

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT)	Docket No. 50-271-LA-2
YANKEE, LLC AND ENTERGY)	
NUCLEAR OPERATIONS, INC.)	March 17, 2015
)	
(Vermont Yankee Nuclear Power Station))	

**THE STATE OF VERMONT’S REPLY TO NRC STAFF AND ENTERGY
ANSWERS TO PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST**

Pursuant to 10 C.F.R. § 2.309(i)(2) and the Atomic Safety and Licensing Board’s (“ASLB” or “Board”) March 16, 2015 Order denying a stay of the above-captioned license amendment request (“LAR”) proceeding,¹ the State of Vermont (“State”), through the Vermont Department of Public Service, submits the following reply to U.S. Nuclear Regulatory Commission (“NRC”) Staff (“Staff”), and Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (together, “Entergy”) answers in opposition to its Petition for Leave to Intervene, and Hearing Request (“Petition”).²

The State’s Petition contains two contentions: one, the LAR is not ready for review because a directly related exemption request has not been approved by the NRC; and, two, the LAR increases the risk to public health and safety in the event that the directly related exemption request is approved. The State’s reply addresses the issues related to each contention separately.

¹ See *In the Matter of Energy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.*, ASLB Order (Denying Motion to Stay Proceeding and Extending Deadline for Reply) (Mar. 16, 2015).

² See State of Vermont’s Petition for Leave to Intervene and Hearing Request (Feb. 9, 2015) (ADAMS Accession No. ML15040A723); NRC Staff’s Answer to State of Vermont’s Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015)(ML15065A364); and Entergy’s Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015)(ML15065A300).

CONTENTION ONE

Both Entergy and NRC Staff argue that Contention One is moot because the NRC has approved the NRC's recommendation that the exemption request directly related to the LAR be granted. The NRC approved the NRC Staff's recommendation that Entergy's exemption request be granted.³ The State has since filed a Petition for Reconsideration of that approval to the Commission, which is attached here as Exhibit A.⁴

According to NRC Staff, "[t]he Commission's determination *controls* and the Board is *bound* by that determination."⁵ Leaving aside the State's request for reconsideration of the Commission's determination (discussed in more detail below), what is telling here is that NRC Staff's statement concedes that the exemption request is directly related to the LAR – and thus triggers the State's right to a hearing on that exemption request. Indeed, it is difficult to imagine how an exemption request could be more directly related to a LAR than what is presented here, since, according to Entergy and NRC Staff, there is nothing left for the ASLB to review now that the Commission has acted.

This is precisely the type of situation that NRC has held to be an unlawful deprivation of an intervenor's hearing rights, in violation of the Atomic Energy Act and the Administrative Procedures Act.

Although NRC has held that, in general, an intervenor has no right to a hearing to challenge an exemption request,⁶ it has created a clear exception to this rule. NRC has held that

³ See Commission Voting Record re SECY-14-0125, Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements (Mar. 2, 2015)(ML15062A135).

⁴ See State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests (Mar. 12, 2015)(Attached as Exhibit A).

⁵ NRC Staff Answer at 21-22 (emphasis added).

when an exemption request is “directly related” to a licensing amendment action, and an intervenor raises an admissible contention related to the exemption, that contention should be subject to a hearing.⁷ In *PFS*, the NRC granted a hearing on an exemption request that was made during the pendency of a licensing proceeding for a proposed Independent Spent Fuel Storage Installation (“ISFSI”). The key to the decision was whether the exemption request was a direct part of an initial license or licensing amendment request:

[I]t is not true that the Commission only grants a hearing on exemption requests that are directly related to an already-admitted contention. The proper focus is on *whether the exemption is necessary for the applicant to obtain an initial license or amend its license*. Where the exemption is thus a direct part of an initial licensing or licensing amendment action, there is a potential that an interested party could raise an admissible contention on the exemption, triggering the right to a hearing under that AEA.⁸

