UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LA
	)	March 20, 2015
(Vermont Yankee Nuclear Power Station)	)	

ENTERGY'S ANSWER OPPOSING THE STATE OF VERMONT'S APPEAL OF ATOMIC SAFETY AND LICENSING BOARD'S JANUARY 28, 2015 MEMORANDUM AND ORDER DENYING THE STATE'S REQUEST FOR HEARING AND PETITION TO INTERVENE

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I. INTRODUCTION AND SUMMARY

In accordance with 10 C.F.R. § 2.311(b), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy") submit this answer opposing the untimely Appeal of the Atomic Safety and Licensing Board's ("Board") January 28, 2015 Memorandum and Order (LBP-15-4) filed by the State of Vermont ("State").[1] The State seeks review of the Board's decision in LBP-15-4[2] to deny the State's September 22, 2014 Notice of

[1] The State of Vermont's Notice of Appeal of Atomic Safety and Licensing Board's January 28, 2015 Memorandum and Order Denying the State's Request for Hearing and Petition to Intervene (Feb. 23, 2015), *available at* ADAMS Accession No. ML15055A278; The State of Vermont's Brief in Support of Notice of Appeal of Atomic Safety and Licensing Board's January 28, 2015 Memorandum and Order Denying the State's Request for Hearing and Petition to Intervene (Feb. 23, 2015), *available at* ADAMS Accession No. ML15055A277 ("Appeal"). As discussed below in Section IV.A, although the State provided its filings to counsel for Entergy and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff by email at 11:47 pm on February 23, 2015 (the filing deadline), it did not serve its filing through the NRC's E-Filing system until 12:29 pm on February 24, 2015. Entergy also notes that reply briefs are not permitted in support of appeals under 10 C.F.R. § 2.311.

[2] *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-4, 81 NRC __ , slip op. (Jan. 28, 2015) ("LBP-15-4").

Intention to Participate, Petition to Intervene, and Hearing Request ("Petition").[3] The State's Petition provided a single contention and challenged Entergy's request that the NRC amend the Vermont Yankee Nuclear Power Station ("VYNPS") renewed operating license to revise the site Emergency Plan to reflect the plant's permanently defueled condition.

For the reasons discussed below, the State's Appeal is untimely and fails to demonstrate that the Board committed an error of law or abused its discretion in rejecting the State's sole proposed contention. For example, the Appeal ignores or fails to identify any error with the multiple bases provided by the Board for concluding that the proffered contention is an impermissible collateral attack on NRC regulations. Moreover, even if the State could show that the Board erred or abused its discretion in LBP-15-4 – which it cannot – the State's proposed contention should nonetheless be rejected for failure to satisfy additional contention admissibility requirements not addressed by the Board in LBP-15-4. Accordingly, the Commission should deny the Appeal and affirm the well-reasoned decision by the Board in LBP-15-4 to reject the State's Petition.

II. BACKGROUND AND PROCEDURAL HISTORY

By letter dated September 23, 2013, Entergy informed the NRC that VYNPS would permanently cease operations at the end of its current operating cycle, which, at that time, was expected to occur in the fourth quarter of 2014.[4] This proceeding concerns Entergy's March 24,

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[3] Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Sept. 22, 2014), *available at* ADAMS Accession No. ML14267A524 ("Petition").

[4] Letter from M. Perito, Entergy Nuclear Operations Inc., to NRC, "Notification of Permanent Cessation of Power Operations" (Sept. 23, 2013), *available at* ADAMS Accession No. ML13273A204.

