the scope of this motion, particularly in light of the Board’s ruling admitting Contention I.

And while Entergy likens its withdrawal to other withdrawals that have been granted unconditionally, this case is different. In determining appropriate conditions, “the circumstances of each case should be carefully considered, giving due regard to the legitimate interests of all parties.”⁴¹ In addition to the interests of the parties, the Board must also consider “the public interest in general.”⁴² This entire proceeding exists because Entergy sought a license amendment that would prevent the NRC, the State, and the public from receiving notice about Entergy’s intention to make withdrawals from the NDT Fund. Now that Entergy has agreed that it must continue giving 30-day notice, the Board may, as part of the withdrawal, ensure that the 30-day notice is actually meaningful.

³⁹ 10 C.F.R. § 2.107(a).

⁴⁰ Motion at 5.

⁴¹ *Phila. Elec. Co.* (Fulton Generating Station, Units 1, 2, and 3), ALAB-657, 14 NRC 967, 979 n.14 (1981).

⁴² *Id.* at 979.

The Board correctly found that the State had supported its “contention that approval of the LAR would prevent the State from objecting to improper expenditures before they occur by removing the current 30-day notice requirement.”⁴³ The State respectfully requests that the Board examine Entergy’s latest 30-day notice, attached here as Exhibit 1, to determine whether it provides the State with a meaningful opportunity to “object[] to improper expenditures before they occur,”⁴⁴ and that the Board consider this in fashioning conditions on withdrawal of the LAR. In these particular circumstances, the State’s requested conditions should be granted.

CONCLUSION

For these reasons, the Board should, at a minimum, impose the following two conditions on Entergy’s withdrawal:

- (1) The Board’s ruling on the admissibility of the State’s Contentions I and V in LBP-15-24 resolves the admissibility of those contentions with prejudice and the decision shall not be vacated; and
- (2) Entergy shall provide the State all supporting documentation for the specific expenses for which Entergy has filed 30-day notices from the Vermont Yankee Nuclear Decommissioning Trust Fund, and shall continue to provide that information for future withdrawals.

⁴³ *Entergy*, LBP-15-24, at 22.

⁴⁴ *Id.*

Further, before deciding this matter, the State respectfully requests that the Board hold oral argument on this motion.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Montpelier, Vermont
this Second day of October 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of |) | |
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| ENTERGY NUCLEAR VERMONT |) | Docket No. 50-271-LA-3 |
| YANKEE, LLC AND ENTERGY |) | |
| NUCLEAR OPERATIONS, INC. |) | October 2, 2015 |
| |) | |
| (Vermont Yankee Nuclear Power Station) |) | |

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the State of Vermont's Reply to Entergy's September 22, 2015 Motion to Withdraw Its September 2014 License Amendment Request have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding, this Second day of October 2015.

/Signed (electronically) by/
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Dated at Montpelier, Vermont
this Second day of October 2015