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	)	Docket No. 50-271-LT-2
NUCLEAR OPERATIONS, INC.;	)	
CONSIDERATION OF APPROVAL	)	July 17, 2017
OF TRANSFER OF LICENSE AND	)	
CONFORMING AMENDMENT	)	
	)	
(Vermont Yankee Nuclear Power Station)	)	

STATE OF VERMONT'S
REPLY IN SUPPORT OF THE STATE'S PETITION
FOR LEAVE TO INTERVENE AND HEARING REQUEST

Stephanie Hoffman
Special Counsel
Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620
(802) 828-5543
steph.hoffman@vermont.gov

Kyle H. Landis-Marinello
Assistant Attorney General
Vermont Attorney General's Office
Environmental Protection Division
109 State Street
Montpelier, VT 05609
(802) 828-1361
kyle.landis-marinello@vermont.gov

Counsel for the State of Vermont

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INTRODUCTION

The State of Vermont's petition for leave to intervene and hearing request identifies two contentions. Each contention is accompanied by lengthy and detailed bases and supporting evidence, including three affidavits from expert witnesses. Each contention meets all of the requirements of 10 C.F.R. § 2.309(f)(1).

In their Answer to the State's petition, Entergy Nuclear Vermont Yankee LLC, Entergy Nuclear Operations, Inc., and NorthStar Nuclear Decommissioning Company, LLC (collectively "Applicants") oppose admission of the two contentions. Applicants' Answer presents a limited challenge to the State's request for a hearing. Applicants concede that the State has standing and has filed a timely petition to intervene. Applicants also implicitly concede that both contentions meet the first two requirements of 10 C.F.R. § 2.309(f)(1); Applicants do not challenge that the State has provided "a specific statement of the issue of law or fact to be raised or controverted"[1] and "a brief explanation of the basis for the contention."[2]

Applicants' challenges focus on two requirements of contention admissibility:

(1) Whether "the issue raised in the contention is within the scope of the proceeding,"[3] including whether it is "material to the findings the NRC must make to support the action that is involved in the proceeding"[4]; and

[1] 10 C.F.R. § 2.309(f)(1)(i).

[2] *Id.* § 2.309(f)(1)(ii).

[3] *Id.* § 2.309(f)(1)(iii).

[4] *Id.* § 2.309(f)(1)(iv).

(2) Whether the State has adequately justified its contentions with "a concise statement of the alleged facts or expert opinions which support"[5] the contentions and "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[6]

The State has done both. The State's contentions fall within the scope of this proceeding. Applicants' claim to the contrary—that this proceeding must ignore the financial viability of NorthStar's plans for spent fuel management and decommissioning—fails for two reasons. First, the notice of hearing explicitly mentions those plans, thus placing them directly within the scope of this proceeding. Second, even if the notice of hearing did not mention this, the Commission has long held that interested parties are entitled to a hearing not just on the matters specified in the notice of hearing, but also "on contentions which arise as a direct consequence or necessary implication of the proposal."[7] Here, it is undisputed that the "direct consequence" and "necessary implication" of this license transfer is implementation of NorthStar's plans for spent fuel management and immediate decommissioning. Indeed, Applicants' own Answer describes "expedited decommissioning of the Vermont Yankee site" as the "*primary* purpose" of the proposed license transfer and amendment.[8]

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[5] *Id.* § 2.309(f)(1)(v).

[6] *Id.* § 2.309(f)(1)(vi).

[7] *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), 8 A.E.C. 873, 875 (Nov. 27, 1974).

[8] Answer at 4 (emphasis added).

Applicants fare no better in their claim that the State has not adequately justified its contentions so as to demonstrate a genuine dispute on a material issue. Notably, Applicants do not challenge the expert qualifications of the three witnesses who signed affidavits in support of the State's contentions. Instead, Applicants provide an extensive explanation of why, in their opinion, the testimony from the State's expert witnesses is incorrect. But an Applicant's "challenge to the accuracy of the bases" does not prove that there are "no bases" for the contention; to the contrary, it "demonstrates that some type of factual dispute exists."[9] This necessitates a hearing on the matter.

Additionally, Applicants entirely fail to address the State's arguments that the license transfer and amendment application presents insufficient information. Both contentions, their bases and supporting evidence, and the three expert witness affidavits, explicitly identify deficiencies in the information provided. As the State noted in its Petition:

> In general, the State supports moving into immediate decommissioning and restoring the Vermont Yankee site as soon as possible. The State does not, however, believe that such a transaction should be structured to create a significant risk that a new entity begins decommissioning and then runs out of money. This could leave the State hosting a partially dismantled industrial site contaminated with radiological and non-radiological hazardous waste. The Atomic Energy Act and the National Environmental Policy Act require the NRC to consider and address this significant threat to public health and the environment before the NRC approves the proposed license transfer and license amendment.

[9] *Arizona Pub. Serv. Co., et. al.* (Palo Verde Nuclear Station, Unit Nos. 1, 2 & 3), 33 NRC 397, 1991 WL 149505, at *11 (May 9, 1991).

> The proposed transaction does not provide sufficient detail to ensure adequate protection of public health, safety, and the environment. NorthStar has not demonstrated financial assurance, and has not met its burden to prove that the Decommissioning Fund will suffice to clean up this site. The Atomic Energy Act and the National Environmental Policy Act require a hearing in these circumstances.[10]

In short, the State has met the requirements for contention admissibility on both of its contentions.

I. CONTENTION 1 MEETS THE REQUIREMENTS OF 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

All of the issues raised in Contention 1 fall within the scope of this proceeding. And the State has presented adequate factual support and expert opinion to raise a genuine dispute warranting a hearing on Contention 1.

a. Contention 1 is within the scope of this proceeding.