2014 request to amend the VYNPS renewed operating license to revise the site Emergency Plan to reflect the permanently defueled condition.[5]

The proposed Emergency Plan changes would eliminate the on-shift staff positions not needed for the safe storage of spent fuel in the spent fuel pool and eliminate the Emergency Response Organization ("ERO") staff positions not needed to effectively respond to credible accidents once Entergy permanently ceased operations at VYNPS and permanently defueled the reactor.[6] Based on a comprehensive evaluation, Entergy concluded that the proposed staffing reductions would not compromise the site's ability to respond to an emergency and that the revised site Emergency Plan would continue to meet the emergency planning standards and requirements of 10 C.F.R. § 50.47(b) and Appendix E to 10 C.F.R. Part 50.[7]

The NRC Staff issued a *Federal Register* notice on July 22, 2014, indicating that it had reviewed Entergy's no significant hazards consideration ("NSHC") analysis, stating that the proposed changes appeared to satisfy the three 10 C.F.R. § 50.92(c) standards for NSHC, and establishing a deadline of September 22, 2014 for petitions to intervene.[8]

The State served its Petition through the NRC's E-Filing system on September 24, 2014,[9] offering a single contention that alleged:

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5 Letter from C. Wamser, Entergy Nuclear Operations, Inc., to NRC, "Proposed Changes to the Vermont Yankee Emergency Plan" (Mar. 24, 2014), *available at* ADAMS Accession No. ML14085A257 ("License Amendment Request" or "LAR").

6 *Id.*, Attachment 1 at 1.

7 *Id.*, Attachment 1 at 1, 19.

8 Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 42,539, 42,546 (July 22, 2014).

9 The State initially e-mailed its Petition directly to NRC Secretary Vietti-Cook shortly before midnight on the filing deadline, September 22, 2014. *See* Memorandum from A. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, Atomic Safety and Licensing Board Panel Chief Administrative Judge, "Referring a Request for Hearing and Petition to Intervene with Respect to the License Amendment Request of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for the Vermont Yankee Nuclear Power Station, Docket No. 50-271" at 1 (Sept. 30, 2014), *available at* ADAMS Accession No. ML14273A498. The State

> Entergy has failed to ensure a Radiological Monitoring System that will provide the information that the State needs to assess Vermont Yankee conditions as part of the State's protective action decision-making process, and Entergy has thus failed to demonstrate that its license amendment request (1) will not significantly reduce the margin of safety or significantly increase the consequences of an accident previously evaluated as required by 10 CFR § 50.92; (2) will provide adequate protection for the public health and safety as required by 10 CFR § 50.57(a)(3); and (3) will comply with the requirements of 10 CFR § 50.47 to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.[10]

Although Entergy's LAR was unrelated to the operation of any sort of "Radiation Monitoring System," the State asked the Board to require Entergy to continue transmitting VYNPS plant data to the NRC via the Emergency Response Data System ("ERDS"), or an equivalent radiation monitoring system, for as long as spent fuel remains in the VYNPS spent fuel pool.[11]

Both Entergy and the NRC Staff filed answers opposing the State's Petition. Entergy opposed the Petition on the grounds that it was untimely and that the State's contention was inadmissible because it raised issues outside the scope of the proceeding, impermissibly challenged an NRC regulation, lacked adequate factual or expert opinion support, and failed to raise a genuine dispute with the LAR on a material issue of law or fact.[12] The Staff also opposed the Petition, questioning the timeliness of the Petition and arguing that the State's contention was inadmissible because it raised issues outside the scope of the proceeding and immaterial to the

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explained that the reason for the delay in filing its Petition through the NRC's E-Filing system was because it delayed requesting the proper digital credentials required for E-Filing until after the filing deadline because it was engaged in negotiations with Entergy up until that time. LBP-15-4, slip op. at 7.

10 Petition at 3-4.

11 *Id.* at 5.

