

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

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE,
LLC, AND ENTERGY NUCLEAR
OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-LA-3

ASLBP No. 15-940-03-LA-BD01

October 15, 2015

ORDER

(Granting Motion to Withdraw LAR, Denying Motion for
Leave to File Reply, and Terminating Proceeding)

On September 4, 2014, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., (together “Entergy”) filed a license amendment request (“LAR”) to replace site-specific license conditions relating to the decommissioning trust fund for Vermont Yankee Nuclear Power Station with similar regulatory requirements that were promulgated after the license conditions were imposed.¹ Entergy now moves to withdraw its LAR.² The NRC Staff and the State of Vermont, the intervenor in this license amendment proceeding,³ ask this

¹ Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Proposed Change No. 310 Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, attach. 1, at 2 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405) [hereinafter “LAR”].

² Entergy’s Motion to Withdraw Its September 4, 2014 License Amendment Request (Sept. 22, 2015) [hereinafter “Motion to Withdraw”].

³ LBP-15-24, 82 NRC __, __ (slip op. at 1) (Aug. 31, 2015); see State of Vermont’s Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) [hereinafter “Petition”].

Licensing Board⁴ to impose conditions on Entergy's withdrawal.⁵ Finding that two conditions are appropriate given the circumstances of this proceeding, the Board grants Entergy's motion to withdraw the LAR without prejudice on the conditions that (1) Entergy must provide written notice to Vermont of any new license amendment application relating to the decommissioning trust fund at the time such application is submitted to the NRC and (2) Entergy must specify in its 30-day notice to the NRC if any proposed disbursement includes one of the six line items⁶ or legal expenses⁷ to which Vermont objected in its admitted contention. The Board denies Entergy's motion for leave to file a reply because Entergy has not demonstrated the requisite compelling circumstances.⁸

I. Background

This license amendment proceeding primarily involves a dispute between Entergy and Vermont over the necessity of a 30-day notice requirement for disbursements from the decommissioning trust fund and the connection between the LAR and a related exemption request. Entergy's current license conditions regarding the Vermont Yankee decommissioning

⁴ 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).

⁵ NRC Staff's Answer to Entergy's Motion to Withdraw (Oct. 2, 2015) at 17 [hereinafter "Staff's Response"]; State of Vermont's Response to Entergy's Motion to Withdraw (Oct. 2, 2015) at 13 [hereinafter "Vermont's Response"].

⁶ The six line items are "(1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of non-radiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof." LBP-15-24, 82 NRC at ___ (slip op. at 8).

⁷ Vermont objected to legal expenses related to Vermont Yankee's emergency response preparedness. Id.; see Petition at 10 (citing Petition, attach. 1, at 37 n.9 (Comments of the State of Vermont on the Post-Shutdown Decommissioning Activities Report (Mar. 6, 2015))).

⁸ Entergy's Motion for Leave to File Reply and Reply in Support of Motion to Withdraw License Amendment Request (Oct. 13, 2015) [hereinafter "Motion for Leave to File Reply"]; see 10 C.F.R. § 2.323(c) ("The moving party has no right to reply, except as permitted by . . . the presiding officer. Permission may be granted only in compelling circumstances . . .").

trust fund were imposed when the Commission approved Entergy's license transfer application in May 2002 and include a requirement to provide 30 days' notice before disbursing funds (other than administrative expenses for the fund itself) to afford the NRC an opportunity to review, and possibly reject, a particular proposed expense.⁹

In its LAR, Entergy sought to replace that 30-day notice requirement and other plant-specific license conditions with the decommissioning fund requirements in 10 C.F.R. § 50.75(h)(1)–(4), which were promulgated in December 2002 to govern reporting and recordkeeping rules for decommissioning trusts.¹⁰ If the LAR were approved, Entergy would no longer have to provide the 30-day notice to the Commission once it began decommissioning and started making withdrawals under 10 C.F.R. § 50.82(a)(8).¹¹

While the NRC Staff was reviewing the LAR, on January 6, 2015, Entergy submitted a request for exemptions from the decommissioning regulations.¹² Specifically, Entergy sought three regulatory exemptions from 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A) to allow it to use the decommissioning fund to manage its spent fuel and to eliminate the 30-day notice requirement that would otherwise apply to spent fuel management. Without an exemption from the NRC, Entergy would be prohibited from using the decommissioning fund for spent fuel management because it is not an allowable decommissioning expense under the regulations.¹³

⁹ LAR, attach. 1, at 1; see Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station); Order Approving Transfer of License and Conforming Amendment, 67 Fed. Reg. 36,269, 36,270 (May 23, 2002).

