

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

ENERGY NUCLEAR VERMONT YANKEE, LLC
and
ENERGY NUCLEAR OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-LA-3

CLI-16-08

MEMORANDUM AND ORDER

The NRC Staff requests that we vacate LBP-15-24, in which the Atomic Safety and Licensing Board granted the State of Vermont's hearing request in this license amendment matter.¹ As discussed below, this proceeding became moot while LBP-15-24 was still subject to appeal. Therefore, in keeping with our established practice, we grant the Staff's motion and vacate LBP-15-24.

¹ *NRC Staff Motion to Vacate LBP-15-24* (Oct. 26, 2015) (Staff Motion); LBP-15-24, 82 NRC 68 (2015).

I. BACKGROUND

As one of a number of activities associated with decommissioning the Vermont Yankee Nuclear Power Station, in September 2014 Entergy sought a license amendment to remove license conditions associated with the decommissioning trust fund for the facility.² Rather than following the license conditions, Entergy proposed to conform to the regulations in 10 C.F.R. § 50.75(h)(1)-(3).³ Shortly thereafter, Entergy requested an exemption pursuant to 10 C.F.R. § 50.12.⁴ The exemption request (which assumed approval of the license amendment request) sought to relieve Entergy from two of the requirements of section 50.75(h)(1)(iv).⁵ First, Entergy requested an exemption from the requirement that trust disbursements are restricted to decommissioning expenses until final decommissioning has been completed.⁶ Second, Entergy requested an exemption from the requirement to provide thirty working days' advance notice to the NRC of intended disbursements.⁷ Taken together, the requested exemptions and license

² Letter from Christopher J. Wamser, Entergy, to NRC Document Control Desk (Sept. 4, 2014), at 1 (ADAMS Accession No. ML14254A405) (License Amendment Request).

³ See Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8359 (Feb. 17, 2015) (Notice of Opportunity to Request a Hearing). At the time section 50.75 was promulgated, the NRC clarified that licensees had the option of either maintaining existing license conditions governing decommissioning trusts or submitting to the new regulatory requirements. See Decommissioning Trust Provisions, Final Rule, 67 Fed. Reg. 78,332, 78,334-35 (Dec. 24, 2002).

⁴ Letter from Christopher J. Wamser, Entergy, to NRC Document Control Desk (Jan. 6, 2015) (ML15013A171) (Exemption Request).

⁵ *Id.* at 1-3. The exemption request also sought to relieve Entergy from 10 C.F.R. § 50.82(a)(8)(i)(A), allowing it to make withdrawals from the decommissioning trust fund for certain irradiated fuel management costs. *Id.* at 1-2.

⁶ *Id.* at 2; see 10 C.F.R. § 50.75(h)(1)(iv).

⁷ Exemption Request at 1; see 10 C.F.R. § 50.75(h)(1)(iv).

amendment would allow Entergy to make withdrawals from the decommissioning trust fund for certain spent fuel management costs without providing prior notice.⁸ The Staff determined that Entergy's exemption request met the requirements of 10 C.F.R. § 50.12 and granted the request on June 17, 2015.⁹

In response to a notice of opportunity to request a hearing on Entergy's license amendment request, Vermont requested a hearing.¹⁰ Vermont proffered four contentions in its initial petition and later proposed a fifth contention.¹¹ Entergy and the Staff opposed admission of all five contentions.¹²

In August 2015, the Board issued LBP-15-24, in which it granted Vermont's hearing request and admitted Contentions I and V.¹³ In September 2015, Entergy filed a motion to

⁸ See Exemption Request at 1.

⁹ Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992 (June 23, 2015).

¹⁰ Notice of Opportunity to Request a Hearing, 80 Fed. Reg. at 8356-58, 8359-60; *State of Vermont's Petition for Leave to Intervene and Hearing Request* (Apr. 20, 2015) (Hearing Request).

¹¹ Hearing Request at 3-31; *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), at 4-7.

¹² See *NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request* (May 15, 2015); *Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request* (May 15, 2015); *NRC Staff's Answer to the State of Vermont's Motion for Leave to File New and Amended Contentions* (July 31, 2015); *Entergy's Answer Opposing State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV* (July 31, 2015).

