

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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In the Matter of: )

Docket No. 50-271-LA-2 )

ENTERGY NUCLEAR VERMONT YANKEE, )  
LLC, and ENTERGY NUCLEAR )  
OPERATIONS, INC. )

March 6, 2015 )

(Vermont Yankee Nuclear Power Station) )  
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**ENTERGY'S ANSWER  
OPPOSING PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST**

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**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(i), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) submit this answer opposing the Petition for Leave to Intervene and Hearing Request filed on February 9, 2015 (“Petition”) by the State of Vermont (“State”).<sup>1</sup> As explained below, the Atomic Safety and Licensing Board (“Board”) should deny the Petition because the proposed contentions are inadmissible.

On December 9, 2014, the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) published in the *Federal Register* a notice of an opportunity to request a hearing

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<sup>1</sup> The State attached the following documents to the Petition: Attachment A, Comments and Declarations of the Vermont Department of Public Service Regarding Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme, License Amendment Request BVY 14-033 (“Leshinskie Declaration”); Attachment A.1, *Curriculum Vitae* of Anthony R. Leshinskie; Attachment B, Comments and Declarations of the Vermont Division of Emergency Management and Homeland Security on BVY 14-033 Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme (“Bornemann Declaration”); Attachment B.1, *Curriculum Vitae* of Erica M. Bornemann; Attachment C, Comments and Declarations of the Vermont Department of Health on Entergy [sic] Vermont Yankee’s License Amendment Request for the Emergency Planning Zone in Letter BVY 14-033 Dated June 12, 2014 and SECY-14-0125 Dated November 14, 2014 (“Irwin Declaration”); Attachment C.1, *Curriculum Vitae* of William E. Irwin, Sc.D., CHP.

(“Notice”)<sup>2</sup> on Entergy’s June 12, 2014 license amendment request (“LAR”)<sup>3</sup> for the Vermont Yankee Nuclear Power Station (“Vermont Yankee”). The LAR seeks NRC approval to revise the Vermont Yankee site emergency plan and Emergency Action Levels (“EAL”) for the plant’s then-anticipated permanently defueled condition.<sup>4</sup> The LAR referenced a separate request for exemptions filed by Entergy related to certain specified requirements in 10 C.F.R. §§ 50.47(b), 50.47(c)(2), and Part 50, Appendix E, which would allow the plant “to reduce emergency planning requirements and subsequently revise” the Vermont Yankee emergency plan.<sup>5</sup> Entergy’s submission of a separate Exemption Request and LAR are consistent with standard, Commission-endorsed practice for decommissioning plants.<sup>6</sup>

The State proffers two contentions. The first contention (“Contention 1”) alleges that the LAR is not ready for review, because it is predicated upon and assumes approval of the Exemption Request.<sup>7</sup> The second contention (“Contention 2”) alleges that the LAR, if approved along with the exemptions, fails to account for all credible emergency scenarios, undermines the effectiveness of the site emergency plan and off-site emergency planning, and poses an increased

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<sup>2</sup> Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 73,106, 73,109 (Dec. 9, 2014) (“Notice”).

<sup>3</sup> BVY 14-033, Letter from C. Wamser to NRC Document Control Desk, Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme (June 12, 2014) (“LAR”), *available at* ADAMS Accession No. ML14168A302.

<sup>4</sup> *Id.* at 1.

<sup>5</sup> BVY 14-009, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Request for Exemptions from Portions of 10 CFR 50.47 and 10 CFR 50, Appendix E (Mar. 14, 2014) (“Exemption Request”), *available at* ADAMS Accession No. ML14080A141.

<sup>6</sup> *See, e.g.*, Letter from Chairman Macfarlane to Senator Markey, *et al.* at 1 (June 26, 2014) (“Macfarlane Letter to Markey”), *available at* ADAMS Accession No. ML14147A108 (“The practice of considering exemptions [for decommissioning plants from emergency planning and security requirements] . . . is a well-established part of the NRC’s regulatory process . . .”).

<sup>7</sup> *See* Petition at 3.

risk to the health and safety of Vermont citizens.<sup>8</sup> The Petition also requests that the hearing on its contentions be held under the Rules for Formal Adjudications in 10 C.F.R. Part 2, Subpart G.<sup>9</sup>

Fundamentally, both Contentions 1 and 2 are impermissible challenges to the NRC's regulations and regulatory process. The Commission's long-standing regulatory framework establishes a clear distinction between exemptions and license amendments. The two regulatory actions are governed by separate regulations, subject to separate regulatory reviews, and are evaluated using separate standards and separate processes for public participation. Here, the LAR is the subject of this proceeding; the Exemption Request is not. The State seeks to blur that regulatory distinction and impermissibly expand this LAR proceeding into a consideration of the merits of Entergy's Exemption Request. The State's claims, therefore, are a collateral attack on the Commission's regulatory process, raise immaterial issues, and are inadmissible under 10 C.F.R. §§ 2.309(f)(1)(iii), and (iv).

Even beyond this threshold legal hurdle, the proposed contentions are inadmissible for multiple additional reasons. First, the Commission has already approved Entergy's Exemption Request and, therefore, Contention 1 is moot.<sup>10</sup> Second, the contentions allege no substantive reason why the LAR should be denied. Instead, the State's principal challenge is to the spent fuel pool ("SFP") accident analysis presented in the Exemption Request and summarized as background information in the LAR. The contentions also misinterpret or mischaracterize the LAR and other technical documents that the State and its experts reference. As a result, the contentions lack basis, lack support in alleged facts or expert opinion, and fail to raise a genuine

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<sup>8</sup> *See id.* at 6.

<sup>9</sup> *See id.* at 3.

<sup>10</sup> *See* SRM-SECY-14-0125 – Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements, (Mar. 2, 2015) ("SRM-SECY-14-0125"), available at ADAMS Accession No. ML15061A516. As explained further below, the Staff still has some remaining steps related to its environmental review before the exemptions are issued.

dispute on a material issue of law or fact. The State's contentions are therefore also inadmissible pursuant to 10 C.F.R. §§ 2.309(f)(1)(ii), (v), and (vi).

Thus, the Petition should be denied in its entirety.

## II. PROCEDURAL HISTORY

By letter dated September 23, 2013, Entergy informed the NRC that Vermont Yankee would permanently cease operations at the end of its current operating cycle, which was expected to occur in the fourth quarter of 2014.<sup>11</sup> Consistent with the anticipated permanently defueled condition of the plant, on March 14, 2014, Entergy filed the Exemption Request, and provided a copy of the Exemption Request and associated attachments to the Vermont Department of Public Service Commissioner, the designated State official.<sup>12</sup>

The basis for this Exemption Request is that the application of certain regulations to Vermont Yankee, once shutdown and permanently defueled for a sufficient period of time, would no longer be necessary to ensure adequate emergency response capability, and therefore, to protect the public health and safety.<sup>13</sup> Consistent with NRC guidance in Draft NSIR/DPR-ISG-02, Interim Staff Guidance, "Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants" ("Draft ISG"),<sup>14</sup> the Exemption Request provides an evaluation of the consequences of design basis and beyond design basis events for the permanently shutdown and defueled condition. The evaluation demonstrates that, after a certain period following shutdown, there is no credible accident scenario that will result in radiological

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<sup>11</sup> BKY 13-079, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Sept. 23, 2013), *available at* ADAMS Accession No. ML13273A204.

<sup>12</sup> *See* Exemption Request at 1, 3.

<sup>13</sup> *See id.* at 1. Absent the exemption, there would also be an unnecessary burden on Entergy and the Vermont Yankee Decommissioning Trust Fund. *See id.*

<sup>14</sup> Draft Interim Staff Guidance (ISG) NSIR/DPR-ISG-02, Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants ("Draft ISG"), *available at* ADAMS Accession No. ML13304B442; *see* Exemption Request, Attach. 1 at 1.

releases requiring offsite protective action.<sup>15</sup> In addition, Entergy's evaluation of beyond-design basis events shows that the time for the hottest fuel assembly to reach the applicable criterion of 900 °C in an adiabatic heatup scenario will be ten hours 15.4 months after shutdown, which will occur in mid-April, 2016.<sup>16</sup> Accordingly, Entergy requested that the exemptions be approved with an effective date of April 15, 2016.<sup>17</sup> On November 14, 2014, the NRC Staff issued SECY-14-0125, recommending that the Commission approve the requested exemptions.<sup>18</sup> On March 2, 2015, the Commission approved the Exemption Request, as recommended by the Staff.<sup>19</sup>

Separately, on June 12, 2014, Entergy submitted the LAR, seeking NRC approval to revise the Vermont Yankee site emergency plan and EALs to reflect the plant's permanently defueled condition. The LAR is predicated on the approval of the Exemption Request. Accordingly, the LAR provides background on the accident analyses presented in the Exemption Request and other technical issues related to the safety of the SFP during the decommissioning period,<sup>20</sup> and presents the permanently defueled emergency plan ("PDEP") and EAL scheme for NRC review and approval.<sup>21</sup>

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<sup>15</sup> See Exemption Request, Attach. 1 at 41-44.

<sup>16</sup> See Exemption Request at 2; *id.*, Attach. 1 at 41-44; *see also id.*, Attach. 2, Sargent & Lundy, Vermont Yankee Maximum Cladding Temperature Analysis for an Uncovered Spent Fuel Pool with no Air Cooling (Dec. 11, 2013). Adiabatic heatup refers to the conservative assumption that there is zero heat transfer from the uncovered fuel.

<sup>17</sup> See Exemption Request at 2.

<sup>18</sup> SECY-14-0125, Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements (Nov. 14, 2014) ("SECY-14-0125"), *available at* ADAMS Accession No. ML14227A711.

<sup>19</sup> See SRM-SECY-14-0125 – Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements, (Mar. 2, 2015) ("SRM-SECY-14-0125"), *available at* ADAMS Accession No. ML15061A516.

<sup>20</sup> See LAR, Attach. 1 at 3-6.

<sup>21</sup> See *id.* at 8.