¹⁰ LAR, attach. 1, at 2–6; see also Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,332 (Dec. 24, 2002).

¹¹ 10 C.F.R. § 50.75(h)(1)(iv).

¹² Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) (Jan. 6, 2015) (ADAMS Accession No. ML15013A171) [hereinafter "Exemption Request"].

¹³ 10 C.F.R. § 50.75(c) & n.1 (stating that the minimum amounts required for decommissioning trust funds "are based on activities related to the definition of 'Decommission' in § 50.2 of this

The NRC Staff accepted Entergy's LAR for review and informed the public of the opportunity to petition for a hearing in a Federal Register notice on February 17, 2015.¹⁴ Vermont requested a hearing and proffered four contentions challenging the LAR on April 20, 2015.¹⁵ Among other arguments, Vermont asserted that the 30-day notice remained necessary in light of Entergy's alleged plans to spend decommissioning trust funds on impermissible expenses and also argued that the LAR could only be understood in connection with the related exemption request.¹⁶ The Secretary of the Commission referred Vermont's timely petition to the Atomic Safety and Licensing Board Panel,¹⁷ and this Licensing Board was established on May 1, 2015.¹⁸ Entergy and the NRC Staff submitted answers opposing Vermont's hearing request on May 15,¹⁹ and Vermont filed its reply to those responses on May 22, 2015.²⁰

part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license"); see also 10 C.F.R. § 50.2 (*"Decommission means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits—(1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license."*).

¹⁴ Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8359–60 (Feb. 17, 2015).

¹⁵ Petition at 3, 17, 20, 26.

¹⁶ Id. at 3–6, 24–26.

¹⁷ Memorandum from Annette Vietti-Cook, Secretary of the Commission, to E. Roy Hawken, Chief Administrative Judge (Apr. 30, 2015) (ADAMS Accession No. ML15120A477).

¹⁸ 80 Fed. Reg. at 26,301–02.

¹⁹ Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request (May 15, 2015); NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request (May 15, 2015).

²⁰ The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (May 22, 2015).

Before the Board held oral argument on the admissibility of Vermont's four contentions, the NRC Staff granted Entergy's exemption requests on June 17, 2015.²¹ The NRC Staff agreed with Entergy that the decommissioning fund has, or will have, sufficient funds to pay for both decommissioning and spent fuel management and that it was unnecessary for Entergy to provide a 30-day notice of its planned spent fuel management disbursements.²² The NRC Staff also concluded that the exemptions were categorically excluded from environmental review as administrative changes that did not increase the risk of public radiation exposure.²³

The NRC Staff made all three of the requested exemptions effective upon issuance.²⁴ However, only the exemption from 10 C.F.R. § 50.82(a)(8)(i)(A), relating to the withdrawal of trust funds for spent fuel expenses, had an immediate effect.²⁵ Entergy's current license conditions require 30-day notification for all withdrawals (decommissioning, spent fuel, or other), and the granted exemption for notification could not go into effect before the LAR was granted.²⁶ Thus, the two exemptions from 10 C.F.R. § 50.75(h)(1)(iv)—which allow Entergy to use the

²¹ Letter from James Kim, Project Manager, Plant Licensing IV-2 and Decommissioning Transition Branch, Division of Operating Reactor Licensing to Site Vice President (June 17, 2015) (ADAMS Accession No. ML15128A219).

²² Id., encl. 1, at 5.

²³ Id., encl. 1, at 9 (citing 10 C.F.R. § 51.22(c)(25)).

²⁴ Id., encl. 1, at 11; see Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992, 35,995 (June 23, 2015).

²⁵ 80 Fed. Reg. at 35,993 ("The requested exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would allow [Entergy] to use a portion of the funds from the Trust for irradiated fuel management without prior notice to the NRC . . .").