The parties dispute the proper scope of this proceeding. In broad terms, Applicants claim that the proposed license transfer and amendment require little review since, according to Applicants, they do not present even a *potential* impact on public health, safety, or the environment. The State disagrees. Far from a mere administrative matter, this case involves the *first-in-the-nation* sale of a shutdown nuclear power plant for the express purpose of expedited decommissioning. As Applicants themselves admit, "expedited decommissioning of the Vermont Yankee site" is the "*primary* purpose" of the proposed license transfer and amendment.[11] As

[10] Petition at 3-4.

[11] Answer at 4 (emphasis added).

Applicants themselves frame it, expedited decommissioning *will not happen* unless this license transfer and amendment occur. The financial consequences of that expedited decommissioning are thus necessarily within the scope of this proceeding.

Further, it is undisputed that NorthStar must demonstrate financial assurance to meet the NRC's regulatory requirements for license transfer. As Applicants concede, "the question of NorthStar's financial qualifications *is* subject to a challenge in this proceeding."[12]

The scope of this proceeding therefore entails evaluating the adequacy, reliability, and completeness of the representations NorthStar has made in its efforts to demonstrate financial assurance. Applicants are incorrect in claiming that this proceeding should ignore: (1) NorthStar's plans for paying for spent fuel management, including whether the June 2015 exemption for spent fuel expenses

[12] Answer at 27 (emphasis in original). Applicants cannot and do not contend that the Commission has already determined that the license *transfer* presents no significant hazards consideration. Rather, Applicants only claim that NRC Staff has determined that the license *amendment* involves no significant hazards consideration, citing the May 24, 2017 hearing notice. Answer at 24. As NRC Staff confirmed one day after that notice was issued, the Commission has not yet made a determination regarding the license transfer: "Our review is currently ongoing of the application. So we haven't made any conclusions about whether NorthStar is financially or technically qualified to hold the license. We're still in the initial stages of our review." 5/25/17 Tr. at 40 (Adams Accession No. ML17163A424). Further, even as to the license amendment, the State disagrees with the claim that it is merely a conforming one. As noted in the State's petition, the license amendment would replace Entergy's commitment of parental guarantees with NorthStar's "support agreement" (which NorthStar states is *not* a guarantee). Although Applicants correctly note that the NRC has allowed Entergy to release its parental guarantees at this time, the current license would presumably allow reinstatement of those guarantees at a later time. The amended license would not include a similar provision. This is a substantive change, and 10 C.F.R. § 2.1315(b) is thus inapplicable here. At a minimum, this is a genuine dispute that merits further consideration, as opposed to dismissal at this stage.

would apply to a new owner with an entirely new decommissioning plan, and whether NorthStar's plan for spent fuel expenses complies with 10 C.F.R. § 55.54(bb); and (2) the representations NorthStar has made in its Revised Post-Shutdown Decommissioning Activities Report ("Revised PSDAR"). Both of those matters are directly related to Applicants' alleged financial assurance.

To be clear, the State is not seeking a hearing in this proceeding on whether the NRC should disapprove of the June 2015 exemption or NorthStar's Revised PSDAR. Nor is the State seeking a declaratory ruling in this proceeding that, if and when NorthStar files a spent fuel management plan, that plan will not comply with 10 C.F.R. § 55.54(bb). The State fully recognizes the limitations placed on the scope of this proceeding. But that does not mean that the Commission can turn a blind eye to those matters. To the contrary, those matters are directly relevant to this proceeding's central issue: whether NorthStar has demonstrated adequate financial assurance.

1. NorthStar's spent fuel management plans, including the applicability of the June 2015 exemption to NorthStar, are within the scope of this proceeding.

The scope of this proceeding necessarily includes evaluating how NorthStar intends to pay for spent fuel management. Applicants concede that whoever owns Vermont Yankee is going to spend hundreds of millions of dollars on spent fuel management over the next few decades. The State has presented uncontroverted expert testimony that these expenses could be much larger than anticipated, and

that Applicants cannot assume that all such expenses will be recovered from the U.S. Department of Energy (DOE).

NorthStar's plan for paying for spent fuel management expenses is a crucial part of determining whether it has demonstrated adequate financial assurance to take ownership of Vermont Yankee. NorthStar's plan for paying for spent fuel management relies on at least three faulty assumptions: (1) that NorthStar has a legal right to withdraw these expenses from the Vermont Yankee Decommissioning Trust Fund, pursuant to the non-final June 2015 exemption that Entergy received based on Entergy's plans for decommissioning; (2) that NorthStar will reach a settlement or through litigation recover all such expenses from DOE; and (3) that these expenses will be as estimated. All three of these assumptions are material to Applicants' alleged financial assurance, and the State has presented a genuine dispute regarding the reasonableness of each of these assumptions.

First, the State's Petition has explained why NorthStar is not entitled to the June 2015 exemption, since that exemption is not final and was based entirely on Entergy's plans for decommissioning, not NorthStar's. The State thus contends that NorthStar cannot make use of the June 2015 exemption.[13] Applicants concede "that the Staff's approval of the exemption was based, in part, on Entergy's previous plan to utilize the SAFSTOR method, and that NorthStar now proposes to pursue expedited decommissioning," but then assert that "there is no apparent reason why

[13] Petition at 17-21.

the existing exemption should not continue in effect."[14] Applicants do not cite any authority for their claim that they can unilaterally determine that a regulatory exemption applies in circumstances that are entirely different from those presented to the NRC as the basis for the exemption. The Commission's view is that each exemption is "an 'extraordinary' equitable remedy to be used only 'sparingly'" and "only when supported by compelling reasons."[15] At any rate, regardless of the merits of each side's arguments, there is no doubt that the State has presented a genuine dispute over a legal issue: does the June 2015 exemption apply to NorthStar?