Entergy developed the PDEP based on the Draft ISG, Attachment 1, “Guidance for Evaluation of Decommissioning Emergency Plans.”<sup>22</sup> The permanently defueled EAL scheme is also consistent with the NRC-approved guidance in Nuclear Energy Institute (“NEI”) 99-01.<sup>23</sup> In accordance with 10 C.F.R. § 50.91(b)(1), Entergy provided a copy of the LAR and associated attachments to the Vermont Department of Public Service Commissioner, the designated State official.<sup>24</sup> The NRC accepted the LAR for docketing, and issued the Notice on December 9, 2014, setting a deadline of February 9, 2015 for filing petitions for leave to intervene challenging the LAR.<sup>25</sup>

On December 29, 2014, Vermont Yankee permanently ceased power operations, and the fuel has now been permanently removed from the Vermont Yankee reactor vessel and placed in the SFP.<sup>26</sup>

On February 9, 2015, the State filed the Petition and its attachments, proposing two contentions.<sup>27</sup> As previously noted, Contention 1 alleges that “the LAR is “not ready for review”

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<sup>22</sup> *See id.* at 6.

<sup>23</sup> NEI 99-01, Rev. 6, Development of Permanently-Defueled Emergency Action Levels for Non-Passive Reactors (Nov. 2012), *available at* ADAMS Accession No. ML12326A805. The NRC endorsed NEI-99-01 in 2013. *See* Letter from M. Thaggard, Acting Director, Division of Preparedness and Response, NRC, to S. Perkins-Grew, Director, Emergency Preparedness, NEI, U.S. Nuclear Regulatory Commission Review and Endorsement of NEI-99-01, Revision 6, Dated November 2012 (Mar. 28, 2013), *available at* ADAMS Accession No. ML12346A463.

<sup>24</sup> *See* LAR at 3.

<sup>25</sup> *See* Notice, 79 Fed. Reg. at 73,108-09.

<sup>26</sup> BVY-15-001, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel (Jan. 12, 2015), *available at* ADAMS Accession No. ML15013A426.

<sup>27</sup> The Petition suffers from two threshold deficiencies. First, the State did not file a certificate of service, contrary to the requirements of 10 C.F.R. §§ 2.302(c) and 2.305(c)(4). Second, the State’s counsel has not filed a Notice of Appearance, contrary to 10 C.F.R. § 2.314(b). The State bears the burden of demonstrating that it has authorized its representative appearing in the proceeding. *See Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), LBP-90-29, 32 NRC 89, 92 (1990). An attorney’s Notice of Appearance can meet this requirement, *see N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), LBP-08-26, 68 NRC 905, 913 (2008), but no attorney has submitted a Notice of Appearance on behalf of the State. Given that the Petition was signed by Mr. Recchia, the Commissioner of the Vermont Department of Public Service, it is also not clear who is representing the State in this proceeding.

as it is predicated on the approval of the separate Exemption Request then pending before the Commission.<sup>28</sup> Contention 2 alleges that the LAR, “if approved along with the predicate requested exemptions,” fails to account for all credible emergency scenarios, undermines the effectiveness of the site emergency plan and off-site emergency planning, and poses an increased risk to the health and safety of Vermont citizens.<sup>29</sup> Thus, the State’s Petition seeks to litigate the merits of both the now-approved Exemption Request and the LAR in the hearing in this proceeding. It also requests the opportunity to provide comments on and seek a separate hearing on the Exemption Request in the future.<sup>30</sup>

### **III. REGULATORY AND TECHNICAL BACKGROUND**

#### **A. The Exemption Request and License Amendment Are Separate Licensing Actions, Subject to Separate Regulatory Review Processes and Standards**

Entergy’s Exemption Request and LAR are separate licensing actions, and are subject to distinct review processes and standards. Only the LAR is subject to challenge in this proceeding, and only the LAR is within the scope of the Board’s jurisdiction.

##### **1. The NRC’s Exemption Review Process**

Although Entergy’s Exemption Request is not subject to challenge in this proceeding, a brief overview of the NRC’s regulatory framework for reviewing exemption requests from emergency planning requirements for decommissioning plants is provided here for background.

For plants undergoing decommissioning, the Commission has long recognized that, in comparison to operating reactors, there is a substantially reduced risk of accidents that could result in an offsite radiological release.<sup>31</sup> As a result, the Commission has consistently approved

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<sup>28</sup> Petition at 3. As previously noted, the Commission has now approved the Exemption Request.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> Dominion Energy Kewaunee, Inc.; Kewaunee Power Station, 79 Fed. Reg. 65,715 (Nov. 5, 2014).

exemptions from certain emergency planning regulations, to eliminate the need for licensees of decommissioning reactors to maintain offsite radiological emergency plans and reduce the scope of onsite emergency planning activities. Most recently, the Commission approved such exemptions for the Vermont Yankee and San Onofre Nuclear Generating Station (“SONGS”) plants.<sup>32</sup>

As part of its exemption review process, the NRC requires licensees to demonstrate, through a site-specific assessment, that given a permanently shut down and defueled reactor, the radiological consequences of design basis accidents will not exceed the U.S. Environmental Protection Agency’s (“EPA”) Protective Action Guidelines (“PAGs”) at the exclusion area boundary, and that in the unlikely event of a beyond-design basis accident, spent fuel stored in the SFP would not reach the zirconium ignition temperature of 900 °C in fewer than 10 hours based on an analysis that very conservatively assumes no water or air cooling of the spent fuel.<sup>33</sup> The NRC reviews the exemption request against the requirements of 10 C.F.R. § 50.12 and determines whether the exemption should be approved.<sup>34</sup> The Commission has retained for itself the authority to approve such exemptions.<sup>35</sup>

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<sup>32</sup> See SRM-SECY-14-0125 (approving the Vermont Yankee exemptions); SRM-SECY-14-0144 – Request by Southern California Edison for Exemptions from Certain Emergency Planning Requirements, (Mar. 2, 2015) (“SRM-SECY-14-0144”) (approving the San Onofre Nuclear Generating Station (“SONGS”) exemptions), *available at* ADAMS Accession No. ML15061A521; *see also, e.g.*, SRM-SECY-14-0118 – Request by Duke Energy Florida, Inc., for Exemptions from Certain Emergency Planning Requirements, (Dec. 30, 2014) (“SRM-SECY-14-0118”) (approving similar exemptions for the Crystal River 3 (“CR3”) plant), *available at* ADAMS Accession No. ML14364A111; Dominion Energy Kewaunee, Inc.; Kewaunee Power Station, 79 Fed. Reg. 65,715 (Nov. 5, 2014); Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2); Exemption, 64 Fed. Reg. 48,856 (Sept. 8, 1999).

<sup>33</sup> See SECY-14-0125, Enclosure at 1-2; *see also* SECY-14-0144, Request by Southern California Edison for Exemptions from Certain Emergency Planning Requirements, Enclosure at 1-2 (Dec. 17, 2014) (“SECY-14-0144”), *available at* ADAMS Accession No. ML14251A554; SECY-14-0118, Request by Duke Energy Florida, Inc., for Exemptions from Certain Emergency Planning Requirements, Enclosure at 1-2 (Oct. 29, 2014) (“SECY-14-0118”), *available at* ADAMS Accession No. ML14219A444; SECY-14-0066, Request by Dominion Energy Kewaunee, Inc., for Exemptions from Certain Emergency Planning Requirements, Enclosure at 1-2 (June 27, 2014) (“SECY-14-0066”), *available at* ADAMS Accession No. ML14072A257.

<sup>34</sup> Under Section 50.12, the Commission may grant an exemption from the regulatory requirements in 10 C.F.R. Pat 50 if the exemption is authorized by law, will not present an undue risk to public health and safety, and are

The NRC Staff recently issued the Draft ISG on this exemption process. The Draft ISG explains that:

[T]he NRC should not grant approval for the exemption of [emergency preparedness] requirements for decommissioning power reactor licensees until site-specific analyses provide sufficient assurance that an offsite radiological release is not postulated to exceed the EPA PAGs at the site boundary, or that there is sufficient time to initiate appropriate mitigating actions by offsite agencies on an ad hoc basis to protect the health and safety of the public.<sup>36</sup>

Therefore, as part of the exemption process, the NRC conducts a technical review of the site-specific accident analyses submitted by decommissioning plant licensees. The NRC will not issue an exemption unless and until it finds the accident analysis adequate.

Once the Staff issues the requested exemptions and they become effective in April 2016, they would, among other things, remove the requirements to address hostile action in the Vermont Yankee emergency plan,<sup>37</sup> to maintain an emergency operations facility (“EOF”),<sup>38</sup> and to have an evaluation of the adequacy of offsite emergency response by the Federal Emergency Management Agency (“FEMA”).<sup>39</sup>

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consistent with the common defense and security. Section 50.12 also requires special circumstances to be present, such as when application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule, where compliance would result in undue hardship or other costs, or where the exemptions would result in a benefit to the public health and safety that compensates for any decrease in safety that might result from the exemption.

<sup>35</sup> See SECY-14-0125 at 1 (“The purpose of this paper is to seek Commission approval for the staff to grant Entergy Nuclear Operations, Inc.’s [ ] request for exemptions . . . .”); *see also, e.g.*, SECY-14-0066 at 1 (providing a similar explanation for the Kewaunee plant); SECY-14-0118 at 1 (providing a similar explanation for the CR3 plant).

<sup>36</sup> Draft ISG at 6.

<sup>37</sup> See SECY-14-0125, Enclosure at 7 (explaining that the requirement, in 10 C.F.R. Part 50, Appendix E, Section IV, to address potential hostile action in its emergency plans applies only to nuclear power reactors, not decommissioning power reactors). Entergy would still, however, be subject to certain requirements to classify a security-related event, and notify and coordinate emergency response with offsite agencies. *See id.* at 10.

<sup>38</sup> *See id.* at 3, 16 (proposing the removal of requirements in 10 C.F.R. § 50.47(b)(3) and Part 50, Appendix E to maintain an EOF).

<sup>39</sup> *See id.* at 21, 23.