A hearing right clearly exists where a licensing action is predicated on an exemption request: “[b]ecause resolution of the exemption request directly affects the licensability of the proposed ISFSI, the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties.”⁹

Here, Entergy conceded in its LAR that the request is dependent on granting of the Exemption Request. This is obvious because, if the Exemption Request is denied, then it is a given that the LAR must also be denied. Otherwise the LAR would authorize activities that fall below the safety requirements of currently applicable regulations. Because “the exemption is

⁶ See 42 U.S.C. § 2239(a)(1) and *In the Matter of Commonwealth of Edison Co. (Zion Nuclear Power Station)*, CLI-00-05, 51 NRC 90, 98.

⁷ *In the Matter of Private Fuel Storage, LLC (“PFS”)*, CLI-01-12, 53 NRC 459, 476; see also, e.g., *In the Matter of Honeywell International, Inc.*, CLI-13-1, 77 NRC 1, 7 (“But when a licensee requests an exemption in a related license amendment application, we consider the hearing rights of the amendment application to encompass the exemption request as well.”).

⁸ *PFS* at 470 (emphasis added).

⁹ *PFS* at 467.

necessary for the applicant to . . . amend its license,” it “trigger[s] the right to a hearing under the AEA.”¹⁰

A proper examination of the LAR’s potential impact on public health and safety cannot be made independent of the Exemption Request – a point repeatedly stressed in the State’s LAR Petition. The two must be reviewed together. The use of an exemption “cannot remove a matter germane to a licensing proceeding from consideration in a hearing, assuming an interested party raises an admissible contention thereon. To hold otherwise would exclude critical safety questions from licensing hearings merely on the basis of an ‘exemption’ label.”¹¹

Entergy and NRC Staff seek to remove the exemption request from consideration here by attempting to distinguish the present circumstances from those present in *PFS*. Those distinctions fail. The exemption request is, by Entergy’s own admission, necessary for Entergy to amend its license here. First, *PFS* did not base its holding on the particular order of procedural actions. While the applicant in *PFS* did make an exemption request after a related LAR proceeding had been initiated, this distinction is without consequence. The order of actions in *PFS* matters only because it shows that the exemption request and the LAR were directly related to one another, as is the case here. Likewise, the Commission’s standard for triggering a hearing right on an exemption request is not dependent on the particular focus of the exemption request. *PFS*’s exemption request’s focus on the facility’s design or operation is immaterial to whether it was required for the applicant’s license amendment.

Second, both Entergy and NRC Staff raise *Zion*, arguing that exemption requests which involve “already-licensed facility[ies] asking for relief from performing a duty imposed by NRC regulations . . . ordinarily do not trigger hearing rights.” The parties’ reliance on *Zion* is wholly

¹⁰ *Id.* at 470.

¹¹ *Id.*

misplaced. The *Zion* exemption request did not trigger a hearing right because it was a stand-alone exemption request with no companion LAR under review. Additionally, as explained above the type of activity an exemption seeks to affect does not impact the core *PFS* hearing right analysis. Whether the ASLB and the Commission characterize the exemption request as a decommissioning-related activity, or something else entirely, has no bearing on the State's recognized right to a hearing when an LAR is directly related to an exemption request.

Lastly, the State should be given a hearing right pursuant to *PFS*, regardless of whether or not the exemption request is deemed essential to VY's operation.¹² The hearing right is triggered once the exemption request is necessary for a license amendment without additional consideration as to where the exemption fits into the operation of the applicant's facility.

Entergy's and NRC Staff's own answers to the petition further bolster the dependent link between the exemption and the LAR. The parties illustrate the link by simply arguing that Contention One, along with the substantive and vital concerns of the State that came with it, in effect disappeared once the Commission voted in favor of the exemption request. According to the NRC Staff, as noted above, the ASLB is now "bound" by that decision.¹³ As addressed below, the parties take the same approach to opposing Contention Two, further illustrating the connection between the exemption and the LAR. Removing the exemption from ASLB consideration in the LAR proceeding would deprive the Board of critical safety questions related to the LAR, which is flatly prohibited by *PFS*.