²⁶ A licensee cannot be "exempted" from license conditions without a license amendment modifying such conditions. See 10 C.F.R. § 50.90.

decommissioning trust fund for spent fuel management without a 30-day notice—will continue to have no effect because 10 C.F.R. § 50.75(h) does not apply to Entergy.²⁷

Shortly after the exemptions were granted, the Board heard oral argument on July 7, 2015, regarding the admissibility of Vermont's four contentions.²⁸ Meanwhile, on July 6, Vermont moved for leave to file a new contention—Contention V—and to add the NRC Staff's approval of the exemptions as an additional factual basis to support admission of three of Vermont's previously filed contentions.²⁹ Entergy and the NRC Staff submitted answers on July 31, 2015, opposing admission of the new contention and the addition of the new factual basis,³⁰ to which Vermont submitted a reply on August 7.³¹

On August 31, 2015, the Board granted Vermont's petition to intervene and admitted Contentions I and V.³² Contention I concerned the necessity of the 30-day notice in light of Vermont's factual allegations that Entergy could otherwise improperly reduce the fund to such an extent that the plant could not be maintained in a safe condition.³³ In particular, Vermont alleged that three different categories of planned expenses contravened the decommissioning

²⁷ In its letter to the NRC Staff, Entergy concurs that withdrawing the LAR "requires no changes to the exemptions from specific requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv)." Motion to Withdraw, attach. A, at 1.

²⁸ Tr. at 1–78.

²⁹ 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 (July 6, 2015).

³⁰ Entergy's Answer Opposing State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV (July 31, 2015); NRC Staff's Answer to the State of Vermont's Motion for Leave to File New and Amended Contentions (July 31, 2015).

³¹ 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).

³² LBP-15-24, 82 NRC at __ (slip op. at 45).

³³ Id. at __ (slip op. at 27–29).

regulations: (1) six line items in the Post Shutdown Decommissioning Activities Report,³⁴ (2) the legal costs associated with Entergy's reduction in emergency planning, and (3) the potential for unforeseen costs associated with radionuclide releases and indefinite storage of spent fuel.³⁵ Contention V dealt with the correctness and completeness of the LAR, given that it did not mention the related exemption request,³⁶ as well as the legal issue of whether the LAR was "in accordance with the provisions of paragraph (h) of [10 C.F.R. § 50.75]" when the licensee was already exempt from two provisions of 10 C.F.R. § 50.75(h)(1)(iv).³⁷

The Board issued a Notice of Hearing³⁸ and, based on a conference call with the parties discussing scheduling matters,³⁹ provided an Initial Scheduling Order that set out a bifurcated hearing schedule for Contentions I and V.⁴⁰

II. Arguments

On September 22, 2015, Entergy moved to withdraw the LAR based on its determination "that maintaining the existing license conditions represents a manageable administrative burden and is allowed by the NRC 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)."⁴¹ Entergy argues that an unconditional withdrawal without prejudice is appropriate because the parties have not

³⁴ Vermont Yankee Nuclear Power Station, Post Shutdown Decommissioning Activities Report, at 2.1.3, 4.0 (Dec. 2, 2014) (ADAMS Accession No. ML14357A110) [hereinafter "PSDAR"]; see supra note 6.

³⁵ LBP-15-24, 82 NRC at __ (slip op. at 21–26) (citing Petition at 5–6, 9–10, 22–23).

³⁶ Id. at __ (slip op. at 41).

³⁷ Id. at __ (slip op. at 44–45).

³⁸ Licensing Board Notice of Hearing (Sept. 18, 2015) (unpublished).

³⁹ Tr. at 79–105.

⁴⁰ Licensing Board Initial Scheduling Order (Sept. 21, 2015) (unpublished).

⁴¹ Motion to Withdraw at 2–3.

begun the process of mandatory disclosures or sustained a legal injury.⁴² The company adds that it “currently has no plans to reinstate this license amendment proceeding at a future date.”⁴³

The NRC Staff “largely supports Entergy’s position that its Motion to Withdraw should be granted without conditions.”⁴⁴ However, to provide Vermont with adequate notice in the event of a future filing, the NRC Staff requests “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.”⁴⁵

Noting the amount of time and effort already dedicated to the issues in this proceeding, Vermont asks the Board to impose two substantive conditions:

- (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.⁴⁶

Vermont argues that a dismissal with prejudice is appropriate because “the admissibility of Contentions I and V have been extensively litigated and addressed by the Board’s decision.”⁴⁷

In particular, Vermont notes that Contention V was a legal argument that would have been resolved on the merits within the next several months.⁴⁸

⁴² Id. at 4–6.