As previously noted, the NRC Staff recommended and the Commission has now approved Entergy's Exemption Request, although final issuance is still pending. The Commission recently approved similar exemption requests for the SONGS, Crystal River 3 ("CR3") and Kewaunee plants as well. In so doing, the Commission specifically stated that it "continues to support the current practice of approving appropriately-justified exemptions from certain emergency planning requirements while plants are transitioning to decommissioning based on site-specific evaluations."<sup>40</sup>

## **2. The License Amendment Review Process**

The license amendment review, on the other hand, involves a consideration of whether, under the regulations, *as exempted*, the proposed permanently defueled emergency plan and EAL schemes are adequate.<sup>41</sup> Importantly, the LAR review takes the Commission's approval of the exemption, and the associated findings regarding spent fuel accidents, as entering assumptions in the evaluation of the LAR.<sup>42</sup> Therefore, Entergy is not seeking approval of the Exemption Request as part of the LAR.

The Safety Evaluation for the recently-approved Kewaunee license amendment and Attachment 1 of the Draft ISG both describe this review.<sup>43</sup> As explained in the Draft ISG, the NRC will review whether the proposed defueled emergency plan provides for adequate: (1)

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<sup>40</sup> SRM-SECY-14-0125; SRM-SECY-14-0144.

<sup>41</sup> *See generally* Letter from T. Wengert, Senior Project Manager, NRC, to D. Heacock, President and Chief Nuclear Officer, Dominion Energy Kewaunee, Inc., Kewaunee Power Station – Issuance of Amendment for Changes to the Emergency Plan and Emergency Action Levels (TAC No. MF3411), Enclosure 2 (Oct. 31, 2014) ("Kewaunee Amendment"), *available at* ADAMS Accession No. ML14279A482.

<sup>42</sup> *See, e.g.*, Draft ISG, Attach. 1 at 36 ("When in a permanently defueled condition, the licensee will typically receive approval from the NRC for exemption from specific emergency planning requirements. These exemptions reflect the lower radiological source term and risks associated with [SFP] storage relative to an operating power reactor."); Kewaunee Amendment, Enclosure 2 at 2 ("With the NRC staff granting [Dominion Energy Kewaunee] approval to the previously requested [emergency preparedness] exemptions, [Dominion Energy Kewaunee] states that the proposed [Kewaunee Power Station] PDEP will continue to meet the remaining applicable planning standards.").

<sup>43</sup> *See generally* Kewaunee Amendment; Draft ISG, Attach. 1.

emergency response equipment and facilities, such as respiratory equipment, protective clothing, firefighting equipment, etc.; (2) emergency response staffing and communication, such as identifying the onsite emergency response organization, and identifying the persons who have primary responsibility for implementing the emergency response and coordination with offsite response organizations; (3) mitigation of consequences, such as identifying the means and equipment provided for limiting the consequences of accidents, describing onsite protective actions, and discussing the assessment of potential releases; (4) provisions for periodic drills and exercises, (although offsite response organizations would not be required to participate, under the regulations as exempted); and (5) provisions for assistance from offsite response organizations.<sup>44</sup> The NRC will also review the defueled EALs for whether there is adequate identification of events that could lead to the initiation of an Unusual Event, an Alert, and initiating events at an independent spent fuel storage installation (“ISFSI”) (if the licensee is using an ISFSI).<sup>45</sup> Thus, the Staff evaluates each of these issues in reaching the requisite safety determinations on the proposed license amendment.<sup>46</sup>

Thus, the requested license amendment is “predicated” on the NRC’s issuance of the exemptions. But the only question in this proceeding is whether the emergency plans and EALs proposed in the LAR meet the regulations, as exempted.

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<sup>44</sup> See Draft ISG, Attach. 1 at 29-36, 38-39.

<sup>45</sup> See *id.* at 36-38.

<sup>46</sup> See Kewaunee Amendment, Enclosure 2 at 4-5, 19-25.

**B. The Commission’s Exemption Process and the Technical Bases for the Exemptions Involve Opportunities for Public Participation**

Under the Atomic Energy Act (“AEA”) and longstanding Commission practice, there is no right to an adjudicatory hearing on an exemption request.<sup>47</sup> For example, in a decision involving the Zion plant, the Commission denied petitions to intervene challenging an exemption from physical security-related regulations to reflect the permanently shut down status of the plant.<sup>48</sup> The Commission held that the exemption request was not effectively an amendment of the facility’s license and, as such, “there is no right to request a hearing in this case because the action involves an exemption from NRC regulations and not one of those actions for which section 189a. of the AEA provides a right to a request a hearing.”<sup>49</sup>

There are, however, opportunities for public participation in the exemption process. First, Entergy served a copy of the Exemption Request on the State when it submitted the request to the NRC in March 2014.<sup>50</sup> Thus, the State has been aware of the Exemption Request for nearly one year. There is also no prohibition on the State’s submitting comments to the NRC on the Exemption Request,<sup>51</sup> yet the State apparently has chosen not to do so. Moreover, the Staff will notify the State and provide it an opportunity to submit comments before the NRC publishes

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<sup>47</sup> See *Kelley v. Selin*, 42 F.3d 1501, 1517 (6th Cir. 1995) (“[T]he grant of an exemption from a generic requirement does not constitute an amendment to the reactor’s license that would trigger hearing rights.”); 10 C.F.R. § 2.1 (limiting the scope of Part 2 to proceedings involving granting, suspending, revoking, amending, or “taking other action with respect to any license . . .” and specified other proceedings, but not the review of exemptions from regulations).

<sup>48</sup> See *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2)*, CLI-00-5, 51 NRC 90 (2000). As explained further in Section IV.C.1.a, below, the Commission may exercise its own discretion to allow limited exceptions to this rule, but it has not done so in this proceeding.

<sup>49</sup> *Id.* at 98; see also *id.* at 96-97.

<sup>50</sup> See Exemption Request at 3.

<sup>51</sup> For example, in 2011, the State of New York submitted comments opposing an exemption request filed by Entergy regarding the Indian Point facility. The NRC Staff provided a detailed response to New York’s comments. See Response to New York State Comments on the Fire Protection Exemption Requests for the Indian Point Nuclear Generating Unit Nos. 2 and 3 (Feb. 1, 2012), available at ADAMS Accession No. ML112991557.

an Environmental Assessment and Finding of No Significant Impact in the *Federal Register*,<sup>52</sup> and a final notice after the exemption is issued.<sup>53</sup> Thus, the State has been and will be “given an opportunity to at least comment” on the Exemption Request.<sup>54</sup>

The State has also been afforded the opportunity to participate in developing the NRC’s decommissioning guidance and evaluating the safety and environmental impacts of spent fuel storage. For example, the NRC received and considered comments from the State of Vermont on the recent SFP consequence study,<sup>55</sup> the draft ISG,<sup>56</sup> and the Continued Storage GEIS.<sup>57</sup>

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<sup>52</sup> See Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 11,233, 11,235 (Mar. 2, 2015) (“On January 20, 2015, the Florida state representative was notified of this EA and FONSI and did not provide any comments.”); Environmental Assessment and Finding of No Significant Impact: Dominion Energy Kewaunee, Kewaunee Power Station, 79 Fed. Reg. 60,513, 60,514 (Oct. 7, 2014) (“On September 16, 2014, the Wisconsin State’s representative was notified of this EA and FONSI and did not provide any comments.”).

<sup>53</sup> See Dominion Energy Kewaunee, Inc.; 79 Fed. Reg. at 65,715 (issuing exemption to Emergency Planning requirements).

<sup>54</sup> Petition at 5. Moreover, in early 2014, the NRC received at least three letters from members of the Vermont Congressional delegation and other State officials providing comments on state and public participation in the decommissioning process. Then-Chairman Macfarlane provided responses to these letters, explaining the NRC’s practice of using exemptions in the decommissioning process, and explaining the opportunities for public participation in the decommissioning process. See Letter from Chairman Macfarlane to Senator Sanders, *et al.* (May 5, 2014), available at ADAMS Accession No. ML14079A131; Macfarlane Letter to Markey; Letter from Chairman Macfarlane to Senator Boxer, *et al.* (July 24, 2014), available at ADAMS Accession No. ML14157A098.

<sup>55</sup> See NUREG-2161, Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a US Mark I Boiling Water Reactor (Sept. 2014) (“Consequence Study”), available at ADAMS Accession No. ML14255A365; Letter from C. Recchia, Commissioner, Vermont Department of Public Service, to C. Bladey Chief, Rules, Announcements, and Directives Branch, NRC, Comments to Docket ID NRC-2013-0136, Draft Report on Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor, (July 31, 2013) (“Comments to Docket ID NRC-2013-0136”), available at ADAMS Accession No. ML13217A131.

<sup>56</sup> See Comments of the Vermont Dept. of Public Service and the Vermont Division of Emergency Management and Homeland Security on Draft Interim Staff Guidance (ISG) NSIR/DPR-ISG-02, “Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants” at 8 (Apr. 10, 2014) (“Vermont Comments on Draft ISG”), available at ADAMS Accession No. ML14113A424.

<sup>57</sup> See NUREG-2157, Vol. 2, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel at D-573, D-597 (Sept. 2014) available at ADAMS Accession No. ML14196A107 (“Continued Storage GEIS”).

#### **IV. THE STATE'S CONTENTIONS ARE INADMISSIBLE**

##### **A. Governing Legal Standards for Contention Admissibility**

Under 10 C.F.R. § 2.309(f)(1), a hearing request “must set forth with particularity the contentions sought to be raised.” Section 2.309(f)(1)(i) through (vi) identifies the six admissibility criteria for each proposed contention.<sup>58</sup> Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.<sup>59</sup> The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”<sup>60</sup>

Of particular relevance here is the longstanding principle that a contention challenging an NRC rule or the basic structure of the Commission’s regulatory process is outside the scope of the proceeding under 10 C.F.R. § 2.309(f)(1)(iii) and, therefore, inadmissible.<sup>61</sup> “Additionally, the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner’s own view regarding the direction regulatory policy should take.”<sup>62</sup>

For license amendment proceedings, such as this one, the scope of a proceeding is defined by and restricted to the Commission’s notice of opportunity for a hearing.<sup>63</sup> The Notice

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<sup>58</sup> Those criteria are: (1) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner’s position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.