Further, even if Entergy and NRC Staff were correct that the NRC could deprive the State of its hearing rights in this LAR by granting Entergy's Exemption Request, there are at least two additional problems with their theory. First, both Entergy and NRC Staff concede that the

¹² See NRC Staff Answer at 25.

¹³ NRC Staff Answer at 21-22.

exemption request has not yet been granted, even though the Commission has voted to approve it. Thus, as of today, the LAR cannot be granted because it would authorize activities that violate currently applicable regulations. This is why the State has asked that the current proceeding be held in abeyance – a move that would benefit all parties to this proceeding and create a more common-sense approach to the pending issues.

Second, the State has since filed a Petition for Reconsideration of the Commission's approval. There is no basis for Entergy and NRC Staff to argue that Contention One is moot while that motion is pending before the NRC. As of the date of this filing, the NRC's initial determination has been challenged. The NRC's approval is therefore not complete and does not provide a basis to dispose of Contention One. More importantly, as spelled out in the State's Petition for Reconsideration, NRC precedent and federal law indicate that the Commission's approval was improper, and that the State has a right to a hearing on the exemption request as part of this LAR proceeding. If the Commission agrees with the State that Commission precedent such as *PFS* requires this LAR proceeding to address the exemption request, what will this Board do if it has already granted the LAR as Entergy and NRC Staff urge the Board to do? Similarly, if the Commission agrees with the state that applicable federal law such as the National Environmental Policy Act require additional environmental review before the NRC can allow Entergy to significantly reduce emergency preparedness at Vermont Yankee, what will the Board do if it has already granted the LAR? For these reasons, the Board should not and cannot grant the LAR while the State's Motion to Reconsider the Exemption Request is pending.

CONTENTION TWO

Contention Two is within the scope of this proceeding and illustrates a material dispute that is supported by expert testimony. The contention outlines deficiencies contained in the

LAR, both when viewed alongside the directly related exemption request and alone, that pose a risk to public health and safety. As explained above, the contention's focus on problems posed by the exemption request constitutes an admissible contention on the exemption in the event that the NRC grants a hearing on the request now under reconsideration. The contention also presents a basis for a hearing on the LAR alone.

The State's Petition and companion expert-supported declarations outline a number of credible threat scenarios that have not been analyzed by Entergy in the LAR. Public health and safety, in turn, would be adversely impacted in the event of any of these scenarios if the LAR is granted. The State has identified credible beyond design-basis-scenarios, including hostile action, the use of fire accelerants compromising spent fuel pool safety, spent nuclear fuel pool loss of cooling that results in a zirconium fire, and spent fuel transfer accidents. In the case of threats from accelerants in the fuel pool, Entergy performed an emergency response exercise at VY in March 2015 included the use on an accelerant dropped into the fuel pool. In each of these scenarios, the LAR's proposed expansion of notification of an emergency to the State from 15 to 60 minutes, coupled with the reduction of the Emergency Planning Zone to the plant footprint, as contemplated by the LAR, adds significant and unnecessary risk to the public by way of delayed and reduced emergency response action.

The reduction in emergency response capabilities violates the requirements of 10 CFR § 50.54(q)(3), even in the event that Entergy is exempted from portions 10 CFR § 50.47 and Part 50, Appendix E. The lack of adequate safety analysis regarding credible accident scenarios applies independently to the LAR in addition to applying to the directly related exemption request.