12 Entergy's Answer Opposing the State of Vermont's Notice of Intention to Participate, Petition to Intervene, and Hearing Request at 9-10, 13-18 (Oct. 20, 2014), *available at* ADAMS Accession No. ML14293A701 ("Entergy Answer to Petition").

findings the NRC must make on the LAR and impermissibly challenged NRC regulations.[13] The Board held oral argument on the State's Petition on December 1, 2014.[14]

On January 12, 2015, Entergy submitted its certifications of permanent cessation of operations and permanent defueling of the reactor to the NRC.[15] On January 28, 2015, the Board issued LBP-15-4, denying the State's Petition and ruling that the proposed contention was inadmissible because it collaterally challenged an NRC regulation in contravention of 10 C.F.R. § 2.335(a).[16] Given this ruling, the Board did not consider whether the contention was inadmissible on the alternative grounds asserted by Entergy and the NRC Staff.[17]

On February 4, 2015, the NRC Staff issued the requested license amendment, approving the proposed on-shift and ERO staffing reductions.[18] On February 23, 2015, in accordance with 10 C.F.R. § 50.54(q), Entergy submitted to the NRC Revision 55 of the VYNPS Emergency Plan.[19] In addition to the changes approved by the Staff, the revised Emergency Plan also

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13 NRC Staff's Answer to Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request at 3 n.8, 9-16 (Oct. 20, 2014), *available at* ADAMS Accession No. ML14293A114 ("Staff Answer to Petition").

14 *See* Official Transcript of Proceedings, Atomic Safety and Licensing Board Panel Hearing, *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station) (Dec. 1, 2014), *available at* ADAMS Accession No. ML14337A666 ("Tr.").

15 Letter from C. Wamser, Entergy Nuclear Operations, Inc., to NRC, "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.

16 *See* LBP-15-4, slip op. at 1, 13. Judge Wardwell dissented from LBP-15-4, indicating that he would have admitted the State's contention, on the grounds that the contention did not challenge NRC regulations and presented a material dispute.

17 *See* LBP-15-4, slip op. at 13 n.65.

18 Letter from J. Kim, NRC, to Entergy, "Vermont Yankee Nuclear Power Station – Issuance of Amendment to Renewed Facility Operating License Re: Changes to the Emergency Plan (TAC No. MF3668)" (Feb. 4, 2015), *available at* ADAMS Accession No. ML14346A065.

19 Letter from M. McKenney, Entergy, to NRC, "Emergency Plan Change, Revision 55" (Feb. 23, 2015) (Attached to this Answer as Attachment 1). It was brought to Entergy's attention during the week of March 9 that not all of the intended recipients had received this submittal, due to an apparent mix-up in the submittal's distribution. In an abundance of caution, Entergy re-submitted the entire February 23 submittal to both the NRC and the State on March 13, 2015.

incorporated several changes that Entergy had determined did not require prior NRC approval, pursuant to evaluations performed under Section 50.54(q)(3).[20] Among those changes was the retirement of ERDS and removal of references to ERDS from the Emergency Plan and several Entergy procedures. These changes became effective on February 5, 2015. Entergy's February 23 submission included a Section 50.54(q)(3) evaluation of the ERDS-related changes, which Entergy finalized on January 26, 2015.[21]

Although the deadline for the State's Appeal was February 23, 2015, the State did not serve its Appeal via the NRC's E-Filing system until 12:29 pm on February 24, 2015.

III. LEGAL STANDARDS

A. Standard of Review

An order denying a petition to intervene and/or request for hearing is appealable by the petitioner and/or requester pursuant to 10 C.F.R. § 2.311. As required by Section 2.311(c), the State's Appeal must demonstrate that the "request and/or petition should have been granted." The Commission reviews Board decisions on contention admissibility under a standard of "substantial deference."[22] Indeed, "[t]he Commission's customary practice is to affirm Board rulings on contention admissibility absent an abuse of discretion or error of law."[23] Under the abuse of discretion review standard, "the appellant faces a substantial burden," and it is not enough for the State to establish simply that the Board could have reached the same conclusion

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20 *Id.* at 1.

21 *See id.*, Attachment 1 at .pdf pages 95-111 of 111.

22 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986)).