The resolution of that legal issue is material because, if the State is correct, then NorthStar has not demonstrated how it will pay for hundreds of millions of dollars in spent fuel management expenses. Simply put, there is no way to analyze NorthStar's alleged financial assurance without, at a minimum, answering whether NorthStar is entitled to make use of the June 2015 exemption. That is a question that must be resolved either on summary disposition or on the merits; it cannot be dismissed at this early stage of the proceedings. The State has thus presented an admissible contention.[16]

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[14] Answer at 26-27.

[15] *Honeywell International, Inc.*, CLI-13-1, 77 NRC 1, 9 (2013).

[16] This issue—the continuing validity of an exemption when the exemption was based on circumstances that no longer apply—appears to be a novel one that may need to be a certified question for the Commission. Its resolution significantly impacts this proceeding, as it is the State's position, based on Commission precedent, that "NorthStar must file an exemption request to use the Decommissioning Fund for spent fuel management expenses, and the State is entitled to a hearing on that matter because it is 'directly related' and inextricably intertwined with this license transfer and amendment." Petition at 19 (quoting *Private Fuel Storage, LLC*, CLI-01-12, 53 NRC 459, 476 (2001); also citing *Honeywell*

Second, as explained in the State's Petition, Applicants cannot demonstrate financial assurance based on speculation about how NorthStar will fare in future settlement discussions or litigation with DOE.[17] Yet that is precisely what Applicants ask the Commission to allow. Again, this is a genuine dispute that presents an admissible contention.

Third, the State has raised a genuine dispute regarding the reasonableness of Applicants' estimates for spent fuel management expenses, including the presumption that all spent fuel will be removed from the site by 2052.[18] This presents another genuine dispute that is material to determining whether Applicants have demonstrated financial assurance.

2. The scope of this proceeding includes the State's challenges to cost estimates and other financial representations that NorthStar has made both in its license transfer and amendment application and in its Revised PSDAR.

Applicants incorrectly characterize the State's position as a challenge to "the adequacy of the Revised PSDAR."[19] The question in this proceeding is not whether

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International, Inc., CLI-13-1, 77 NRC at 7); *see also, e.g.*, *Private Fuel Storage, LLC*, CLI-01-12, 53 NRC at 467 n.3 ("We are aware of no licensing case where we have declared exemption-related safety issues outside the scope of the hearing process altogether.").

[17] Petition at 15-16; *see also, e.g.*, Brewer Aff. ¶ 7(g) (explaining that any recoveries from DOE may be "less than anticipated or on a more protracted schedule than anticipated").

[18] *See, e.g.*, Petition at 27 (explaining that Applicants have failed to account for the "potential expenses identified in the NRC's Continued Storage Rule" of "(a) the construction of a Dry Fuel Transfer Station; (b) the purchase of 58 new casks and all other labor and material costs for transferring the fuel every 100 years; and (c) the costs of maintaining security at the site for any time after 2052 should onsite storage continue past that time").

[19] Answer at 24.

the Revised PSDAR is "adequate." This proceeding does, however, require analyzing whether NorthStar has demonstrated financial assurance to safely decommission Vermont Yankee and manage its spent fuel. In evaluating the adequacy of financial assurance, NorthStar's representations in the Revised PSDAR present factual evidence of which costs NorthStar has accounted for—and, more importantly, which costs it has not. The State has every right to challenge those underlying assumptions in this proceeding, and it has done so here.

Applicants' attempt to evade review of the underlying assumptions of the Revised PSDAR fails for several other reasons. First, this matter is necessarily within the scope of this proceeding because it is explicitly mentioned in the hearing notice: "In parallel with NRC's review of the application, NorthStar NDC submitted an updated proposed PSDAR, dated April 6, 2017 (ADAMS Accession No. ML17096A394), to become effective after license transfer, which would reflect NorthStar NDC's plans for accelerated decommissioning following the proposed transfers of the license."[20] Second, as mentioned earlier, it is undisputed that the underlying purpose of the proposed license transfer and amendment is to allow NorthStar to implement the immediate decommissioning plan outlined in its Revised PSDAR. Those are the real-world consequences of the proposed license transfer and amendment, and the State's "contention is material because it concerns the real-world consequences of approving the [requested licensing

[20] Hearing Notice, 82 Fed. Reg. 23845-01, 23847 (May 24, 2017).

action]."[21] Third, according to Applicants themselves, the Revised PSDAR does *not* "require formal NRC Staff approval."[22] There is thus no basis for Applicants to assert that the underlying assumptions of the Revised PSDAR must be taken as indisputable facts that cannot be challenged in this proceeding. The Commission has held that licenses cannot "exclude critical safety questions from licensing hearings merely on the basis of [the] label" given to those issues.[23]

For these reasons, the scope of this proceeding includes analyzing the merits of the State's challenges to the underlying assumptions of the Revised PSDAR.

b. The State has presented adequate factual support and expert opinion to raise a genuine dispute on Contention 1.

In addition to demonstrating that Contention 1 is within the scope of this proceeding, the State has also presented adequate factual support and expert opinion to raise a genuine dispute.

1. The State has presented adequate factual support and expert opinion to raise a genuine issue regarding NorthStar's spent fuel management plans, including the applicability of the June 2015 exemption to NorthStar.

As already noted, the applicability of the June 2015 exemption to NorthStar is a genuine legal issue that must be addressed in this proceeding, and no factual

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[21] *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.*, Docket No. 50-271-LA-3, LBP-15-24, at 41 (Aug. 31, 2015), *vacated as moot when licensee withdrew the disputed license amendment request after a hearing was granted*, CLI-16-08

[22] Answer at 24.