<sup>59</sup> See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

<sup>60</sup> Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

<sup>61</sup> *Phila. Elec. Co.* (Peach Bottom Atomic Power Station), ALAB-216, 8 AEC 13, 20, *aff’d in part on other grounds*, CLI-74-32, 8 AEC 217 (1974); see also 10 C.F.R. § 2.335(a) (absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding”).

<sup>62</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station Unit 3), LBP-08-9, 67 NRC 421, 431 (2008) (citing *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33).

<sup>63</sup> See *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

for this proceeding states that: “Contentions shall be limited to matters within the scope of the amendment under consideration.”<sup>64</sup> Any contention that falls outside the specified scope of the proceeding must be rejected.<sup>65</sup> Therefore, contentions that challenge separate licensing actions, such as the Exemption Request, are not admissible in this proceeding.

With respect to factual information or expert opinion proffered in support of a contention, “the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention.”<sup>66</sup> “[A]n expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a *reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion” as it is alleged to provide a basis for the contention.<sup>67</sup>

Any supporting material provided by a petitioner, including those portions not relied upon, is subject to Board scrutiny, “both for what it does and does not show.”<sup>68</sup> The Board will examine documents to confirm that they support the proposed contentions.<sup>69</sup> A petitioner’s imprecise reading of a document cannot be the basis for a litigable contention.<sup>70</sup> Moreover,

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<sup>64</sup> Notice, 79 Fed. Reg. at 73,107.

<sup>65</sup> See *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) (affirming the board’s rejection of issues raised by intervenors that fell outside the scope of issue identified in the notice of hearing); see also *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998).

<sup>66</sup> *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998), *aff’d* CLI- 98-13, 48 NRC 26, 37 (1998).

<sup>67</sup> *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

<sup>68</sup> See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

<sup>69</sup> See *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

<sup>70</sup> See *Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995), *aff’d*, CLI-95- 12, 42 NRC 111, 124 (1995).

vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.<sup>71</sup>

**B. Proposed Contention 1 Is Inadmissible**

Proposed Contention 1 asserts that “Entergy’s license amendment request is not ready for review, as the amendment request is predicated upon and assumes approval of an exemption request that has not been ruled upon by the Nuclear Regulatory Commission and/or Atomic Safety and Licensing Board.”<sup>72</sup> The State argues that it would be inappropriate to approve the LAR without allowing Vermont to comment on and request a hearing on the Exemption Request, when the two requests “are dependent on one another”<sup>73</sup> and that there are unspecified “deficiencies and problems” in the now-approved exemptions.<sup>74</sup>

As demonstrated in the following sections, Contention 1 is inadmissible. As a threshold matter, to the extent Contention 1 is simply a request for a Commission decision on the Exemption Request before the LAR is ready for review, the Commission has made its decision, so that aspect of Contention 1 is moot. In addition, Contention 1 is inadmissible because it fundamentally challenges the NRC’s regulatory process, which intentionally distinguishes between the exemption and license amendment reviews.

**1. Contention 1 Is Moot**

As previously noted, the Commission approved the Exemption Request on March 2, 2015. The Commission imposed no conditions on that approval—it approved the exemptions as

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<sup>71</sup> *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989) (further stating that the mere incorporation of massive documents by reference is unacceptable).

<sup>72</sup> Petition at 3.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* at 5.

requested by Entergy and as recommended by the NRC Staff.<sup>75</sup> Contrary to the State’s claim in Contention 1,<sup>76</sup> both the State and the NRC clearly have sufficient information available to evaluate whether the LAR will meet NRC requirements under its regulations, as exempted.<sup>77</sup> Thus, Contention 1 is moot.<sup>78</sup>

**2. Contention 1 Is Inadmissible Because Challenges to the Exemption Request Are Outside the Scope of this Proceeding**

Contention 1 is also an impermissible challenge to the Exemption Request, in that the factual bases focus solely on alleged “deficiencies and problems of the requested exemptions.”<sup>79</sup> The Commission has the discretion to regulate through adjudication, rulemaking or through the granting of exemptions to otherwise generally-applicable rules.<sup>80</sup> With limited exceptions discussed further in Section IV.C.1, below, challenges to separate licensing matters—even if allegedly connected in some fashion—are outside the scope of this proceeding.<sup>81</sup>

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<sup>75</sup> See SRM-SECY-14-0125.

<sup>76</sup> Petition at 4-5.

<sup>77</sup> As previously noted the FONSI and final issuance of the proposed exemptions remain pending. However, given the Staff and Commission approval of the requested exemptions, the standards that apply to the review of the LAR are clear.

<sup>78</sup> See, e.g., *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 472 (2006) (upholding the Board’s denial of a petition to intervene, in part because challenges to the applicant’s environmental report were mooted by the Staff’s draft environmental impact statement). To the extent the State is requesting another, future opportunity to file new contentions challenging the Exemption Request and/or the LAR, such a placeholder contention is unauthorized under the rules of practice, and would be tantamount to impermissible notice pleadings. See *Exelon Generation Co., LLC* (Byron Nuclear Station, Units 1 & 2; Braidwood Nuclear Station, Units 1 & 2), CLI-14-06, 79 NRC \_\_\_, slip op. at 5 (May 2, 2014); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-05, 69 NRC 115, 120 (2009).

<sup>79</sup> Petition at 5.

<sup>80</sup> See, e.g., *All Power Reactor Licensees and Research Reactor Licensees who Transport Spent Nuclear Fuel*, CLI-05-06, 61 NRC 37, 40 (2005).

<sup>81</sup> See *Prairie Island*, LBP-08-26, 68 NRC at 922-23 (rejecting a contention alleging a connection between the proposed license renewal and a later potential expansion of the ISFSI to accommodate additional spent fuel, because the ISFSI expansion was “a separate project, subject to a separate proceeding”); *Nuclear Mgmt. Co. LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 733 (2006) (“The current proceeding concerns the renewal of the reactor operating license pursuant to 10 C.F.R. Parts 51 and 54, and not the ISFSI, which is licensed pursuant to 10 C.F.R. Part 72.”).

More specifically, the scope of this proceeding is defined in the Notice,<sup>82</sup> and the Notice limits this proceeding to the proposed amendment.<sup>83</sup> Thus, the Commission has not delegated to the Board jurisdiction over the Exemption Request.<sup>84</sup> Accordingly, Contention 1 is outside the scope of this proceeding and inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

**C. Proposed Contention 2 Is Inadmissible**

Proposed Contention 2 claims that “Entergy’s license amendment request, if approved along with the predicate requested exemptions, fails to account for all credible emergency scenarios, undermines the effectiveness of the site emergency plan and off-site emergency planning, and poses an increased risk to the health and safety of Vermont citizens in violation of NRC regulatory requirements 10 CFR § 50.54(q)(4) and Appendix E to Part 50.”<sup>85</sup> The supporting Declarations from Mr. Leshinskie, Ms. Bornemann, and Dr. Irwin provide further detail on the State’s concerns in these areas.

As demonstrated in the following sections, Contention 2 is inadmissible because: (1) like Contention 1, it fundamentally challenges the Exemption Request and NRC’s regulatory process; (2) it fails to raise any material challenges to the LAR; and (3) it is unsupported and fails to raise a genuine dispute.

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<sup>82</sup> See *Catawba*, ALAB-825, 22 NRC at 790-91.

<sup>83</sup> See Notice, 79 Fed. Reg. at 73,109 (“The proposed amendment would revise the site emergency plan (SEP) and Emergency Action Level (EAL) scheme to reflect the reduced scope of offsite and onsite emergency planning and the significantly reduced spectrum of credible accidents that can occur for the permanently defueled condition.”).

<sup>84</sup> Contention 1 is also fundamentally unsupported in that the State provides no specificity about its technical concerns. To the extent the “Comments and Declarations” provide more information on the State’s concerns regarding the alleged “deficiencies and problems,” in the Exemption Request, such concerns are addressed in Section IV.C, responding to Contention 2.

<sup>85</sup> Petition at 6.

**1. Contention 2 Challenges the NRC Regulatory Process, Which Distinguishes Between the Exemption Request and the LAR**

As with Contention 1, the claims in Contention 2 and in the supporting Leshinskie, Bornemann, and Irwin Declarations are, in fact, challenges to the Exemption Request. Therefore, under Section 2.309(f)(1)(iii), Contention 2 is inadmissible.

*a. The Contention Challenges the Exemption Request, Not the LAR*

The focus of Contention 2 is on Entergy's SFP accident analyses. The State alleges that the LAR fails to adequately analyze "multiple credible Beyond Design Basis scenarios" involving SFP accidents.<sup>86</sup> But these accident scenarios are the key technical evaluation reviewed and approved by the NRC in the Exemption Request<sup>87</sup>—not in the LAR, where they are only presented as background information.<sup>88</sup> As previously described, the issue presented in the LAR is whether the proposed PDEP and decommissioning EAL scheme is adequate under the regulations, as exempted.<sup>89</sup> Accordingly, the question of whether the site-specific SFP accident analyses are sufficient to demonstrate that the regulations should be exempted in the first place is outside the scope of this proceeding. Similarly, the State's critiques of the Staff's review of Entergy's SFP accident analyses in SECY-14-0125<sup>90</sup> are also inadmissible, for the additional reason that the adequacy of the Staff's safety determinations are not subject to challenge before the Board.<sup>91</sup>

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<sup>86</sup> *Id.* at 8.

<sup>87</sup> *See* SECY-14-0125, Enclosure at 1-2

<sup>88</sup> *See, e.g.*, LAR, Attach. 1 at 4 (referring to the analysis of beyond design basis events "provided in Reference 2," *i.e.*, the Exemption Request).

<sup>89</sup> *See supra* Section III.A.2.

<sup>90</sup> Bornemann Declaration at 8; Irwin Declaration at 1-2.

<sup>91</sup> *See* Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,567 (Aug. 3, 2012). ("It is well-established in NRC case law that safety contentions must challenge the adequacy of the application, not the adequacy of the staff's review.").