23 *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 729 (2006).

as the State.[24] Rather, the State must persuade the Commission "that a reasonable mind could reach no other result."[25] When considering an appeal under 10 C.F.R. § 2.311 or a petition for review, the Commission may affirm a Board decision on any ground finding support in the record, whether or not relied on by the Board.[26]

Moreover, the State "bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims."[27] In that regard, "[a] mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.'"[28]

B. Contention Admissibility Standards

Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." Further, each contention must:

1) provide a specific statement of the legal or factual issue sought to be raised or controverted;

2) provide a brief explanation of the basis for the contention;

3) demonstrate that the issue raised is within the scope of the proceeding;

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24 *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 715 (2006) (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532, *aff'd in part and overruled in part*, CLI-91-13, 34 NRC 185 (1991)).

25 *Id.* (quoting *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983)).

26 *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision) (citing federal court precedent).

27 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-06, 39 NRC 285, 297 (1994)).

28 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993) (footnote omitted).

4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;

5) 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

6) provide sufficient information to show that a genuine dispute exists with the applicant with regard to a material issue of law or fact.[29]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[30] The NRC's contention admissibility rules are "strict by design."[31] Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[32]

IV. THE STATE'S APPEAL SHOULD BE DENIED

As a threshold matter, the Appeal should be denied as untimely. Additionally, as discussed in detail below, the State's Appeal fails to demonstrate any abuse of discretion or error of law in the Board's decision to reject the State's contention for impermissibly attacking an NRC regulation. Furthermore, the State's contention failed to meet several other admissibility criteria. Therefore, the Appeal should be denied for these additional reasons, and the Board's order should be affirmed.

A. The Appeal Should Be Denied as Untimely

The filing deadline for the State's notice of appeal and accompanying brief was February 23, 2015.[33] At 11:47 pm on that date, counsel for the State sent copies of the Appeal

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29 *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

30 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

31 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-1, 55 NRC 1 (2002).

32 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC at 325.

33 *See* 10 C.F.R. § 2.311(b); LBP-15-4, slip op. at 24.

and accompanying notice of appeal to Entergy and NRC Staff counsel via email.[34] State counsel explained that he was issued a new work computer during the week of February 16, 2015 and that on the morning of the filing deadline, he confirmed with the NRC's Electronic Information Exchange Help Desk that his new computer was properly configured to enable electronic submissions.[35] Counsel did not attempt to submit the State's Appeal until "approximately 11:30pm" on February 23, however, and encountered technical difficulties at that time and was not able to submit the filing through the E-Filing system.[36] The following day, counsel was able to resolve the technical issues and served the State's Appeal via the E-Filing system at 12:29 pm.[37]

As noted above, the State did not serve its original Petition via the E-Filing system until two days after the filing deadline. Although Entergy and the NRC Staff opposed the Petition as untimely, the Board found good cause to excuse the State's late E-Filing.[38] The Board did, however, caution the State that "failure to comply with the NRC's E-Filing requirements without good cause or without obtaining an exemption from the requirements under 10 C.F.R. § 2.302(g) can result in rejection of a pleading."[39] The Board also noted that "'[w]ith e-filing, one hour's or even a minute's delay can cost a litigant valuable rights. A prudent litigant or lawyer *must allow time for difficulties on the filer's end*.'"[40] Despite these Board warnings, the State did not allow sufficient time for any filing difficulties and did not

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34 *See* Affidavit of Aaron Kisicki Regarding the Late Electronic Filing of the State of Vermont's February 23, 2015 Notice of Appeal and Supporting Brief (Feb. 24, 2015), *available at* ADAMS Accession No. ML15055A276.

35 *Id.*

36 *Id.*

37 *Id.*

38 *See* LBP-15-4, slip op. at 8.

39 *Id.*

40 *Id.* at 8 n.41 (quoting *Justice v. Town of Cicero, Ill.*, 682 F.3d 662, 665 (7th Cir. 2012)) (emphasis added).

attempt to file its Appeal until 11:30 pm on the filing deadline.

In summary, the State has not demonstrated sufficient good cause for its late E-Filing or obtained an extension under 10 C.F.R. § 2.307, and (for the second time in this proceeding) has failed to comply with the Commission's E-Filing rules. Consequently, its Appeal should be rejected as untimely.