[23] *Private Fuel Storage, LLC*, CLI-01-12, 53 NRC at 467.

support or expert opinion is necessary for this contention to be admissible. It is undisputed that the owner of Vermont Yankee will incur hundreds of millions of dollars in spent fuel management expenses over the next few decades, or perhaps centuries, to come. If the June 2015 exemption does not apply to NorthStar, then NorthStar has *no* plan for paying for spent fuel management expenses and has not demonstrated financial assurance at this time.

Applicants incorrectly claim that the State "completely ignores and fails to dispute the adequacy of the specific measures described in the [license transfer and amendment application] that maintain the sufficiency of funding for decommissioning and spent fuel management."[24] The State has raised genuine disputes regarding potential shortfalls that would occur even with Applicants' alleged protections of "planned use of performance-bonded, fixed-price/fixed-rate contracts, and the planned use of a pay-item disbursement approach," the alleged limiting of withdrawals for spent fuel expenses to "$20 million in revolving funds," and the $125 million support agreement.[25] If, for instance, previously undiscovered contamination is found onsite, Applicants cannot—and do not—claim that their subcontractors would pay for that under the planned performance-bond or fixed-rate approach. Further, one of the State's experts explicitly addresses the performance-bond, fixed-rate approach and explains how, even for anticipated

[24] Answer at 3.

[25] *Id.* at 18.

expenses, it could lead to delays that cause significant cost increases.[26] As for NorthStar's claim that it will limit its use of the decommissioning trust fund for spent fuel expenses to "$20 million in revolving funds, replenished from recoveries from the DOE,"[27] the State's Petition explicitly challenges whether NorthStar can in fact rely on future litigation or settlement recoveries from DOE.[28] Finally, the State's Petition raises numerous arguments regarding the inadequacy of the $125 million support agreement.[29] The State has not "ignore[d]" these matters at all,[30] but has addressed them head-on and raised genuine disputes that warrant a hearing.

While the State has not ignored the plans Applicants mention in their license transfer and amendment application, Applicants have made the error of placing far too much weight on these statements. Applicants rely on unenforceable statements

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[26] Brewer Aff. ¶ 7(c) ("*Delays in the work schedule leading to increased costs for overhead and project management.* Although NorthStar claims that it intends to use performance bonds to create fixed costs for each discrete task, it does not appear from presently available information that NorthStar has accounted for the cost impact of delays in work schedule. In particular, if a specific activity takes longer than anticipated, then even if NorthStar does not have to pay more than the fixed cost for the direct work associated with that activity, the entire decommissioning schedule may be delayed. This would lead to increased, currently unaccounted for, costs for overhead and project staffing and management. These costs could be significant. For instance, at the Humboldt Bay facility, a 2006 TLG Report estimated the staff costs for that project at $107.6 million after escalation to 2010 dollars. After the start of the project, the estimate for expected staff costs was increased to $168 million in 2010 dollars.")

[27] Answer at 18.

[28] Petition at 15-16.

[29] *See, e.g.*, *id.* at 21-22.

[30] Answer at 3.

of "plans" presented in a license transfer amendment and application. Applicants entirely ignore the most important part of that application—Attachment 6—which lists *only one* enforceable regulatory commitment: "Partial site release" by "December 31, 2030."[31] Limiting their use of the Decommissioning Trust Fund for spent fuel expenses to $20 million in revolving funds, and the use of performance bonds and fixed-rate contracts—an alleged financial assurance that, even in their Answer, Applicants refer to merely as "planned," not set in stone—are not included as regulatory commitments.[32] Most importantly, and without explanation, Applicants have not even listed the $125 million support agreement as a regulatory commitment. This raises genuine disputes about whether anyone will ever have standing to enforce that support agreement should the need arise.[33]

Additionally, the State's Petition specifically identifies, with factual support and expert opinion, a number of ways Applicants have underestimated the potential costs of spent fuel management. The most significant cost increases are those that will occur if DOE fails to remove all spent nuclear fuel by 2052. As the NRC has candidly recognized in a public hearing on this license transfer, "there's going to be some point where if there is no resolution found for spent fuel, *there will be*

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[31] *See* License Transfer and Amendment Application, Attachment 6.

[32] Answer at 18.

[33] *Cf. Arizona Pub. Serv. Co.* (Palo Verde Nuclear Station, Unit Nos. 1, 2 & 3), 34 NRC 149, 156 (Aug. 16, 1991) (holding that a commitment made during briefing on contention admissibility "ought properly to be addressed after admission of the contention" and "cannot be used to negate a petitioner's rationale for a contention").

additional costs."[34] The NRC has further recognized that DOE "has not had a very good track record" on this issue.[35] Despite Congress' mandate 35 years ago that DOE resolve this issue, we are arguably no closer to a resolution on the long-term storage of spent fuel. DOE is nearing 20 years of being in breach of its contract to remove spent fuel from plants such as Vermont Yankee. Thus, as the NRC has stated: "sometime, additional funding will have to be found."[36]

The NRC has further noted that, if DOE fails to remove spent fuel in a timely manner, the NRC "cannot . . . tell you what the costs are to an infinite time."[37] But the NRC's position is "that if it's going to happen, the licensee will be responsible for the cost."[38] NorthStar has failed to identify how it would, or even could, pay for such costs. Leaving aside the legal question of whether it can rely on the Vermont Yankee Decommissioning Trust Fund or anticipated recoveries from DOE for spent fuel expenses, the license transfer application fails to identify how NorthStar would pay for unanticipated expenses.

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[34] 5/25/17 Tr. at 139 (Adams Accession No. ML17163A424).

[35] *Id.*

[36] *Id.* at 140. The NRC's own statements belie Applicants' claim that the opinions of the State's experts are too speculative to create a genuine dispute, particularly since the Commission has recognized that "'[s]peculation' of some sort is unavoidable when the issue at stake concerns predictive judgments about an applicant's future financial capabilities." *N. Atl. Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-20 (1999).