¹³ LBP-15-24, 82 NRC at 104. As admitted, Contention I concerned Entergy's current license condition requiring thirty-day notification for decommissioning trust fund withdrawals in light of Vermont's assertions that Entergy could otherwise improperly reduce the fund such that the plant cannot be maintained in a safe condition. *Id.* at 92. In particular, Vermont claimed that three categories of expenses violated NRC decommissioning regulations: "(1) the six line items

withdraw its license amendment request and to dismiss the proceeding without prejudice.¹⁴ In LBP-15-28, the Board granted Entergy's motion to withdraw the license amendment request without prejudice and terminated the proceeding.¹⁵ The Board imposed two conditions on the withdrawal. First, it directed Entergy to provide written notice to Vermont of any new license amendment application relating to the decommissioning trust fund at the time of the application.¹⁶ Second, the Board directed Entergy to specify in the thirty-day notices that it must provide before making disbursements from the decommissioning fund if any of the proposed disbursements are to be used for certain expenses to which Vermont objected in its admitted Contention I.¹⁷ Following withdrawal of the license amendment request, Entergy may continue

from the [Post Shutdown Decommissioning Activities Report] that Vermont alleges to be non-decommissioning costs, (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." *Id.* (citations omitted). The Board admitted Contention V as a legal contention challenging the sufficiency of Entergy's license amendment request, in view of the exemptions that the Staff approved. *Id.* at 102, 104.

¹⁴ *Entergy's Motion to Withdraw its September 4, 2014 License Amendment Request* (Sept. 22, 2015), at 1 (Motion to Withdraw). At the same time, Entergy sought to extend the time for filing appeals until ten days after the Board's ruling on its motion to withdraw. See *Entergy's Unopposed Motion to Extend the Time to Appeal LBP-15-24* (Sept. 22, 2015); Order of the Secretary (Sept. 24, 2015) (unpublished) (granting the request).

¹⁵ LBP-15-28, 82 NRC 233, 244 (2015).

¹⁶ *Id.*

¹⁷ *Id.* These expenses are six line items in Entergy's Post Shutdown Decommissioning Activities Report and the legal costs associated with emergency planning. *Id.* at 242; LBP-15-24, 82 NRC at 86-87, 92; Hearing Request at 9-10; see also Site Specific Decommissioning Cost Estimate for the Vermont Yankee Nuclear Power Station, Rev. 0 (Dec. 2014), at app. C (submitted as Attachment 1 to Entergy's Post Shutdown Decommissioning Activities Report, enclosed in the Letter from Christopher J. Wamser, Entergy, to NRC Document Control Desk (Dec. 19, 2014) (ML14357A110)). The six line items are (1) a five million dollar 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; (6) and replacement of structures during SAFSTOR, such as a

to make withdrawals from the decommissioning trust fund for spent fuel management expenses. But, Entergy still must provide thirty days' advance notice to the NRC of such withdrawals, given that the license condition requiring notice remains in effect.¹⁸

The Staff has now submitted a motion to vacate the Board decision granting Vermont's hearing request, LBP-15-24, as moot.¹⁹ Vermont opposes the Staff's motion.²⁰

II. DISCUSSION

The Staff seeks to vacate the Board's decision granting Vermont's request for a hearing on Entergy's license amendment request. The Board has now granted Entergy's motion to withdraw the license amendment request and terminated the proceeding in LBP-15-28. The

bituminous roof. LBP-15-28, 82 NRC at 242. The Board referred to item 6 as "replacement of structures related to dry cask storage, such as a bituminous roof." *Id.* We clarify that the condition should reference the SAFSTOR period, as reflected in Vermont's petition. See Hearing Request at 9-10 (listing "items that the State believes fail to meet the NRC's definition of decommissioning, such as: . . . [r]eplacement of structures during SAFSTOR (*e.g.*, line 2b.1.4)"). The Board did not include unforeseen expenses related to radionuclide releases and spent fuel management, although Vermont objected to these expenses as part of Contention I. LBP-15-28, 82 NRC at 242; see *supra* note 13.

¹⁸ See LBP-15-24, 82 NRC at 74.

¹⁹ The Staff did not seek review of LBP-15-24. Staff Motion at 5, 7.

²⁰ *State of Vermont's Response to NRC Staff's Motion to Vacate LBP-15-24* (Nov. 5, 2015) (Vermont Answer). The Staff notes that Entergy does not oppose the motion to vacate. Staff Motion at 2 n.4.

Also pending before us is the petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation seeking "a robust, comprehensive, and participatory review of Entergy's use of the Vermont Yankee Nuclear Decommissioning Trust Fund." See *Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear Operation, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund* (Nov. 4, 2015), at 1. The petitioners request that we consider the Staff's motion to vacate as part of the comprehensive review they seek. *Id.* at 14. We decline to do so and will issue a separate decision addressing that petition.

issue before us today is whether vacatur of LBP-15-24 is appropriate in the circumstances presented here. Because there is no longer a live dispute with respect to the license amendment request, we vacate LBP-15-24 in accordance with our usual practice.