B. The State Has Failed to Demonstrate that the Board Committed an Error of Law or Abused Its Discretion in Denying the Petition

1. The State Has Not Identified Any Error in the Board's Interpretation of 10 C.F.R. Part 50, Appendix E, Section VI

As noted above, the Board rejected the State's contention as inadmissible because it collaterally attacked an NRC regulation in contravention of 10 C.F.R. § 2.335(a).[41] In particular, the Board found that the relief sought by the State – *i.e.*, to require Entergy to maintain its ERDS link (or create an ERDS-like system) even after the VYNPS reactor had been permanently shut down and defueled – was inconsistent with the exception provision in 10 C.F.R. Part 50, Appendix E, Section VI.2.[42] That provision exempts "all nuclear power facilities that are shut down permanently" from the requirement to provide an ERDS link to the NRC.[43] In reaching this conclusion, the Board reviewed and considered Appendix E, Section VI's regulatory history, which plainly states that ERDS "is to be 'used by *licensees of operating reactors*' and which repeatedly stresses that the purpose of ERDS is to enhance the NRC's ability to monitor 'what is taking place *at the reactor during an accident.*'"[44] The Board reasoned that, given Appendix E, Section VI's "unambiguous purpose," Section VI.2's

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41 LBP-15-4, slip op. at 1, 13.

42 *Id.* at 12.

43 10 C.F.R. Part 50, App. E § VI.2.

44 LBP-15-4, slip op. at 12 (quoting Final Rule, Emergency Response Data System, 56 Fed. Reg. 40,178, 40,178, 40,179 (Aug. 13, 1991)) (footnote omitted).

exception provision is most reasonably interpreted as exempting from the ERDS program all nuclear reactors that, like Vermont Yankee, are permanently shut down – *i.e.*, those that have permanently ceased operations and permanently removed all fuel from the reactor.[45]

The Board noted that its interpretation of Appendix E, Section VI.2 was consistent with the NRC Staff's longstanding interpretation of the provision and longstanding industry practice.[46] Moreover, the Board found that its interpretation was further confirmed by 10 C.F.R. § 50.72, the only regulation that actually requires a licensee to activate its ERDS link.[47] The Board noted that Section 50.72 governs notification requirements for "*operating* nuclear power reactors."[48] The Board reasonably concluded that, "if the licensee of a permanently shut down reactor is never required to activate the ERDS link, it follows that such a licensee need not maintain the ERDS link."[49] Thus, "the fact that section 50.72 requires only 'operating nuclear power reactors' to activate the ERDS link *convincingly supports the conclusion* that only licensees with operating reactors are required to maintain the ERDS link."[50] Given that the State's contention would require Entergy to maintain the ERDS link or create a new ERDS-like system at VYNPS after the reactor had permanently ceased operations and had been permanently defueled, the Board determined that the contention sought "to impose a requirement more stringent than the requirement imposed in Section VI"

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45 *Id*.

46 *Id.* at 16.

47 *Id*.

48 *Id.* (emphasis added); *see also id*. at 16-17.

49 *Id.* at 12-13.

50 *Id.* at 17 (emphasis added). This rationale is discussed several times throughout LBP-15-4. *See id.* at 12-13, 16-17, 19.

and was, therefore, "an impermissible collateral attack on a regulation in derogation of 10 C.F.R. § 2.335(a) and must be rejected as inadmissible."[51]

Despite the Board's repeated references to Section 50.72 and its reliance on the regulation as confirming its interpretation of Appendix E, Section VI.2, the State fails to even mention Section 50.72 in its Appeal, let alone identify any error in the Board's reliance on the regulation. The Board correctly relied upon Section 50.72(a)(4) as supporting its interpretation of Appendix E, Section VI's exemption provision and rejecting the proposed contention on that basis.