The Commission’s legal authority to distinguish between exemptions and licensing proceedings is well settled, and subject to only very limited exceptions. For a hearing right to attach to an exemption request, it must be *part of* a licensing proceeding—not simply related or connected to that proceeding.<sup>92</sup> For example, in the *Private Fuel Storage* ISFSI proceeding, the Commission chose, in its discretion, to allow a hearing to be held on a challenge to an exemption request when the applicant sought the exemption in the midst of an ongoing, contested initial licensing proceeding.<sup>93</sup> That situation, however, is distinct from this proceeding.

First, in *PFS*, the applicant sought the exemption on its own initiative during the course of a contested initial licensing proceeding.<sup>94</sup> Here, Entergy filed the separate Exemption Request first, following an established Commission-endorsed process.<sup>95</sup> In this respect, this proceeding is more akin to the *Prairie Island* and *Palisades* decisions discussed in note 81, above, because it is the Commission—not the licensee or applicant, as in *PFS*—that has established a distinction between two licensing actions.<sup>96</sup>

Second, the *PFS* decision involved an initial licensing of the proposed ISFSI, not a decommissioning-related proceeding for an already licensed facility. In *PFS*, the Commission

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<sup>92</sup> See *Honeywell Int’l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (“An exemption standing alone does not give rise to an opportunity for hearing under our rules. But when a licensee requests an exemption in a related license amendment application, we consider the hearing rights on the amendment application to encompass the exemption request as well.”) (emphasis added); *Zion*, CLI-00-5, 51 NRC at 96, 98 (“there is no right to request a hearing” on an exemption unless the exemption is “in effect an amendment of the facility license”).

<sup>93</sup> *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001) (“PFS”).

<sup>94</sup> *Id.*

<sup>95</sup> See SRM-SECY-14-0118 at 1 (Kewaunee); Macfarlane Letter to Markey at 1 (“The practice of considering exemptions [for decommissioning plants from emergency planning and security requirements] . . . is a well-established part of the NRC’s regulatory process . . .”).

<sup>96</sup> See *Prairie Island*, LBP-08-26, 68 NRC at 922-23 (rejecting a contention seeking consideration of environmental impacts of an anticipated ISFSI expansion in a license renewal proceeding).

distinguished its prior decision in *Zion* on that basis.<sup>97</sup> Accordingly, this proceeding is much more analogous to the *Zion* decision, where the licensee of a decommissioning facility sought exemptions from security-related regulations that applied to operating reactors.<sup>98</sup> As discussed above, the Commission dismissed the petitions in *Zion* because it determined that there was no hearing right for an exemption request unless the exemption is, in effect, an amendment to the license.<sup>99</sup> Here, the Exemption Request would clearly not amend the Vermont Yankee license. On the contrary, Entergy has submitted an LAR separate and apart from the Exemption Request to obtain approval of changes to the emergency plan and EAL scheme through license amendment.

b. *The Supporting Declarations Challenge the Exemption Request, Not the LAR*

As explained in the following sections, the State’s experts are also fundamentally challenging the Exemption Request’s evaluation of site-specific accident analyses, not the LAR. Therefore, the State’s experts’ challenges are likewise outside the scope of this proceeding and inadmissible under to 10 C.F.R. § 2.309(f)(1)(iii).

(1) *Leshinskie Declaration*

The thrust of Mr. Leshinskie’s Declaration is that the LAR does “not contemplate the full scope of possible threat scenarios” and that the analysis of “certain credible Beyond Design Basis events is not properly presented . . . .”<sup>100</sup> He claims that the LAR fails to analyze potential hostile actions, fails to adequately analyze a potential SFP fire, and fails to properly analyze the risks of an accident while transferring spent fuel from the SFP to dry casks, particularly

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<sup>97</sup> *PFS*, 53 NRC at 467. The *Zion* decision is discussed in Section III.B, above.

<sup>98</sup> *Zion*, CLI-00-5, 51 NRC at 96.

<sup>99</sup> *See id.* at 96-98.

<sup>100</sup> Leshinskie Declaration at 1.

considering high-burnup fuel.<sup>101</sup> As previously shown, however, the SFP accident analyses Mr. Leshinskie critiques have already been evaluated and approved by the Staff and Commission pursuant to the Exemption Request.<sup>102</sup> As such, Mr. Leshinskie's claims are beyond the scope of this proceeding and inadmissible. Specifically:

- Mr. Leshinskie claims that the LAR fails to address potential hostile actions.<sup>103</sup> But that issue is addressed in the Exemption Request. As proposed and approved, the Exemption Request eliminates the need to address this issue in the Vermont Yankee emergency plan.<sup>104</sup> Mr. Leshinskie's concerns about the alleged need for the emergency plan to consider information from the September 11, 2001 attacks fall into the same category.<sup>105</sup>
- Mr. Leshinskie asserts that under the proposed PDEP, a security event or "Hostile Action" could lead to the suspension of Emergency Response Organization activation, and therefore an alternate EOF should be required offsite.<sup>106</sup> But this issue is also addressed by the Exemption Request which, as previously noted, removes the requirement to consider hostile action in the Vermont Yankee emergency plan. In addition, the Exemption Request would remove the requirement for Entergy to maintain an EOF for Vermont Yankee.<sup>107</sup> Further, Mr. Leshinskie's demand that the LAR provide measures to ensure that he, as the State's representative, can reach the Vermont Yankee control room (the purported EOF) during an emergency<sup>108</sup> is also addressed by the Exemption Request which removes the requirement to maintain an EOF.

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<sup>101</sup> See *id.* at 1-4. The technical support for Mr. Leshinskie's assertions is addressed in Section IV.C.3, below.

<sup>102</sup> At certain points in his declaration, Mr. Leshinskie acknowledges that his concerns address the Exemption Request rather than the LAR. See, e.g., Leshinskie Declaration at 2 (acknowledging that the "Fuel Assembly Heat Up / Zirconium Fire" analysis was "submitted as part of a separate License Exemption Request"); see also *id.* at 4.

<sup>103</sup> See *id.* at 1-2.

<sup>104</sup> See SECY-14-0125, Enclosure at 7.

<sup>105</sup> See Leshinskie Declaration at 3; see also *id.* at 4-5.

<sup>106</sup> *Id.* at 5.

<sup>107</sup> See SECY-14-0125, Enclosure at 3, 16 (proposing no requirements to maintain an EOF).

<sup>108</sup> See Leshinskie Declaration at 6.

- The remaining claims in the Leshinskie Declaration are inadmissible for other reasons, as explained in Sections IV.C.2 and 3, below.

(2) Bornemann Declaration

Likewise, the Bornemann Declaration discusses the impact the Exemption Request could have on the funding of Ms. Bornemann’s organization,<sup>109</sup> expresses disagreement with the regulatory standards that would apply if the exemption were granted,<sup>110</sup> asserts that the NRC should continue to require the evaluation of offsite response organizations by FEMA,<sup>111</sup> and challenges the NRC Staff’s evaluation of the Exemption Request in SECY-14-0125, alleging that the NRC Staff has disregarded the continued need for Entergy to provide financial support to Vermont emergency planning organizations.<sup>112</sup>

As an initial matter, neither the State nor Ms. Bornemann identifies any NRC regulation requiring a licensee to provide funding for State and local emergency response organizations or any requirement for the NRC to consider the impact of granting the Exemption Request on continued funding of such organizations—because such requirements do not exist. As previously explained, the requested exemptions, as approved, remove all NRC requirements for formal offsite emergency planning for the Vermont Yankee plant.<sup>113</sup> They also revise the regulatory standards that apply to emergency planning at Vermont Yankee, including elimination of the requirement for FEMA evaluations of offsite emergency response.<sup>114</sup> Given that the

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<sup>109</sup> See, e.g., Bornemann Declaration at 1-2 (“[I]f the requested exemptions are granted, the license would no longer require the licensee to support activities such as planning, exercises, and training. . .”).

<sup>110</sup> See *id.* at 3-4.

<sup>111</sup> See *id.* at 6-7. The Exemption Request, not the LAR, would remove this requirement. See SECY-14-0125, Enclosure 1 at 21, 23.

<sup>112</sup> See Bornemann Declaration at 7-9.

<sup>113</sup> See SECY-14-0125 at 1.

<sup>114</sup> See *id.*, Enclosure 1 at 21, 23.

Exemption Request, as approved by the Staff and Commission, eliminates the need for formal offsite emergency planning, the potential effects this determination might have on the funding of State and local emergency response organizations is outside the scope of this proceeding. As such, all of Ms. Bornemann's claims challenge the Exemption Request, and are outside the scope of this proceeding.<sup>115</sup>

(3) Irwin Declaration

Finally, Dr. Irwin's Declaration also focuses solely on issues related to the Exemption Request rather than the LAR. In fact, his entire Declaration is a critique of the Staff's evaluation of the Exemption Request in SECY-14-0125. Dr. Irwin prefaces his critique with an explicit admission of this point: "While the SECY-14-0125 Satorius Memorandum *is not necessarily under review by the commission here*, the memorandum's contents are highly relevant to any Commission consideration of the LAR."<sup>116</sup> Ultimately, Dr. Irwin concludes his declaration with "[t]he Commission should reject the staff recommendations of SECY-14-0125."<sup>117</sup>

Specifically, Dr. Irwin challenges the following aspects of the Exemption Request and the Staff's review thereof as documented in SECY-14-0125, but without providing any linkage to the LAR: (a) the NRC Staff's reliance on the EPA PAGs in reaching its conclusion that the radiological consequences of design basis accidents would not exceed these guidelines, thereby providing reasonable assurance of adequate protection of the public health and safety; (b) the alleged assumption in SECY-14-0125 that a comprehensive emergency management plan for Vermont Yankee can be maintained without licensee financial support; and (c) the NRC's

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<sup>115</sup> Ms. Bornemann's remaining allegation, that the LAR is "incomplete," is addressed in Section IV.C.2, below.

<sup>116</sup> Irwin Declaration at 1 (emphasis added).