[37] 5/25/17 Tr. at 140.

[38] *Id.*; *see also id.* at 140-41 ("[O]ne way or the other, . . . the licensee is responsible for the costs until the license is terminated completely.").

NorthStar plans to spend nearly the entirety of the Decommissioning Trust Fund on anticipated expenses, and thus cannot rely on that source to pay for unanticipated spent fuel expenses. Nor is it clear that DOE would cover the potential currently-unanticipated expenses that the State has identified. As the NRC recently noted, licensees who litigate against DOE have "unfortunately" obtained "not necessarily a very good payment on these judgments."[39] This is one reason why, as the State explained in its Petition, the NRC has *never* previously allowed a licensee to demonstrate financial assurance based on the assumption that they will recover funds in future litigation. In response to that claim, Applicants assert in a footnote that "the NRC has indeed allowed reliance on DOE recoveries," citing a "Letter from Karl Feintuch, NRC to Christopher R. Costanzo, FPL Energy Duane Arnold, LLC, 'Duane Arnold Energy Center – Safety Evaluation Re: Spent Fuel Management Program and Decommissioning Cost Estimate (TAC No. ME1148),' Safety Evaluation at 4 (Mar. 29, 2010) (ML100770505))."[40] But in that instance, the licensee had *already* signed a settlement agreement with DOE. Here, by contrast, Applicants have no such settlement agreement in place. Applicants have failed to rebut the State's argument that their financial assurance relies on special dispensation that the NRC has never previously provided to a licensee.[41]

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[39] *Id.* at 140.

[40] Answer at 46 n.210.

[41] Notably, Applicants do not deny that "Entergy attempted to show financial assurance for spent fuel management at Vermont Yankee in this same way in 2009, and the NRC correctly rejected it." Petition at 16.

As for Applicants' proposed "support agreement" of $125 million, the State's Petition explains that this agreement does not appear to be a parental guarantee and in fact states explicitly that it "is not . . . a direct or indirect guarantee."[42] Additionally, the "support agreement" is not listed as a regulatory commitment in Attachment 6 of NorthStar's application for a license transfer and amendment.[43] As noted earlier, this raises a genuine dispute over whether anyone will ever have standing to enforce that support agreement should the need arise. The State's Petition also explains, and Applicants do not contest otherwise, that "[n]o other decommissioning nuclear power plant has used this type of financial assurance."[44] For these reasons, it is not clear that even this $125 million would in fact be available in the event of a shortfall.

Further, for all the reasons explained in the State's Petition, even if the support agreement were available, it may prove to be insufficient to ensure adequate protection of public health, safety, and the environment. The State has identified a number of potential cost overruns that, either alone or in combination, could lead to more than $125 million in unplanned-for expenses. This problem is exacerbated by the fact that, as the State asserts—and uncontroverted by anything in Applicants' Answer—"the 'support agreement' does not have an escalation clause to address the difference in buying power between current and future dollars" and

[42] License Transfer and Amendment Application, Enclosure 6.

[43] *See* License Transfer and Amendment Application, Attachment 6.

[44] Petition at 22.

thus "will be worth far less" in the future if cost overruns (such as the repackaging of spent fuel) occur many years from now.[45]

2. The State has presented adequate factual support and expert opinion to raise genuine issues regarding the cost estimates and other financial representations that NorthStar has made in its license transfer and amendment application and its Revised PSDAR.

The State's three expert witness affidavits, and the other factual support cited in the State's Petition, raise genuine issues regarding NorthStar's cost estimates for decommissioning, spent fuel management, and site restoration. Applicants incorrectly claim that the State "makes no attempt to contest any aspect" of the "cash flow analysis" that Applicants provide in Enclosure 4 of Attachment 1 of their license transfer and amendment application.[46] According to Applicants, the cash-flow analysis in Enclosure 4 definitively "shows" that the decommissioning trust fund will be "sufficient to fund the entire estimated cost of decommissioning and up to $20 million in revolving funds for spent fuel

[45] Petition at 22. This is not a minor matter. If, for instance, spent fuel must be repackaged 100 years from now—a possibility contemplated by the NRC's own Continued Storage Rule—it would cost "hundreds of millions" in today's dollars. Brewer Aff. ¶ 7(j); *see also* Continued Storage of Spent Nuclear Fuel, 10 C.F.R. Part 51, 79 Fed. Reg. 56,238, 56,245 (Sept. 19, 2014) (assuming that for long-term storage all "[s]pent fuel canisters and casks would be replaced approximately once every 100 years"). But the value of the $125 million support agreement would be significantly decreased 100 years from now. For instance, if inflation is the same over the next 100 years as it was over the last 100 years, $125 million today might be worth less than $7 million 100 years from now. *See, e.g.*, U.S. Inflation Calculation, *available at* http://www.usinflationcalculator.com. An amount of $7 million would come nowhere near what would be needed to purchase 58 new dry casks at Vermont Yankee and transfer the fuel from the old casks into new ones.

[46] Answer at 35.

management costs."[47] This argument fails for several reasons. To begin, Enclosure 4 is not a "cash flow analysis." Rather, it contains three, one-page documents—one is a timeline, and the other two are cost estimates for lump-sum expenditures related to decommissioning, spent fuel management, and site restoration. Unlike a cash-flow analysis, Enclosure 4 says nothing about the anticipated value of the trust fund at any given time. The lack of a cash-flow analysis is a material omission in Applicants efforts to demonstrate financial assurance.