The Staff argues that LBP-15-24 should be vacated because Entergy's withdrawal of the license amendment request has made our review of that decision moot.²¹ Vermont counters that the Staff's "characterization of the withdrawal fails to recognize that the Board imposed conditions on Entergy's withdrawal that link directly to the underlying decision," such that the underlying dispute is not moot.²² Vermont argues that LBP-15-24 should not be vacated in order to preserve the integrity of the conditions.²³ Further, Vermont raises the concern that vacating the decision that granted its intervention petition could eliminate its ability to enforce the conditions contained in LBP-15-28.²⁴

We agree with the Staff that the case is now moot because the disputed license amendment request has been withdrawn.²⁵ While Vermont asserts that live issues remain because it continues to dispute Entergy's use of decommissioning funds at Vermont Yankee,²⁶ the hearing opportunity that the Board granted in LBP-15-24 was limited to the September 2014 license amendment request. Disagreement regarding use of decommissioning trust funds apart

²¹ Staff Motion at 7.

²² Vermont Answer at 1.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ See, e.g., *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-10, 78 NRC 563, 568 (2013).

²⁶ Vermont Answer at 4.

from that request does not convert this matter into a live controversy. Moreover, vacatur of LBP-15-24 does not affect the conditions that the Board imposed on the withdrawal in LBP-15-28. The Board's decision in LBP-15-28 binds the parties, and Entergy must comply with the conditions of withdrawal set forth therein.²⁷

Vermont also argues against vacatur because, it claims, vacating the decision would “strip the conditions of any context.”²⁸ But as we observed in *San Onofre*, vacated orders, such as LBP-15-24, will remain available for reference; LBP-15-24 will not be expunged from agency records.²⁹ Neither does vacatur of LBP-15-24 diminish Vermont's right to challenge Entergy's compliance with the conditions imposed by the Board in LBP-15-28. If Vermont wishes to lodge such a challenge, it may do so by filing a petition for enforcement action under 10 C.F.R. § 2.206.³⁰

²⁷ While it is true that LBP-15-28 has no precedential effect, it binds the parties to this case. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 558 (2013).

²⁸ Vermont Answer at 6.

²⁹ *San Onofre*, CLI-13-9, 78 NRC at 559 (“Regardless of vacatur, the decision is an agency record, and will not be excised from the public view.”). As was the case in *San Onofre*, LBP-15-24 will be publicly available via the agency's ADAMS recordkeeping system and will be published as part of NUREG-0750, a compilation of Commission and Board decisions. *Id.*

³⁰ Vermont asserts that the “Board necessarily has continuing jurisdiction to enforce those conditions.” Vermont Answer at 6. On this point, Vermont is incorrect. After a proceeding is terminated, a licensing board does not retain jurisdiction over the matter. Cf. *Virginia Electric & Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699-701 (discussing when the Licensing Board's jurisdiction ends). Vermont does not need—or benefit from—“party status” to seek to enforce the conditions in the Board's decision; under section 2.206, “[a]ny person” may request enforcement action.

Citing the Board's Condition 1, which requires Entergy to notify Vermont if it submits a new license amendment request relating to the decommissioning trust fund, Vermont also argues that LBP-15-24 should not be vacated because the dispute it has raised falls into the "capable of repetition, yet evading review" exception to the mootness doctrine.³¹ Vermont argues that, by imposing Condition 1, the Board "effectively recognized" the likelihood that Entergy will submit a new license amendment request.³² The Staff acknowledges this exception to the mootness doctrine but argues it is inapplicable here.³³ Based on Entergy's representation, the Staff contends that there is no reasonable expectation that Entergy will submit another license amendment request similar to the September 2014 request and, in any case, any future license amendment request would trigger an opportunity for a hearing and thus allow for review.³⁴

As we have previously noted, the "capable of repetition, yet evading review" exception "applies only to cases in which both the challenged action was in its duration too short to be litigated, *and* there is a reasonable expectation that the same complaining party will be subject

³¹ Vermont Answer at 7.

³² *Id.* We do not view the Board's condition as an acknowledgment that Entergy is likely to submit a similar license amendment request in the future, but rather an additional safeguard to ensure that, if Entergy does, Vermont will have adequate notice to seek a hearing on the request. And in any event, as the Board recognized, "[t]his 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." LBP-15-28, 82 NRC at 243 (citing 10 C.F.R. § 50.91(b)(1)).

³³ Staff Motion at 8 (citing *San Onofre*, CLI-13-9, 78 NRC at 558 n.26; *San Onofre*, CLI-13-10, 78 NRC at 568 n.35).