<sup>117</sup> *Id.* at 10.

decision to proceed by exemption rather than rulemaking.<sup>118</sup> All of these claims involve the Exemption Request and, therefore, are outside the scope of this LAR proceeding.<sup>119</sup>

## **2. Contention 2 Fails to Raise Any Material Challenges to the LAR**

Contention 2 also fails to raise a material issue. As explained in Section III.A.2 above, the LAR proceeding involves an evaluation of whether the new proposed emergency plans and EAL scheme comply with the regulations, as exempted. As demonstrated in this section, in the limited areas in Contention 2 and its supporting Declarations where the State actually discusses the LAR, it does not assert, much less support, any material challenge.

First, the State claims that Entergy must comply with all of the requirements of 10 C.F.R. Part 50, Appendix E in order for the NRC to approve the LAR.<sup>120</sup> But there is no question that the NRC will have to exempt Vermont Yankee from certain requirements of Appendix E before the LAR is granted.<sup>121</sup> Therefore, Vermont's apparent claim that the LAR must meet all of the requirements of Appendix E—even those that the Exemption Request would make inapplicable to Vermont Yankee—fails to raise a material issue or a genuine dispute with the LAR.

Second, the State asserts that the Exemption Request does not contain implementing procedures.<sup>122</sup> Ms. Bornemann claims that these documents are necessary for the State to

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<sup>118</sup> See *id.* at 2-10.

<sup>119</sup> Moreover, Dr. Irwin's claims regarding the EPA PAGs are further addressed in Section IV.C.3.b, below. As previously shown in response to the Bornemann Declaration, the potential impact of the granting of the proposed exemptions on Entergy's obligations to fund State and local emergency response organizations is not relevant to the NRC's decisionmaking on the Exemption Request. And finally, the NRC is fully authorized to issue site-specific exemptions. See, e.g., SRM-SECY-14-0125.

<sup>120</sup> See Petition at 9 (“On its face, the LAR does not meet all the Appendix E requirements . . .”).

<sup>121</sup> See LAR, Attach. 1 at 1 (“The proposed PDEP and Permanently Defueled EAL scheme are predicated on approval of requests for exemptions”).

<sup>122</sup> Petition at 7; see also Bornemann Declaration at 4-5 (alleging the LAR is incomplete under 10 C.F.R. § 72.32 because certain agreements and other documents were not submitted to the NRC). Neither the State, nor Ms. Bornemann, however, asserts that they have sought copies of these documents from Entergy or the NRC Staff. Nor do they assert that the LAR must attach these implementing procedures.

“adequately prepare for the implementation” of the PDEP,<sup>123</sup> and for compliance with 10 C.F.R. § 72.32. Neither she nor the State, however, asserts that these documents are necessary for the NRC to evaluate the adequacy of LAR against the regulations in 10 C.F.R. §§ 50.47(b), 50.47(c)(2), and Part 50, Appendix E, as exempted.<sup>124</sup> Instead, Ms. Bornemann’s concerns appear to relate to the State’s implementation activities in support of the Vermont Yankee emergency plan, rather than Entergy’s compliance with the regulations, as exempted. Thus, any dispute over the purported unavailability of these documents fails to raise a material issue regarding the LAR.

Mr. Leshinskie, for his part, requests that: (1) Entergy engage in discussions with State and local officials prior to NRC approval of the LAR regarding implementation of the PDEP and EAL scheme,<sup>125</sup> (2) the LAR should “reflect” the “arrangement” between Entergy and Vermont DPS regarding emergency notifications,<sup>126</sup> (3) the LAR should make mention of the Entergy/State of Vermont communications channel,<sup>127</sup> and (4) the LAR should include measures to ensure that the State’s representative can reach “the EOF (the Vermont Yankee Control Room).”<sup>128</sup> He identifies no NRC regulatory requirements associated with any of these requests, and there are none.<sup>129</sup> Similar to Ms. Bornemann’s concerns, Mr. Leshinskie’s issues here relate

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<sup>123</sup> Bornemann Declaration at 5.

<sup>124</sup> In any event, Entergy will review and revise all applicable procedures as part of its normal process to implement approved license amendments.

<sup>125</sup> See Leshinskie Declaration at 4 (“Section 5.5.3”).

<sup>126</sup> See *id.* at 5 (“Attachment 1, Section 3.3 & 7.7”).

<sup>127</sup> See *id.* at 5-6.

<sup>128</sup> See *id.* at 6.

<sup>129</sup> Nevertheless, as part of its work on the LAR, Entergy has committed to engage in discussions with the State regarding the format, content, and frequency of notifications under the PDEP, and provide follow-up information on this issue to the NRC, prior to NRC approval of the LAR, as Mr. Leshinskie requests. See BVY-15-009, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme, Attach. 1 at 18-19 (Feb. 5, 2015), not yet posted on ADAMS. In addition, Entergy’s PDEP (included in the LAR) and RAI response

to the State’s apparent preferences regarding the content of the LAR, not the adequacy of the LAR under NRC requirements. Mr. Leshinskie’s latter suggestion regarding the EOF also appears to be based on a misinterpretation of the Exemption Request and the LAR. As previously explained, the Exemption Request would eliminate the requirement for Entergy to maintain an EOF, not relocate the EOF to the control room.<sup>130</sup> As such, these claims fail to raise any material issue regarding the adequacy of the LAR.

Finally, Mr. Leshinskie disputes Section 6.3 of the LAR, which evaluates whether the LAR involves No Significant Hazards Consideration (“NSHC”). He expresses his disagreement with Entergy’s conclusion that the proposed PDEP and EAL scheme changes would lead to “no reduction in safety margin.”<sup>131</sup> The NRC Staff has agreed with Entergy’s evaluation of NSHC for the LAR, as documented in the Notice. Challenges to the question of whether a license amendment involves NSHC are foreclosed under 10 C.F.R. § 50.58(b)(6), which states that “[n]o petition or other request for review of or hearing on the Staff’s significant hazards consideration determination will be entertained by the Commission.” Section 50.58(b)(6) has long been held to be a jurisdictional bar to all intervenor challenges on the question of whether a license amendment involves NSHC.<sup>132</sup> Mr. Leshinskie’s statement on this issue is therefore outside the

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identify the Entergy/State communications channel, “InForm,” which is how Vermont Yankee maintains the capability to communicate with State emergency management agencies on a 24-hour basis—again as Mr. Leshinskie requests. *See id.* at 4. Thus, Mr. Leshinskie’s requests fail to raise a genuine dispute on a material issue of law or fact.

<sup>130</sup> *See* SECY-14-0125, Enclosure at 3, 16.

<sup>131</sup> Leshinskie Declaration at 5.

<sup>132</sup> *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001) (holding that intervenor challenges on this topic will be summarily rejected: “Our regulations provide that ‘[n]o petition or other request for review of or hearing on the Staff’s no significant hazards consideration determination will be entertained by the Commission.’ . . . The regulations are quite clear in this regard . . .”) (quoting 10 C.F.R. § 50.58(b)(6)); *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990) (“The issue of whether the proposed amendment does or does not involve a significant hazards consideration is not litigable in any hearing.”) (citing *Pac. Gas & Elec. Co.* (Diablo Canyon

scope of this proceeding, and fails to raise a material issue. It is also wholly unsupported, in that Mr. Leshinskie merely asserts that certain changes to the EAL scheme “bear[] on safety.”<sup>133</sup> Such statements provide no reasoned basis to dispute the evaluation of the NSHC criteria in 10 C.F.R. § 50.92(c), if such a challenge were permitted at all.<sup>134</sup>

In summary, to the extent that the State and its experts arguably address the LAR in Contention 2 and its supporting documents, nothing the State has raised is material, adequately supported with alleged facts or expert opinion, or shows a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).

### **3. Contention 2 Is Unsupported and Fails to Raise a Genuine Dispute**

Without waiving the foregoing objections that challenges to matters addressed in the Exemption Request are outside the scope of this proceeding, Contention 2 is also inadmissible because it is fundamentally unsupported and fails to show a genuine dispute with the applicant. Specifically, the contention and the supporting declarations: (a) fail to accurately portray Entergy’s and the NRC’s evaluations of potential SFP accidents; and (b) otherwise rely on vague and unsupported speculation. Such claims are inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi).

#### *a. Spent Fuel Pool Accident Analyses*

As previously noted, a primary focus of Contention 2 and the Leshinskie Declaration is the analysis of SFP accidents in the Exemption Request. Specifically, the Petition and the Leshinskie Declaration mention the following topics: (a) SFP fires in general; (b) aircraft crashes/malevolent acts; (c) accidents involving fuel handling and transfer; and (d) the use of

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Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 4-5 (1986), *rev’d and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986)).

<sup>133</sup> Leshinskie Declaration at 5.

<sup>134</sup> See *USEC, Inc.*, CLI-06-10, 63 NRC at 472.

high-burnup fuel. As demonstrated in this section, these claims are fundamentally unsupported, in that they are based on bare assertions and speculation, and either fail to address or mischaracterize the extensive technical literature that the NRC Staff has developed and relied on in its evaluation of SFP accidents.

Spent Fuel Pool Fires: The Leshinskie Declaration asserts that the evaluation of the “Fuel Assembly Heat Up / Zirconium Fire” event in the Exemption Request is inadequate because a 2012 Government Accountability Office (“GAO”) report concluded that “‘it is difficult to quantify the probability’ of a [SFP] fire.”<sup>135</sup>

The referenced GAO Report, however, does not support Mr. Leshinskie’s statements. Mr. Leshinskie quotes only a single phrase in the GAO Report, lifted out of context and presented without the actual conclusions of the report. In fact, the GAO concurred with the NRC’s conclusion—based on extensive technical studies—that “the risks of an event causing a large release of radiation that endangers public safety from spent fuel in either wet or dry storage are low enough to be within acceptable limits of risk.”<sup>136</sup> Mr. Leshinskie’s imprecise reading of the GAO Report does not support the admissibility of this contention.<sup>137</sup>

Ultimately, Mr. Leshinskie fails to challenge the conclusions of the GAO Report. Nor does Mr. Leshinskie acknowledge, much less dispute, any NRC studies evaluating the potential for SFP fires—including very recent studies that considered public comments from the State of

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<sup>135</sup> Leshinskie Declaration at 2 (quoting GAO 12-797, Government Accountability Office, Spent Nuclear Fuel: Accumulating Quantities at Commercial Reactors Present Storage and Other Challenges at 27 (Aug. 2012) (“GAO Report”), available at <http://www.gao.gov/assets/600/593745.pdf>.) Vermont did not attach or provide a specific citation to the GAO Report.