⁴³ Id. at 5.

⁴⁴ Staff’s Response at 1–2.

⁴⁵ Id. at 17.

⁴⁶ Vermont’s Response at 3.

⁴⁷ Id. at 4.

⁴⁸ Id. at 5–6.

With respect to the 30-day notice, Vermont argues that additional information about the withdrawals is appropriate because the State did not receive the benefit of mandatory disclosures.⁴⁹ Vermont also attached a recent notice to the NRC showing that Entergy is now providing less information about its withdrawals than when this proceeding began.⁵⁰ Whereas previous notices “confirmed . . . that the payments to be disbursed are for legitimate decommissioning and operational irradiated fuel management expenses,” the most recent notice includes no information about the purpose of the \$7 million withdrawal for September 2015.⁵¹ Vermont argues that this information is important to protect public safety and to prevent “potential loss or destruction of documents concerning Entergy’s use of the [Decommissioning Trust] Fund,” which the State asserts may be relevant to future litigation.⁵²

III. Discussion

Because the Board issued a Notice of Hearing, withdrawal of the LAR “shall be on such terms as the presiding officer may prescribe.”⁵³ These terms are set on a case-by-case basis, with any conditions tailored to address the particular circumstances of that proceeding.⁵⁴ As the

⁴⁹ Id. at 6–7.

⁵⁰ Id. at 7–8; id., attach. 1, at 1 (Letter from David Ryan, Managing Director, The Bank of New York Mellon, and Chris Wamser, Site Vice President, Entergy, to William M. Dean, Director, NRC Office of Nuclear Reactor Regulation (Sept. 14, 2015)).

⁵¹ Id., attach. 2, at 1 (Letter from David Ryan, Managing Director, The Bank of New York Mellon, and Chris Wamser, Site Vice President, Entergy, to William M. Dean, Director, NRC Office of Nuclear Reactor Regulation (Aug. 15, 2015)).

⁵² Id. at 9–11.

⁵³ 10 C.F.R. § 2.107(a); see U.S. Dep’t of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 624 (2010) (“[S]ection 2.107 . . . clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances.”).

⁵⁴ See Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 978–79 & n.14 (1981); Sequoyah Fuels Corp., LBP-93-25, 38 NRC 304, 315–16 (1993).

Commission has explained, an unconditional withdrawal is generally appropriate if it would cause no prejudice “to either the intervenors’ or the public’s interest.”⁵⁵

With respect to its first requested condition, Vermont has not demonstrated sufficient legal harm to justify the sanction of turning a voluntary withdrawal into a withdrawal with prejudice. Vermont’s primary concern is that, were Entergy to resubmit its LAR, the State would be forced to expend resources again to re-litigate all of the admissibility issues that the Board previously addressed in LBP-15-24.⁵⁶ However, a dismissal with prejudice is a harsh sanction reserved for unusual situations because it is the equivalent of a decision on the merits of the LAR.⁵⁷ That standard is not met here because the prospect of future litigation is not unusual—it is inherent in any dismissal without prejudice.⁵⁸ Moreover, Vermont’s admitted contentions focused on alleged deficiencies in this specific (and now withdrawn) LAR; whether a potential future LAR shares those same alleged deficiencies would require a new analysis.⁵⁹

Next, Vermont asks the Board to impose a condition requiring Entergy to provide “basic information about how Entergy is actually spending money from the [Decommissioning Trust] Fund,” as a substitute for the mandatory disclosure that would have occurred during this proceeding.⁶⁰ Vermont argues that the information Entergy provided in its current 30-day notice

⁵⁵ Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

⁵⁶ Vermont’s Response at 3–4.

⁵⁷ See Yankee, CLI-99-24, 50 NRC at 221–22; Puerto Rico Electric Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133–34 (1981).

⁵⁸ Yankee, CLI-99-24, 50 NRC at 222 n.3 (citing North Coast, ALAB-662, 14 NRC at 1145; Fulton, ALAB-657, 14 NRC at 979).

⁵⁹ See Yankee, CLI-99-24, 50 NRC at 222. Of course, a quick resubmission of this specific LAR without any change in circumstances would create the appearance of forum shopping. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-726, 17 NRC 755, 758–59 (1983) (recognizing the concern of avoiding the appearance of forum shopping).