2. The State Has Not Identified Any Error in the Board's Rejection of the State's Argument that Section VI's Exemption Applies Only to Plants Shutdown in 1991

The State argues on Appeal that "Part 50, Appendix E, § IV.2 [*sic*] was promulgated in 1991 and the exemption it provides should be interpreted as applying only to plants that were already shut down at that time."[52] This argument, along with many of the State's assertions made in support of this argument, was previously raised (verbatim) in the State's Reply.[53] These same arguments were considered – and rejected – by the Board in LBP-15-4.[54] In particular, the Board noted that "[i]f, as Vermont argues, Section VI were a one-time requirement that applied only to units existing in 1991, that would mean it was not intended to apply prospectively to newly built reactors."[55] The Board then characterized this interpretation

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51 *Id.* at 13 (citing *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC __ , slip op. at 9 n.27 (Aug. 26, 2014); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012); *GPU Nuclear, Inc. et al.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000)).

52 Appeal at 9.

53 *See id.* at 9-10; *cf.* The State of Vermont's Reply to NRC Staff and Entergy Answers to the State of Vermont's Notice of Intention to Participate, Petition to Intervene, and Hearing Request at 8-9 (Oct. 31, 2014), *available at* ADAMS Accession No. ML14308A570 ("State Reply").

54 *See* LBP-15-4 at 17-18 (citing State Reply at 8-9).

55 *Id.* at 18.

as "defying common sense."[56] It further explained that "nothing in the regulation suggests it was intended to apply only to plants that were operating in 1991, *or that its exemption was intended to be limited to plants that were already shut down in 1991*," noting that Appendix E, Section VI is "written in broad terms."[57] The State has not disputed this Board interpretation or its characterization of the State's interpretation as "defying common sense." Nor has the State identified any legal authority supporting its interpretation, such as where in the rulemaking history the Commission clearly articulated Vermont's interpretation of Part 50, Appendix E, Section VI.2.

The State also asserts that "[e]ven if the regulation could be read as exempting plants that are shut down after 1991, the permanent shut down exception contained in 10 C.F.R. Part 50, Appendix E … does not prohibit the NRC from imposing an obligation on Entergy to continue the operation of the [VYNPS] ERDS data feed to the NRC in order to provide adequate protection for the public health and safety."[58] The Board also addressed and rejected this recycled argument: in its Reply, the State conceded that "at most, [Appendix E] only removes [the] regulatory obligation for Vermont Yankee to continue ERDS" following permanent shutdown of the reactor."[59] The Board found this concession "*fatal* to Vermont's contention, because once the regulatory obligation to continue ERDS has been removed, a contention that seeks to re-impose that obligation, or to otherwise 'impose … a requirement more stringent tha[n] the one imposed by the regulation[],' must be rejected as an impermissible collateral attack on the regulation."[60] The State has failed to address the Board's

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56 *Id.*

57 *Id.* (emphasis added).

58 Appeal at 10; *cf.* State Reply at 9.

59 State Reply at 9.

60 LBP-15-4, slip op. at 20 (emphasis added) (other edits in original) (citing cases).

rejection of this argument and failed to explain why its concession is not "fatal" to its contention under the governing precedent.

The State further argues that Appendix E, Section VI.4.d supports the State's interpretation of Section VI.2's exemption as only applying to plants that were permanently shut down in 1991.[61] The State did not raise this argument before the Board. The State now asserts that Section VI.4.d's requirement for all licensees to complete implementation of ERDS by the later of February 13, 1993, or before escalation to full power, rendered Section VI.2's exemption "unnecessary."[62] The State further contends that Section VI "was then left with a mandate for all plants to install and maintain ERDS before full power production, with no provision expressly allowing or even contemplating termination of the ERDS feed under any circumstances."[63]

As an initial matter, the State's invocation of Section VI.4.d should be rejected as untimely, given that the State raised it for the first time on appeal.[64] The State also offers no legal authority in support of its novel interpretation.[65] Moreover, its interpretation of Section VI as mandating all plants to maintain ERDS after February 13, 1993, without exception for shutdown plants, is completely at odds with reality. As the Board noted, all nuclear reactors that have permanently shut down since 1991 have removed ERDS from their emergency plans or have deactivated their ERDS links, consistent with the NRC Staff's longstanding

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61 Appeal at 10.