<sup>136</sup> GAO Report at 30 (citing Nuclear Regulatory Commission, Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants, NUREG-1738 (Feb. 2001), available at ADAMS Accession No. ML010430066).

<sup>137</sup> See *Ga. Tech.*, LBP-95-6, 41 NRC at 300 (holding that petitioner’s imprecise reading of a document cannot be the basis for a litigable contention); *Yankee*, LBP-96-2, 43 NRC at 90 (documents proffered in support of a contention are subject to Board scrutiny).

Vermont and others. Examples of such evaluations include the analysis of SFP fires in Appendix F of the Continued Storage GEIS (NUREG-2157), which concluded, among other things, that the probability of a SFP fire during the decommissioning period is extremely remote,<sup>138</sup> and the recent SFP Consequence Study, which concluded that “spent fuel is only susceptible to a radiological release within a few months after the fuel is moved from the reactor into the [SFP].”<sup>139</sup> Even if such issues were within the scope of this proceeding, the State would need to present considerably more support for its claims.<sup>140</sup>

Aircraft Crashes: Mr. Leshinskie identifies the potential for “Hostile Action” and “aircraft assaults” as contradicting the “slow progression assumption” purportedly relied upon in the LAR.<sup>141</sup> On this topic, he raises the possibility that chemical accelerants, such as jet fuel, “could conceivably” fuel a spent fuel pool fire and could reduce the time to reach the requisite 900 °C temperature for the onset of a zirconium fire.<sup>142</sup> Dr. Irwin makes similar claims in his Declaration.<sup>143</sup>

Here, the State and its experts miss the mark in multiple ways. As an initial matter, Mr. Leshinskie presents only the bare assertions that jet fuel could conceivably accelerate a SFP fire. He presents no technical analysis challenging the evaluation of accident progression time in the Exemption Request, only speculation that these possibilities would result in a more significant

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<sup>138</sup> NUREG-2157, Vol. 1, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel at F-1 (Sept. 2014), *available at* ADAMS Accession No. ML14196A105. The State of Vermont submitted comments on the Continued Storage GEIS. *See* Continued Storage GEIS, Vol. 2, at D-573, D-597.

<sup>139</sup> Consequence Study at v-vi. As previously noted, the State of Vermont submitted comments on a Draft of the Consequence Study. *See* Comments to Docket ID NRC-2013-0136.

<sup>140</sup> *See, e.g., USEC, Inc.*, CLI-06-10, 63 NRC at 472 (requiring a reasoned basis or explanation for expert opinion proffered in support of a proposed contention).

<sup>141</sup> *See* Leshinskie Declaration at 1-2.

<sup>142</sup> *See id.* at 2.

<sup>143</sup> *See* Irwin Declaration at 4-5.

accident than those evaluated by Entergy. Mr. Leshinskie's failure to provide a technical basis for his speculation further renders this claim inadmissible.<sup>144</sup>

Second, as previously noted, the Exemption Request, as approved, eliminates the requirement for Vermont Yankee to consider hostile action in its emergency plans. This determination is outside the scope of this license amendment proceeding. Relatedly, the speed at which SFP accidents will progress is evaluated in the Exemption Request,<sup>145</sup> and has already been resolved in the Commission's decision on that request.

Third, the NRC addresses the possibility of potential aircraft attacks on plants generally through the mitigating strategies set forth in 10 C.F.R. § 50.54(hh), and in license conditions imposed on various plants, including Vermont Yankee.<sup>146</sup> As explained above, while the Exemption Request removes the requirement to consider hostile action for emergency planning purposes, the license condition requiring Vermont Yankee to implement mitigating strategies for "loss of large areas" due to fire or explosion will remain in place, at least until all of the spent fuel is removed from the SFP.<sup>147</sup> Specifically, the proposed PDEP references Vermont Yankee License Condition 3.N, which requires mitigative actions to address loss of large areas scenarios, but Mr. Leshinskie does not claim that or explain why those provisions of the PDEP are

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<sup>144</sup> See *USEC, Inc.*, CLI-06-10, 63 NRC at 472.

<sup>145</sup> See Exemption Request, Attach. 1 at 5 (discussing the time for SFP accident scenarios to develop in the context of the request for exemption from 10 C.F.R. § 50.47(b)(5)).

<sup>146</sup> Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Renewed Facility Operating License at 12, Condition 3.N (Mar. 29, 2011), available at ADAMS Accession No. ML092110054.

<sup>147</sup> See BVY-14-028, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Technical Specifications Proposed Change No. 307, Revision to Mitigation Strategy License Condition and Technical Specification Administrative Controls for Permanently Defueled Condition – Supplement 1, Attach. 1 at 3 (Apr. 24, 2014); see also Dominion Energy Kewaunee, Inc.; Kewaunee Power Station, Supplement 4 and Response to Request for Additional Information Regarding License Amendment Request 256, Permanently Defueled License and Technical Specifications, Attach. 3 at 5 (Apr. 29, 2014), available at ADAMS Accession No. ML14126A005 (noting that mitigative strategies conditions remain in a license until all spent fuel is removed from the pool).

inadequate.<sup>148</sup> By failing to reference or dispute these specific portions of the LAR, the State fails to show a genuine dispute under 10 C.F.R. § 2.309(f)(1)(vi).

Fuel Transfer Accidents and High-Burnup Fuel: Next, Mr. Leshinskie asserts that the LAR is deficient because “it fails to properly analyze the risks of an accident while transferring fuel from the [SFP] to dry casks.”<sup>149</sup> In support, Mr. Leshinskie cites various documents purportedly showing that the NRC has recognized that the use of high-burnup fuel causes “special problems, including a greater chance of accidents and an increased chance of structural failure.”<sup>150</sup> Thus, Mr. Leshinskie’s claim appears to be that fuel transfer accidents involving high-burnup fuel have not been adequately analyzed.

Once again, to the extent Mr. Leshinskie’s concerns are with the evaluation of a potential spent fuel-related accident, those issues are addressed in the Exemption Request, not the LAR.<sup>151</sup> Even if a critique of the accident analysis in the Exemption Request were within the scope of this proceeding, to raise a genuine dispute on a material issue of law or fact, a petitioner must “read the pertinent portions of the license application . . . state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant.<sup>152</sup> The accident analysis in the Exemption Request considered high burnup fuel,<sup>153</sup> a fact that Mr. Leshinskie fails to challenge. Accordingly, Mr. Leshinskie’s claims regarding high-burnup fuel fail to raise a genuine dispute.

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<sup>148</sup> See LAR, Attach. 2 at 7 (“Mitigation of Consequences of Beyond Design Basis Accidents”).

<sup>149</sup> Leshinskie Declaration at 3.

<sup>150</sup> *Id.*

<sup>151</sup> See LAR, Attachment 1 at 4-5 (summarizing the analysis in the Exemption Request).

<sup>152</sup> Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

<sup>153</sup> See Exemption Request, Attach. 2 at 5-6 (discussing GNF2 and GE14 fuel).

To the extent his concerns are specifically with the analysis of a Refueling/Fuel Handling Accident, the Exemption Request did not revise the existing evaluation of this design basis accident. Instead, the Vermont Yankee Updated Final Safety Analysis Report includes an evaluation of a fuel handling accident scenario,<sup>154</sup> and the NRC recently approved a license amendment which included a revised fuel handling accident analysis involving a postulated load drop over stored spent fuel assemblies (*i.e.*, over the SFP), conservatively accounting for variations in fuel burnup – including high-burnup fuel.<sup>155</sup> The probability and consequences of these accident scenarios are unaffected by the exemptions, and are not at issue in either the Exemption Request or the LAR.<sup>156</sup> Challenges to such current licensing basis analyses are outside the scope of this proceeding.<sup>157</sup>

Mr. Leshinskie’s criticisms on the issue of high-burnup fuel are also generally unsupported. He claims that NUREG-1738 and other documents show that the use of high burnup fuel “causes special problems, including a greater chance of accidents and an increased chance of structural failure of the fuel rods such that transfer to dry casks is more difficult, more dangerous, and more expensive.”<sup>158</sup> But even a cursory examination of the referenced documents establishes that the documents do not support his claims.<sup>159</sup> Contrary to Mr.

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<sup>154</sup> See Exemption Request, Attach. 1 at 40.

<sup>155</sup> See Vermont Yankee Nuclear Power Station – Issuance of Amendment to Renewed Facility Operating License re: Eliminate Operability Requirements for Secondary Containment when Handling Sufficiently Decayed Irradiated Fuel or a Fuel Cask, Encl. 2, Safety Evaluation at 3, 6 (Feb. 12, 2015), *available at* ADAMS Accession No. ML14304A588; BVY 14-036, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Technical Specifications Proposed Change No. 306 Eliminate Certain ESF Requirements during Movement of Irradiated Fuel – Supplement 1 (June 9, 2014) (explaining fuel burnup assumptions in accident analysis), *available at* ADAMS Accession No. ML14163AD08.

<sup>156</sup> See Exemption Request, Attach. 1 at 57.

<sup>157</sup> See Notice, 79 Fed. Reg. at 73,107 (“Contentions shall be limited to matters within the scope of the amendment under consideration.”); *Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-88, 16 NRC 1335, 1342 (1982) (challenges to previously-approved license amendments are inadmissible).

<sup>158</sup> Leshinskie Declaration at 3.

<sup>159</sup> See, *e.g.*, *Vt. Yankee*, ALAB-919, 30 NRC at 48.