⁶⁰ Vermont’s Response at 6–7.

is too limited to allow the NRC Staff to ascertain whether the company is actually using the fund for legitimate decommissioning expenses.⁶¹

Vermont is essentially asking this Board to impose additional discovery activities as a requirement of withdrawal. Most of this requested condition is too broad because it goes beyond the scope of the admitted contentions; “[d]iscovery, of course, is peculiarly related to particular proceedings and particular contentions.”⁶² In this proceeding, the relevant discovery primarily concerned the necessity of the 30-day notice given a disagreement between Vermont and Entergy over the definition of decommissioning as it relates to six specific line items in the Post Shutdown Decommissioning Activities Report and the legal costs associated with an earlier proceeding.⁶³ Those six line items are “(1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of non-radiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof.”⁶⁴ Although Entergy has stated in previous 30-day notices to the NRC that its disbursements are for “legitimate decommissioning” expenses,⁶⁵ this proceeding makes clear that Vermont and Entergy define the term differently.

In these specific circumstances, where a contention was admitted concerning expenses that are still part of Entergy’s decommissioning plans and Entergy has chosen to withdraw its licensing request in lieu of contesting the contention’s admissibility, the Board determines that it

⁶¹ Id. at 8 (“[I]t is the State’s position that both of these notices are deficient and do not comply with Entergy’s license requirements.”).

⁶² Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 55 (1999).

⁶³ LBP-15-24, 82 NRC at __ (slip op. at 21–22); see Petition at 9–10.

⁶⁴ LBP-15-24, 82 NRC at __ (slip op. at 8).

⁶⁵ Vermont’s Response, attach. 2, at 1.

is appropriate to require Entergy to specify in its notice to the NRC when a proposed withdrawal includes one of the six line items or legal costs that were the factual basis of Contention I.⁶⁶

This condition directly relates to the genuine dispute underlying Contention I and is necessary because withdrawal of the LAR leaves Entergy and Vermont's legal dispute over the definition of decommissioning unresolved.⁶⁷ The fact that Vermont may have to challenge the expenses again is not a legal harm, but not receiving notice of the expenses before they occur would create a legal harm by depriving Vermont of the chance to litigate this potentially meritorious issue. Thus, this narrowly-tailored condition will afford Vermont an opportunity, if it chooses, to dispute a specific disbursement via a letter to the NRC or a petition under 10 C.F.R. § 2.206.

Finally, as the NRC Staff notes, allowing Entergy to withdraw its LAR without prejudice means that Vermont would have to request a hearing again if Entergy were to submit a similar LAR in the future. We agree with the NRC Staff that, in these circumstances, it is appropriate to ensure that Vermont receives notice of the LAR at the time of its submission so the State has a fair opportunity to re-litigate the issues that were found admissible in LBP-15-24.⁶⁸ The NRC Staff suggests that this requirement should apply to any "substantively similar" LAR.⁶⁹ Given the specific issues raised in this proceeding, the Board defines "substantively similar" as an LAR

⁶⁶ See LBP-15-24, 82 NRC at ___ (slip op. at 8). Vermont has also expressed its concern that Entergy will use the decommissioning trust fund to pay the legal costs for this proceeding, but that issue was not part of Contention I, so it is not part of this condition.

⁶⁷ The purpose of the rule to dismiss proceedings on conditions is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." Sequoyah Fuels Corp. (Source Material License, No. Sub-1010), LBP-93-25, 38 NRC 304, 315 (1993) (quoting Alamance Indus., Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir. 1961)), aff'd, CLI-95-2, 41 NRC 179 (1995).

⁶⁸ See Energy Fuels Nuclear, Inc. (Source Material License No. SUA-1358), LBP-95-20, 42 NRC 197, 198-99 (1995).