At any rate, the State's Petition directly disputes Applicants' cost estimates because they fail to address the potential cost overruns that the State's three expert witnesses identify. Far from "speculative and conclusory,"[48] the testimony of the State's three expert witnesses provides specific examples of potential cost overruns, several of which have occurred during previous decommissionings, and others which are explicitly anticipated possibilities in the NRC's own Continued Storage Rule. Indeed, an Atomic Safety and Licensing Board has already held that some of these same potential cost overruns—from previously undiscovered contamination or the need to repackage spent fuel every 100 years—create risk of a funding shortfall and "risk to public health and safety" sufficient to warrant a hearing.[49] In that proceeding, the Board explicitly rejected a claim that these arguments were too "speculative," and instead held that undiscovered groundwater contamination is a

[47] *Id.*

[48] *Id.* at 39.

[49] *Entergy Nuclear Vt. Yankee, LLC*, LBP-15-24, at 25.

significant possibility, and that a shortfall arising from unexpected spent fuel management expenses is "very possible."[50]

Finally, Applicants make two arguments that are unmoored to the question presented here of whether the State's contentions are admissible. First, Applicants claim that the potential cost overruns identified by the State "are not unique" to Vermont Yankee.[51] The fact that many other plants may encounter similar cost overruns (just as they have during past decommissioning) is irrelevant, and, if anything, all the more reason to grant a hearing, so that other plants will know which expenses must be accounted for. Second, Applicants argue that "the post-transfer licensee will in fact have greater financial support due the availability of the $125 million Support Agreement."[52] As an initial matter, the State does not concede this to be the case; given past actions by Entergy's parent company supporting its subsidiaries, and given the corporate structure of NorthStar, it may well be that Entergy's parent company is more likely to be held liable in the event of a shortfall.[53] But, again, the test is not whether NorthStar has greater financial resources than Entergy, but whether (regardless of Entergy's financial resources),

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[50] *Id.* at 26.

[51] Answer at 39.

[52] *Id.* at 56.

[53] Applicants incorrectly assert at various points that the State "acknowledges [that] '"NRC does not have the authority to require a parent to pay for the decommissioning expenses of its subsidiary-licensee, except to the extent the parent may voluntarily provide" a parent company guarantee.'" Answer at 48 n.214 (citing Petition at 22). The full sentence clearly noted that the State was presenting a view "according to the NRC." Petition at 22.

NorthStar can independently demonstrate financial assurance. The State has raised genuine disputes regarding that question, and a hearing is thus warranted.

II. CONTENTION 2 MEETS THE REQUIREMENTS OF 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

In Contention 2, the State has identified and supported a genuine dispute regarding the lack of adequate environmental review of the proposed license transfer and amendment. The State's Petition explains in detail the applicable provisions of the National Environmental Policy Act (NEPA) and NRC regulations, as well as the specific ways in which this license transfer and amendment trigger the need for additional environmental review.

In response, Applicants make two arguments, both of which are incorrect. First, Applicants assert that "Contention 2 should be rejected *ab initio*" for raising issues outside the scope of this proceeding.[54] According to Applicants, this proposed federal action falls within a regulatory exemption and there are no special circumstances justifying additional review. But, as explained below, there are special circumstances here. Second, Applicants claim the State has failed to present adequate support for Contention 2. However, the State's three expert witness affidavits and other cited facts support Contention 2. Further, as with Contention 1, Applicants ignore the State's identification of specific information that should have been, but was not, included in the license transfer and amendment application.

[54] Answer at 53.

a. Contention 2 is within the scope of this proceeding.

In support of their argument that Contention 2 is outside the scope of this proceeding, Applicants understandably cite 10 C.F.R. § 51.22(c)(21) as categorically excluding from NEPA review all license transfers and related amendments.[55] But that categorical exemption does not apply when "special circumstances" are present.[56] That is clearly the case here, for all the reasons identified in the State's Petition.

Applicants attempt to avoid any analysis of "special circumstances" by noting that the State has not alleged in its Petition that "special circumstances" exist. This argument elevates form over substance. NEPA review comes in three forms: (1) the least amount of review—a categorical exemption; (2) an intermediate amount of review—an Environmental Assessment and Finding of No Significant Impact; or (3) the greatest amount of review—an Environmental Impact Statement. The State's Petition explicitly argues that "NEPA requires an environmental impact statement, with a full list and analysis of alternatives, before the NRC can approve of the proposed license transfer and amendment and the significant shift in decommissioning methods that NorthStar proposes in the Revised PSDAR."[57] In arguing for the preparation of an environmental impact statement, the State clearly sets forth the special circumstances that preclude categorical exclusion.

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[55] *Id.* at 53-54.

[56] 10 C.F.R. § 51.22(b).

[57] Petition at 39.

Indeed, as Applicants themselves recognize in their Answer, "[t]he gravamen of Vermont's argument is that *an EIS must be prepared* on the proposed license transfer, because it allegedly gives rise to the reasonably foreseeable possibility of a decommissioning funding shortfall and associated environmental and economic effects."[58] Applicants then proceed to respond to the State's claims and argue why, in their view, an environmental impact statement is not warranted here. Applicants can thus claim no prejudice from the fact that the State did not use the phrase "special circumstances" in arguing that special circumstances require additional environmental review here.

More importantly, regardless of what arguments the State's Petition presents, there is an *independent* legal duty, placed by Congress on the NRC, to comply with NEPA. As explained in detail in the State's Petition, that necessitates an environmental impact statement here. It would thus violate NEPA for the NRC to approve of this license transfer and amendment without the Commission first undergoing the requisite environmental review.

The Commission therefore must find special circumstances present here for several reasons. First, as stated in the rulemaking that created this categorical exemption, the exemption is premised on the NRC's view that "[i]n general, license transfers do not involve any technical change to plant operations."[59] That is not the

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[58] Answer at 55 (emphasis added).