While Entergy and NRC Staff both challenge the merits of the State's expert opinions in their answers, such arguments at this stage of the proceeding are premature and have no place for consideration here. The ASLB has made clear that its determination of whether a contention is adequately supported by expert opinion,

does not call upon the intervenor to make its case at [the contention admissibility] stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention. A petitioner does not have to provide an exhaustive list of its experts or evidence or prove the merits of its contention at the admissibility stage. As with a summary disposition motion, the support for a contention may be viewed in a light that is favorable to the petitioner and inferences that can be drawn from evidence may be construed in favor of the petitioner.¹⁴

The State's expert opinions must be given maximum weight relative to the answers in opposition at this stage of the proceeding. The State has shown that Contention Two is admissible as it touches on the NRC's core focus of ensuring public health and safety when reviewing an LAR. Furthermore, as laid out in the State's Petition, and made all the more clearer in Entergy's and NRC Staff's opposition, evaluating the safety impacts of the LAR become all the more difficult when the ASLB is deprived of the necessary opportunity to examine the directly related exemption request. Examination of the LAR in isolation prohibits the ASLB from engaging in the necessary inquiry of whether the underlying requested exemptions increase the risk to public health and safety, as expressed and enabled by the LAR.

The relief the State seeks pursuant to the Petition is narrowly tailored and finite. It seeks only to continue the emergency planning regulations and license requirements currently in place until all spent fuel is placed into dry cask storage. The safety risks associated with spent fuel in the cooling pool identified in the Petition will be sufficiently diminished or eliminated once the

¹⁴ *In the Matter of Energy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* ASLB Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption at 14(Sept. 22, 2006)(LBP-06-20)(ML062650337)(internal citations omitted).

fuel is in dry cask storage. Entergy estimates that all spent fuel will be in dry cask storage by the close of 2020 – less than six years from now. This is a critical safety issue that requires a full hearing on the merits.

Finally, although Entergy and NRC Staff argue that any such hearing should be under Subpart L procedures, the State disagrees. The Board should grant the State a hearing under Subpart G procedures. Indeed, Entergy and NRC Staff effectively concede as much in their Answers by attacking various statements made by the State’s expert witnesses – for instance, claiming that certain statements are “bare assertions and speculation” and “fail to address or mischaracterize the extensive technical literature that the NRC Staff has developed.”¹⁵ This is precisely the type of issue that requires a full hearing – during which the State will put forward its expert witnesses and they will demonstrate their credibility.

Another reason that a Subpart G proceeding is appropriate is because there are numerous documents – some of which the State has, and some of which it may need to obtain during discovery – that are potentially applicable to the LAR. Entergy concedes as much when it faults one of the State’s witnesses for raising the issue of the LAR’s lack of implementing procedures, but failing to “assert[] that they have sought copies of these documents from Entergy or the NRC Staff.”¹⁶ Those are precisely the types of documents that would be obtained during discovery. Other documents that are relevant to the merits hearing include separate contractual agreements Entergy has made to the State to maintain a 15-minute warning system and a 10-mile EPZ, such as those attached to Exhibit A. There may be other such documents or similar ones – the State will not know until this matter proceeds to a merits hearing under Subpart G procedures.

¹⁵ Entergy Answer at 29.

¹⁶ *Id.* at 25.

CONCLUSION

The State's Petition for Reconsideration of the NRC's approval of the directly related exemption request has fundamentally altered the procedural posture of this proceeding. Either the NRC will grant the State the relief it seeks on reconsideration and grant the State a right to hearing to consider the exemption as part of this proceeding, or it will reject the Reconsideration Petition. In either event, the State has presented at least one admissible contention that is within the scope of the proceeding, is supported by fact and expert opinion, and is material to the LAR now under consideration. As a result of the foregoing, the State respectfully requests that this Board accept the State of Vermont's Petition, grant the State party status in the proceeding, and hold a hearing pursuant to 10 C.F.R. Part 2, Subpart G, or, alternatively, hold a hearing pursuant to Part 2, Subpart L including the use of discovery and cross-examination.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Montpelier, Vermont
this 17th day of March, 2015

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the forgoing the State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene, and Hearing Request dated March 17, 2015, have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding, this 17th day of March, 2015.

/Signed (electronically) by/
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Dated at Montpelier, Vermont
this 17th day of March, 2015