Leshinskie’s claims, NUREG-1738 does not corroborate any alleged “special problems” associated with transfer or storage of high-burnup fuel.<sup>160</sup> Similarly, the National Research Council Report he cites identifies no such problems, but merely observes that using higher-burnup fuel “results in an increase in the decay-heat power of the spent fuel assembly by the time it is put into the [SFP].”<sup>161</sup> Mr. Leshinskie vaguely cites to pages 9 through 11 of a report by “R. Alvarez,” but does not specify what “new evidence” the Alvarez article presents.<sup>162</sup> A review of what appears to be the Alvarez article and its cited sources provides no further specificity regarding the purported evidence of “special problems” regarding the transfer of high-burnup fuel, much less for any deficiency in Entergy’s accident analyses.<sup>163</sup> Finally, the NRC Interim Staff Guidance Mr. Leshinskie cites on page 4 of his declaration discusses the need for further studies on the long-term storage of high-burnup fuel in dry casks beyond a 20-year period—but contrary to Mr. Leshinskie’s representation, it says nothing about the transfer of high burnup fuel from SFPs to casks.

*b.* Other Unsupported Claims

Contention 2 contains several other speculative claims and unsupported mischaracterizations of the LAR and the Exemption Request. As with nearly all of the State’s other claims, all of the specific claims addressed in this section are fundamentally challenges to

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<sup>160</sup> See NUREG-1738, Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants at ix, 3-1 (Feb. 2001), *available at* ADAMS Accession No. ML010430066.

<sup>161</sup> National Research Council, Board of Radioactive Waste Management, Committee on the Safety and Security of Commercial Spent Fuel Nuclear Storage, National Academies Press at 101 (2006), *available at* [http://www.nap.edu/openbook.php?record\\_id=11263&page=101](http://www.nap.edu/openbook.php?record_id=11263&page=101).

<sup>162</sup> Leshinskie Declaration at 3-4.

<sup>163</sup> See Letter from S. Young, *et al.*, to A. Imboden, Branch Chief, Communications, Planning, and Rulemaking, NRC, Need for a supplemental waste confidence DGEIS (Docket NRC-2012-0246) (Apr. 24, 2014), Exh. 1, Robert Alvarez, The Storage and Disposal Challenges of High Burnup Spent Power Reactor Fuel (Jan. 3, 2014), *available at* ADAMS Accession No. ML14118A077 (“Alvarez Article”). Mr. Leshinskie’s statement appears to be a modified version of previous claims by the State. See Vermont Comments on Draft ISG at 8 (“New evidence shows that when high-burnup fuels are used and placed in the [SFPs] at certain reactors, it can create special problems that interfere with boron control.”) (citing Alvarez Article at 9-11).

the Exemption Request or to the Commission’s exemption process, and as such are outside the scope of this proceeding. As explained below, these claims are also unsupported and fail to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

First, the State asserts that the Exemption Request “effectively treats the VY plant” as if it were an ISFSI or monitored retrievable storage facility.<sup>164</sup> The State does not explain where in the Exemption Request (or the LAR) this is stated. Instead, this claim appears to be based on Ms. Bornemann’s statement that if a licensee “is exempted from the applicable portions of these regulations [*i.e.*, C.F.R. § 50.47(a)(1)(i) and Part 50, Appendix E], its license no longer imposes needed standards until the license is amended once more and the site is classified as an [ISFSI].”<sup>165</sup> While not entirely clear, Ms. Bornemann’s statement appears to misunderstand Entergy’s Exemption Request, which only seeks exemptions from certain specified requirements in 10 C.F.R. §§ 50.47(b), 50.47(c)(2), and Part 50, Appendix E—not from Section 50.47(a)(1)(i) at all and not from Part 50, Appendix E in its entirety. The remaining provisions of these regulations would remain applicable to Vermont Yankee as a decommissioning power reactor with a Part 50 license.

Second, and relatedly, the State claims that the Exemption Request proposes to eliminate notification procedures for State and local agencies “almost in their entirety.”<sup>166</sup> This is likewise an unsupported mischaracterization of Entergy’s submittals. Under the Exemption Request, the regulatory requirements for Entergy to notify State and local agencies will be largely unchanged,

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<sup>164</sup> Petition at 7.

<sup>165</sup> Bornemann Declaration at 3.

<sup>166</sup> Petition at 7.

other than a change in notification time limits from 15 to 60 minutes.<sup>167</sup> The Leshinskie Declaration appears to acknowledge that this is the relevant notification procedure change—rather than the more sweeping mischaracterization proffered by the State.<sup>168</sup>

Third, as part of his critique of the Staff’s evaluation of the Exemption Request in SECY-14-0125, Dr. Irwin speculates that “public health consequences are possible” even if the EPA PAGs are not exceeded.<sup>169</sup> Dr. Irwin, however, presents no reasoned basis for this speculation, as is required under 10 C.F.R. § 2.309(f)(1)(v). In addition, the Commission has endorsed the use of the EPA PAGs in general, as “tools to be used as a decision aid in [an] actual response situation,”<sup>170</sup> and specifically as appropriate standards to use in the evaluation of exemptions from certain emergency planning requirements for decommissioning plants.<sup>171</sup> Thus, in addition to addressing the Exemption Request rather than the LAR, Dr. Irwin’s claims regarding the EPA PAGS are unsupported and collaterally attack the Commission’s determinations that PAGs are appropriate planning tools.

Finally, Mr. Leshinskie’s “significant concerns” about whether the guidance used in developing the LAR is up to date<sup>172</sup> are misplaced. Mr. Leshinskie specifically identifies SECY-00-0145, which predates September 11, 2001.<sup>173</sup> Mr. Leshinskie’s concerns appear to include the need to consider hostile action and an apparent disagreement with the Commission over its

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<sup>167</sup> See SECY-14-0125, Enclosure at 14.

<sup>168</sup> Leshinskie Declaration at 1.

<sup>169</sup> Irwin Declaration at 8.

<sup>170</sup> See Petition for Rulemaking; Denial, Emergency Planning Zones, 79 Fed. Reg. 19,501, 19514 (Apr. 9, 2014) (quoting NUREG-0396, Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants (1978), available at ADAMS Accession No. ML051390356).

<sup>171</sup> See SECY-14-0125 at 2.

<sup>172</sup> Leshinskie Declaration at 3.

<sup>173</sup> See *id.* (referring to SECY-00-0145, Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning (June 28, 2000) (“SECY-00-0145”), available at ADAMS Accession No. ML003721626).

“ideas” regarding the now-approved exemptions.<sup>174</sup> In any event, Entergy relied upon the 2014 Draft ISG to prepare the LAR and Exemption Request, not SECY-00-0145.<sup>175</sup> A failure to read and dispute the information in Entergy’s application is insufficient to support the admissibility of a contention.<sup>176</sup>

V. **IF THE PETITION IS GRANTED, THEN SUBPART L PROCEDURES WOULD GOVERN THIS PROCEEDING**

As demonstrated above, there is no basis to grant the State’s Petition. Nevertheless, if the Board grants the State’s Petition and hearing request, then the procedures set forth in 10 C.F.R. Part 2 Subpart L should govern the proceeding. The State appears to suggest that the Board should conduct the proceeding under the 10 C.F.R. Part 2 Subpart G procedures. In particular, the State notes that it wishes “to conduct [unspecified] limited discovery to aid in the development of the evidentiary record, . . . as a matter of right in the event that the [Board] and/or NRC grants a hearing . . . .”<sup>177</sup>

Pursuant to 10 C.F.R. § 2.310(a), the standard format for a license amendment proceeding is the “informal” hearing process in Subpart L.<sup>178</sup> The Subpart L process allows for the development of a “full evidentiary record,”<sup>179</sup> through sworn written direct and rebuttal testimony and oral testimony at a “live” hearing.<sup>180</sup> The witnesses are also subject to live

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<sup>174</sup> *Id.* (“The Department believes that, once the SECY-00-145 guidance has been considered, ideas such as reducing the Emergency Planning Zone (EPZ) to the Vermont Yankee fence line and relying on “ad hoc” offsite emergency planning (rather than continued offsite radiological emergency planning support) will be found to be imprudent and unwarranted.”).

<sup>175</sup> LAR, Attach. 1 at 6; Exemption Request, Attach. 1 at 1.

<sup>176</sup> *See Millstone*, CLI-01-24, 54 NRC at 358.

<sup>177</sup> Petition at 3.

<sup>178</sup> *See also* Changes to Adjudicatory Process, 69 Fed. Reg. at 2222 (unless otherwise provided in 10 C.F.R. § 2.310, Subpart L proceedings should “ordinarily” be used).

<sup>179</sup> Petition at 3.

<sup>180</sup> 10 C.F.R. § 2.1207(a), (b).

examination by the Board, with each party providing the Board with suggested questions for the opposing parties' witnesses.<sup>181</sup>

The more formal Subpart G procedures, which include additional discovery, depositions, and potential cross-examination at hearings, are generally reserved for enforcement, uranium enrichment facility licensing, and high-level waste repository licensing proceedings.<sup>182</sup> Subpart G procedures may be used for license amendment proceedings *only if* the presiding officer finds that resolution of a contention or contested matter necessitates resolution of: (1) material facts relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue; or (2) issues of motive or intent of the party or an eyewitness.<sup>183</sup> To the extent the State is seeking to rely on Subpart G procedures, it has failed to show why the formal hearing procedures are warranted in this proceeding.

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<sup>181</sup> *Id.* § 2.1207(a)(3).

<sup>182</sup> *See id.* §§ 2.310(b), (c), (f).

<sup>183</sup> *Id.* § 2.310(d); *see also Entergy Nuclear Vermont Yankee, L.L. C. & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 694 (2004).

## VI. CONCLUSION

As demonstrated above, the State's Petition must be dismissed because it proffers no contention satisfying the admissibility requirements in 10 C.F.R. § 2.309(f)(1).

Respectfully submitted,

*Signed (electronically) by Raphael P. Kuyler*

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Dated in Washington, DC  
this 6th day of March 2015

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
	)	Docket No. 50-271-LA-2
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	March 6, 2015
(Vermont Yankee Nuclear Power Station)	)	
	)	

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the foregoing “Entergy’s Answer Opposing Petition for Leave to Intervene and Hearing Request” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

*Signed (electronically) by Raphael P. Kuyler*

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