³⁴ *Id.* (citing Motion to Withdraw at 5 ("Entergy currently has no plans to reinstate this license amendment proceeding at a future date.")).

to the same action again.”³⁵ Here, however, a future license amendment request relating to the decommissioning trust fund would not be “too short in duration to be fully litigated prior to its cessation or expiration.”³⁶ As the Staff noted, if Entergy were to re-file a similar license amendment request, it would trigger an opportunity for a hearing.³⁷ And because such an amendment would remain relevant throughout the decommissioning process (which, even if performed rapidly, will take years), this case is not one where the challenged action would be too short in duration to be subject to review.³⁸ With respect to whether there is a reasonable expectation that the same parties will be subject to the same action again, Entergy has represented in this case that it “currently has no plans to reinitiate this license amendment proceeding at a future date.”³⁹ While it is possible that Entergy will re-submit its license amendment request at some point during the decommissioning period, we decline to look

³⁵ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 205 (1993); see also *San Onofre*, CLI-13-9, 78 NRC at 558 n.26; *Advanced Medical Systems, Inc.*, (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993) (citing *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911); *Sec. & Exch. Comm’n v. Sloan*, 436 U.S. 103, 109 (1978); *Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1170 (D.C. Cir. 1984)).

³⁶ *Advanced Medical Systems*, CLI-93-8, 37 NRC at 187.

³⁷ Staff Motion at 8 & n.42 (citing Atomic Energy Act of 1954, as amended, § 189a., 42 U.S.C. § 2239(a)(1)(A)).

³⁸ Decommissioning activities at Vermont Yankee are expected to span approximately sixty years. Vermont Answer at 5 (citing Letter from Christopher J. Wamser, Entergy, to NRC Document Control Desk (Dec. 19, 2014), Enclosure, Post Shutdown Decommissioning Activities Report, at 8 (ML14357A110)); see 10 C.F.R. § 50.82(a)(3) (requiring completion of decommissioning within sixty years of permanent cessation of operations).

³⁹ Motion to Withdraw at 5.

behind its representation today and speculate that it will do so. For these reasons, this case does not fit within the “capable of repetition, yet evading review” exception.

While unreviewed Board decisions do not create binding legal precedent, we nonetheless customarily vacate such decisions as a prudential matter when appellate review is cut short by mootness.⁴⁰ We see no reason to depart from our customary practice today. When vacating for mootness, we neither approve nor disapprove the underlying Board ruling; we therefore take no position on the Board’s decision in LBP-15-24.⁴¹

III. CONCLUSION

For the reasons set forth above, we *grant* the Staff’s motion and *vacate* LBP-15-24 as moot.

IT IS SO ORDERED.

For the Commission

NRC SEAL

 /RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of June, 2016.

⁴⁰ See, e.g., *San Onofre*, CLI-13-9, 78 NRC at 558.

⁴¹ In other words, our decision to vacate LBP-15-24 “does not intimate any opinion on [its] soundness.” *San Onofre*, CLI-13-9, 78 NRC at 559 n.31 (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999) (quoting *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 15 (1996))).

Commissioner Baran, Dissenting

I respectfully dissent from the majority's decision.

Vacatur of the Board's decision serves no useful purpose in this case. The Board already terminated the proceeding in LBP-15-28. Unreviewed Board decisions, like the one the NRC Staff seeks to vacate here, do not create binding precedent. Regardless of whether LBP-15-24 is vacated, the decision will remain publicly available and its analysis and reasoning can be cited for its persuasive value.¹ And, as the majority notes, the Board's decision in LBP-15-28 will continue to bind the parties, and Entergy must comply with the conditions of withdrawal set forth in that decision.²

The NRC Staff makes no substantive argument for why vacatur is necessary or in any way desirable. The Staff merely cites prior Commission precedent for the general practice of vacating unreviewed Board decisions when they are later rendered moot and notes the "complexity of the issues raised in LBP-15-24."³ But there is nothing inherently confusing about Board decisions in cases in which the parties vigorously dispute complex issues. Unnecessarily vacating the Board decision is more likely to cause confusion. Although the majority explains that the Commission is not taking a position on the merits of the Board's decision, vacatur will likely leave some with the misimpression that the Commission has concluded that the Board decision is somehow unsound.

I see no reason to continue the customary practice of vacating unreviewed Board decisions simply because the Commission has done so in the past. Rather than perpetuate this

¹ See Majority Decision at 9 (citing *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, CLI-13-9, 78 NRC 551, 559 (2013)).

² *Id.*

³ Staff Motion at 9.

peculiar practice, I believe we should require a litigant seeking vacatur to demonstrate that it is actually warranted. Like federal courts, the Commission should consider the facts of each case and balance the equities in deciding whether to vacate a Board decision.⁴

⁴ See *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994) (emphasizing the equitable nature of a vacatur determination).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER CLI-16-08** have been served upon the following persons by the Electronic Information Exchange and e-mail.

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[Original signed by Brian Newell]
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Dated at Rockville, Maryland
this 2nd day of June, 2016