62 *Id.* at 11.

63 *Id.*

64 *See, e.g.*, *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 348 (1978) (noting that issues raised for the first time on appeal will ordinarily not be entertained).

65 The State effectively concedes the lack of authority supporting its position when it posits yet another novel, unsupported, alternative theory: "[a]t the very least, sufficient ambiguity is present in the rule justifying the NRC to militate toward the increased public health and safety protection afforded by a continued ERDS feed." Appeal at 10.

interpretation of Section VI.2.[66] The State has not attempted to reconcile its interpretation of Section VI with the realities of this longstanding practice.

For these reasons, the Board correctly rejected the State's interpretation of Section VI.2's exemption as applying only to plants that were already permanently shut down in 1991.

3. The State Has Not Identified Any Error in the Board's Conclusion that the Contention Collaterally Attacks Appendix E, Section VI.2

In its Appeal, the State asserts that the Board incorrectly determined that its contention, which it characterizes as "draw[ing] attention to En[t]ergy's failure to meet NRC mandated emergency planning obligations pursuant to 10 C.F.R. §§ 50.47 and 50.54(q)(3)," constitutes a collateral attack on Appendix E, Section VI.2.[67] The State goes to great lengths in its Appeal to show that its contention does "not seek[] to impose the requirements" of Sections 50.47 and 50.54(q)(3); rather, it "[s]eeks to [e]nforce" Entergy's compliance with those NRC regulations.[68] Significantly, however, the Board also viewed the State's contention as seeking to enforce Entergy's compliance with both Sections 50.47 and 50.54(q)(3) – and rejected the contention as a collateral attack on Appendix E, Section VI.2 on that very basis.

a. The State Has Not Identified Any Error in the Board's Conclusion that the State's Reliance on Section 50.47 Constitutes a Collateral Attack

The Board evaluated the State's argument that its contention "simply seeks to have Entergy comply with Appendix E as well as the emergency planning standards in 10 C.F.R. § 50.47(b)," but found that it did not render the contention admissible.[69] The State had argued

66 LBP-15-4, slip op. at 16 & n.79 (citing Tr. at 78-80, 97).

67 Appeal at 16.

68 *See id.* at 12-13.

69 LBP-15-4, slip op. at 19.

that aside from the more specific requirements governing ERDS in Part 50, Appendix E, Section VI, the more general requirement in 10 C.F.R. § 50.47(b) to provide an adequate emergency plan required the maintenance of ERDS.[70]

The Board reasoned that Entergy satisfies the requirements of Appendix E, Section VI by maintaining the ERDS link until the VYNPS reactor is permanently shut down and defueled.[71] It determined that the State's assertion that Entergy must thereafter maintain the ERDS link or an equivalent alternative system "is a demand for requirements beyond those established by Section VI and, thus, is an impermissible collateral attack on a regulation."[72] The Board concluded that the State's reliance on the more general provisions of Section 50.47(b) to support its argument that Entergy must maintain the VYNPS ERDS link or an ERDS-like system was "unavailing."[73] The State has not challenged or pointed to any error in the Board's reasoning on appeal.

b. The State Has Not Identified Any Error in the Board's Conclusion that Its Reliance on Section 50.54(q)(3) Constitutes a Collateral Attack

In its appeal, the State attempts to make much of the fact that the Staff "unilaterally issued the LAR without first receiving, much less evaluating, Entergy's § 50.54(q)(3) safety analysis," which Entergy acknowledged it must complete prior to removing references to ERDS from the VYNPS Emergency Plan.[74] Indeed, the State references the requirements of Section 50.54(q)(3) multiple times in support of its Appeal, claiming that Entergy's alleged

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70 *See id*. (citing State Reply at 8-10).

71 *Id*.

72 *Id.* at 19-20.