⁶⁹ Staff's Response at 2.

relating to the decommissioning trust fund.⁷⁰ This definition is appropriate here because such an amendment would bring Entergy under the requirements of 10 C.F.R. § 50.75(h) and raise anew the legal issues admitted in Contention V.⁷¹ This condition does not impose any additional administrative burden because Entergy is already required by the regulations to notify Vermont of any request to amend the Vermont Yankee license.⁷²

IV. Motion for Leave to File Reply

On October 13, 2015, Entergy moved for leave to file a reply in support of its motion to withdraw the LAR.⁷³ Under the regulations, Entergy has no right to reply and may be granted permission “only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.”⁷⁴ Here, Entergy asserts that it could not have reasonably anticipated the arguments raised in Vermont’s October 2, 2015 answer to the motion to withdraw because Vermont did not discuss those arguments with Entergy during the consultation process.⁷⁵

We are not persuaded that Entergy could not reasonably have anticipated Vermont’s arguments, nor has Entergy shown any other compelling circumstances that would justify a

⁷⁰ Because Vermont Yankee’s license conditions predate the issuance of 10 C.F.R. § 50.75(h), the plant has been allowed to keep its existing license conditions. See 10 C.F.R. § 50.75(h)(5). If Entergy amends any license conditions related to the decommissioning trust fund, however, from that point forward it will have to comply with all of the requirements of 10 C.F.R. § 50.75(h).

⁷¹ See LBP-15-24, 82 NRC at __ (slip op. at 44).

⁷² 10 C.F.R. § 50.91(b)(1) (“At the time a licensee requests an amendment, it must notify the State in which its facility is located of its request by providing that State with a copy of its application . . .”).

⁷³ Motion for Leave to File Reply at 1.

⁷⁴ 10 C.F.R. § 2.323(c).

⁷⁵ Motion for Leave to File Reply at 4 (“[T]he State did not provide any indication about what legal harm it would allege, how those proposed conditions would be ‘curative’ of the alleged legal harm, how the alleged legal harm is demonstrated in the record of this proceeding, or how the State would fulfill its ‘affirmative duty’ to make these demonstrations.”).

reply. Entergy acknowledges that during consultation Vermont “noted the possibility that the State would ask the Board to impose conditions requiring Entergy to provide substantial additional detail in its disbursement notifications to the NRC, and to provide the State with disclosures regarding all past and future trust fund disbursements despite withdrawal of the LAR, and to seek dismissal ‘with prejudice.’”⁷⁶ These are, in fact, the conditions that Vermont sought,⁷⁷ and an experienced litigator such as Entergy would surely expect the State to provide legal arguments in favor of those conditions and to challenge Entergy’s interpretation of the case law concerning unconditional withdrawal of an LAR.⁷⁸ Vermont candidly revealed its proposed conditions during the 10 C.F.R. § 2.323(b) consultations. Entergy cannot claim surprise when Vermont put forth arguments in support of its proposed conditions. We find that Entergy’s motion for leave to file a reply is without merit and is summarily denied.

V. Order

The Board grants Entergy’s motion to withdraw its LAR without prejudice, with the conditions that (1) Entergy must provide written notice to Vermont of any new license amendment application relating to the decommissioning trust fund at the time such application is submitted to the NRC and (2) Entergy must specify in its 30-day notice if the disbursement includes one of the six line items or legal expenses to which Vermont objected in its admitted contention. Accordingly, this license amendment proceeding is terminated.

⁷⁶ Id. at 5.

⁷⁷ Vermont’s Response at 3.

⁷⁸ See Tenn. Valley Auth. (Sequoyah Nuclear Plant, Units 1 & 2), CLI-14-03, 79 NRC 31, 34–35 (2014) (explaining that an experienced litigator should have expected that the NRC Staff might challenge its interpretation of an NRC regulation regarding appeals); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008) (“[T]he parties could reasonably anticipate the argument that [the petitioners’] contention was moot simply based on the Board’s request for an explanation of the significance of the [Request for Additional Information] Response.”).

Under 10 C.F.R. § 2.341(a), this order shall constitute the final decision of the Commission 120 days from the date of issuance, unless within twenty-five (25) days a petition for review is filed in accordance with 10 C.F.R. § 2.341(b) or the Commission directs otherwise.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 15, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ASLB ORDER LBP-15-28 (Granting Motion to Withdraw LAR, Denying Motion for Leave to File Reply, and Terminating Proceeding)** have been served upon the following persons by the Electronic Information Exchange.

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ASLB ORDER LBP-15-28 (Granting Motion to Withdraw LAR, Denying Motion for Leave to File Reply, and Terminating Proceeding)

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Dated at Rockville, Maryland
this 15th day of October, 2015