[59] *Streamlined Hearing Procedures for NRC Approval of License Transfers*, 66 Fed. Reg. 66721-01, at 66721 (Dec. 3, 1998).

case here. To the contrary, this case involves the *first-in-the-nation* sale of a shutdown nuclear power plant for the express purpose of expedited decommissioning. As Applicants themselves admit, "expedited decommissioning of the Vermont Yankee site" is the "*primary* purpose" of the proposed license transfer and amendment.[60] It is undisputed that if this license transfer is approved, there will be a drastic on-the-ground "technical change" as the plant shifts from decades of SAFSTOR to NorthStar's implementation of immediate decommissioning as described in the Revised PSDAR. As Applicants concede, the Revised PSDAR "would apply *only if* the NRC approves NorthStar . . . as the licensee."[61]

Second, the categorical exclusion in 10 C.F.R. § 51.22(c)(21) presumes that a license transfer and related amendment complies with all other applicable regulatory requirements, and Applicants have not made that showing here. As explained throughout the State's Petition, in both Contention 1 and Contention 2, Applicants have failed to demonstrate that this particular license transfer and amendment complies with applicable regulatory requirements. Also, as the State explained in its Petition, Applicants have failed to submit the environmental report that must accompany a PSDAR, including the Revised PSDAR in which NorthStar explains its plans if the license is transferred:

> To facilitate this environmental review, NRC regulations place specific burdens on applicants for license amendments. For instance, as applicable here, under 10 C.F.R. § 51.53(d), every applicant for a "license

[60] Answer at 4 (emphasis added).

[61] *Id.* at 18 (emphasis added).

> amendment approving a license termination plan *or decommissioning plan* under § 50.82 of this chapter either for unrestricted use or based on continuing use restrictions applicable to the site . . . shall submit with its application a separate document, entitled 'Supplement to Applicant's Environmental Report—Post Operating License Stage,' which will update 'Applicant's Environmental Report—Operating License Stage,' as appropriate, to reflect any new information or significant environmental change associated with the applicant's proposed decommissioning activities or with the applicant's proposed activities with respect to the planned storage of spent fuel.[62]

Applicants do not respond to this argument, other than to claim in a footnote, and without support, that § 51.53 does not apply here "[a]s is evident from [its] title[]."[63] But the title of § 51.53 is "Postconstruction environmental reports." The only limitation from the face of this rule is that it cannot apply to activities that occurred before 1972. Thus, § 51.53 does apply here.[64]

Third, Applicants have not cited a single example where a court has upheld the use of a categorical exclusion for a federal approval that directly results in significant substantive impacts. In fact, as Entergy knows from a previous proceeding involving Vermont Yankee, just last year the Commission overturned a

[62] Petition at 32-33 (emphasis added).

[63] Answer at 55 n.245.

[64] Although Applicants do not argue this, the State is aware that NRC Staff has taken the position in pending rulemaking that the reference to a "decommissioning plan" in § 51.53 may have been an unintentional holdover from the time when the NRC required NRC approval of decommissioning plans. *See* Decommissioning Rulemaking Draft Regulatory Basis, 82 Fed. Reg. 13778-01 (Mar. 15, 2017). Whether that is correct will likely be resolved during the decommissioning rulemaking. In the meanwhile, the regulation stands as it is written, and it applies here.

decision by NRC Staff to apply a categorical exclusion reserved for administrative changes to a decision that had substantive impacts.[65]

Fourth, potential substantive impacts require NEPA review because, as the State explained it its Petition, every NEPA analysis must address all "potential environmental effects," unless those effects are so unlikely as to be "remote and highly speculative."[66] "Ignoring possible environmental consequences will not suffice."[67] The mere "possibility of a problem" requires an agency "to evaluate seriously the risk" that this problem will occur, and what environmental consequences would ensue in those circumstances.[68] A "potential" significant effect suffices.[69] The license transfer and amendment at issue here, and the plan for immediate decommissioning that accompanies it, have potential environmental impacts for all the reasons explained in the State's Petition. As noted in the State's Petition, this license transfer and amendment, if approved, risks the creation of a shortfall in the Vermont Yankee Decommissioning Fund—an event that has already been found to present a "risk to public health and safety" sufficient to warrant a hearing according to an NRC Atomic Safety and Licensing Board panel.[70]

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[65] *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-16-17, 84 NRC ____ (Oct. 27, 2016), slip op. at 15-17.

[66] *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1030 (9th Cir. 2006).

[67] *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985).

[68] *Id.*

[69] *San Luis Obispo Mothers for Peace*, 449 F.3d at 1030

[70] *Entergy Nuclear Vt. Yankee, LLC*, LBP-15-24, at 25.

NEPA does not allow the use of a categorical exemption in these circumstances. "Categorical exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment."[71] These exclusions apply only to "actions which do not individually or cumulatively have a significant effect on the human environment."[72] An agency cannot "avoid [the NRC's] statutory responsibilities under NEPA by merely asserting that an activity it wishes to pursue will have an insignificant effect on the environment."[73] Rather, an agency "*must* provide a reasoned explanation of its decision."[74] Nothing in the notice of hearing, or in the underlying rule that created the categorical exemption Applicants cite, supports the claim that there are no potential environmental impacts from a license transfer for the express purpose of expedited decommissioning.

Finally, if there were any doubt on the matter, it is resolved by the State's uncontested arguments that NEPA requires agencies to consider the cumulative impacts of their actions.[75] A cumulative impact is any "impact on the environment which results from the incremental impact of the action when added to other past,

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[71] *Alaska Ctr. For the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999).

[72] 40 C.F.R. § 1508.4.

[73] *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (quotation omitted).

[74] *Id.* (emphasis added); *see also, e.g.*, *Alaska Ctr.*, 189 F.3d at 859 ("When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision.").

[75] *See, e.g.*, 40 C.F.R. § 1508.4.

present, *and reasonably foreseeable future actions* regardless of what agency or person undertakes such other actions."[76] Agencies must consider all foreseeable direct, indirect, and cumulative impacts before applying an established categorical exclusion.[77] Here, it is not only reasonably foreseeable, but it is directly expressed in the license transfer and amendment application itself that the express purpose of this transfer is to allow for the implementation of NorthStar's stated plans for immediate decommissioning and spent fuel management. The potential environmental impacts of those plans are thus precisely the type of cumulative impacts that must be assessed *now* before the NRC can approve this transfer.

b. The State has presented adequate factual support and expert opinion to raise a genuine dispute on Contention 2.

Applicants' final argument is that Contention 2 lacks adequate support. Again, while Applicants disagree with the sworn testimony of the State's three expert witnesses, this disagreement demonstrates the presence, not absence, of a genuine dispute.[78] Further, as explained below, in addition to providing factual support and expert opinion, the State has met the standard for contention

[76] *Id.* § 1508.7 (emphasis added)

[77] *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 23 (D.D.C. 2009); *see also, e.g.*, *N. States Pwr. Co.* (Prairie Island Nuclear Island Nuclear Generating Plant), 76 NRC 503, 514 (2012) (ASLB agreed that cumulative impacts analysis of initial storage facility must take into account later application to expand storage facility, since it is "reasonably foreseeable" that the facility will be expanded).

[78] *Arizona Pub. Serv. Co*, 33 NRC 397, 1991 WL 149505, at *11.

admissibility by identifying specific ways in which the license transfer and amendment application presents insufficient information.

III. BOTH CONTENTIONS MEET THE REQUIREMENTS OF 10 C.F.R. § 2.309(f)(1)(vi) BY DEMONSTRATING THAT THE LICENSE TRANSFER AND AMENDMENT APPLICATION PRESENTS INSUFFICIENT INFORMATION.

Even if Applicants were correct that some of the State's arguments regarding NorthStar's spent fuel management plans and the representations made in the Revised PSDAR lack adequate support, both contentions should be admitted because the license transfer and amendment application presents insufficient information. The contentions are admissible under 10 C.F.R. § 2.309(f)(1)(vi) because they identify required information that the application does not contain. Both contentions, their bases and supporting evidence, and the three expert witness affidavits note a number of deficiencies in the information Applicants have provided. In fact, ironically, those deficiencies are all the greater if, as Applicants suggest, the Commission were to ignore NorthStar's plans for managing spent fuel and the cost estimates NorthStar presents in the Revised PSDAR.

Unless a licensee has unlimited assets and accepts unlimited liability for all potential expenses (neither of which is the case here), it is impossible to analyze financial assurance without calculating potential costs. Reasonably foreseeable costs are thus a relevant matter to this proceeding, and the State has explained the

many ways in which the license transfer and amendment application "fails to contain information" on this relevant matter.[79]

As just one example, the State's Petition argues that NorthStar has failed to demonstrate financial assurance to pay for spent fuel management expenses. The State's Petition notes that NorthStar has not provided a legal avenue for paying for *any* of these expenses, since it is not entitled to make use of the June 2015 exemption that was granted to Entergy. Thus, it cannot pay for these expenses out of the Vermont Yankee Decommissioning Trust Fund. As for Applicants' claim that NorthStar will pay for these expenses by litigating against, or settling with, DOE, the State's Petition notes that NRC precedent does not allow a licensee to demonstrate financial assurance in this way. Additionally, even if Applicants could rely on these two sources of funds to demonstrate financial assurance (they cannot), the State has provided expert witness opinion and factual support demonstrating a failure to account for specific foreseeable expenses of long-term spent fuel storage.

Regarding Contention 2, the State has identified specific ways in which the license transfer and amendment application "fails to contain information" on potential environmental impacts.[80] Applicants do not claim to have provided that information, but rather contend that the information is not needed here. This

[79] 10 C.F.R. § 2.309(f)(1)(vi).

[80] *Id.*

presents a genuine dispute about what the NRC must analyze to ensure that its actions comply with NEPA.

CONCLUSION

Both of the State of Vermont's contentions meet all of the requirements of 10 C.F.R. § 2.309(f) and are therefore admissible. Each contention identifies specific regulatory requirements for which Applicants have failed to present sufficient evidence of compliance. The State has briefly explained the basis, with supporting facts and proposed expert opinions, for each contention. The State has further demonstrated that these matters are within the scope of the proceeding and material to the findings the NRC must make in this proceeding.

For these reasons and those noted in the State of Vermont's petition to intervene and hearing request, the State respectfully requests that both of its contentions be admitted.

Respectfully submitted,

/Signed (electronically) by/
Kyle H. Landis-Marinello
Counsel for the State of Vermont
Assistant Attorney General
Environmental Protection Division
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
(802) 828-1361
kyle.landis-marinello@vermont.gov

Stephanie Hoffman
Counsel for the State of Vermont

Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620
(802) 828-5543
steph.hoffman@vermont.gov

Dated at Montpelier, Vermont
this Seventeenth day of July 2017

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	)	Docket No. 50-271-LT-2
NUCLEAR OPERATIONS, INC.;	)	
CONSIDERATION OF APPROVAL	)	July 17, 2017
OF TRANSFER OF LICENSE AND	)	
CONFORMING AMENDMENT	)	
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that copies of the State of Vermont's Reply in Support of the State's Petition for Leave to Intervene and Hearing Request have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding, this Seventeenth day of July 2017.

/Signed (electronically) by/
Kyle H. Landis-Marinello
Counsel for the State of Vermont
Assistant Attorney General
Environmental Protection Division
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
(802) 828-1361
kyle.landis-marinello@vermont.gov

Dated at Montpelier, Vermont
this Seventeenth day of July 2017