73 *Id*. at 20; *see also U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-22, 72 NRC 661, 671 n.25 (2010) (a regulatory text "should be construed so that effect is given to all of its provisions, so no part will be inoperative or superfluous, void or insignificant") (quoting *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995)).

74 Appeal at 13; *see also* LBP-15-4 (citing Tr. at 44, 50).

failure to conduct the evaluation prior to terminating the VYNPS ERDS link "justifies overturning the ASLB Order and admitting the State's contention."[75]

As an initial matter, the Board rejected the State's claim that Entergy should be required to complete an analysis under Section 50.54(q)(3) as part of its LAR as untimely, because the State belatedly raised it in its Reply for the first time.[76] Notwithstanding this ruling, the State relies heavily on Section 50.54(q)(3) throughout its Appeal[77] – without even acknowledging, much less challenging, the Board's rejection of its argument on this basis. Consequently, on appeal, the Commission should reject the State's arguments purportedly supported by Section 50.54(q)(3).

In addition to being untimely, the Board also rejected the State's Section 50.54(q)(3) argument because "it would not salvage Vermont's hearing request," even if it had been timely argued.[78] The Board found that, based on the relief sought by the State – *i.e.*, requiring Entergy to retain the VYNPS ERDS link or similar system after permanent shut down of the reactor – "it is plain that Vermont is relying on Entergy's alleged non-compliance with section 50.54(q)(3) to impose requirements on Entergy that are in derogation of the exception provision in Appendix E, Section VI.2."[79] The Board concluded that, absent a waiver, which the State had not sought or obtained, the State could not rely on Section 50.54(q)(3) to collaterally attack Section VI.2.[80] The Appeal states plainly that the State is indeed relying on

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75 Appeal at 14; *see also id*. at 12-13, 15-17, 19.

76 LBP-15-4, slip op. at 22 ("the petition did not cite section 50.54(q)(3) or make even a cursory attempt to explain how a contention based on the section 50.54(q)(3) analysis would satisfy the contention admissibility standards").

77 *See* Appeal at 12-17, 19.

78 LBP-15-4, slip op. at 22.

79 *Id.*

80 *Id.*

Entergy's alleged non-compliance with Section 50.54(q)(3),[81] but does not acknowledge or dispute the Board's rejection of its contention on this basis.

Beyond these threshold issues, the State's Section 50.54(q)(3)-based arguments suffer from several additional flaws. First, as Entergy and the NRC Staff have repeatedly stated throughout this proceeding, Entergy's LAR sought NRC approval for on-shift and ERO staffing reductions – not for approval to terminate the VYNPS ERDS link.[82] The LAR does not request prior NRC approval to terminate the ERDS link, because no regulation imposes this prior approval requirement.[83] Therefore, it should come as no surprise that the NRC Staff issued the LAR without having received or reviewed a summary of Entergy's Section 50.54(q)(3) evaluation (or the full evaluation itself), given that the LAR did not seek (and was not required to seek) the Staff's approval for terminating the ERDS link. Moreover, as Entergy and the Staff argued before the Board, and as discussed further below, the issues of Entergy's compliance with Section 50.54(q)(3) and its termination of the ERDS link are outside the scope of the LAR and this proceeding.

Second, as noted above, on January 26, 2015, Entergy finalized its Section 50.54(q)(3) evaluation of the retirement of ERDS and removal of references to ERDS from the Emergency Plan and several Entergy procedures. These changes, along with the on-shift and ERO staffing-related changes approved by the NRC Staff on February 4, 2015, became effective on

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81 *See, e.g.*, Appeal at 12 ("The State's Contention Seeks to Enforce NRC Regulations"), 16 (contention "draws attention to En[t]ergy's failure to meet NRC mandated emergency planning obligations pursuant to 10 C.F.R. §§ 50.47 and 50.54(q)(3)").

82 *See, e.g.*, Entergy Answer to Petition at 6-7, 14-15; Staff Answer to Petition at 10-13; Tr. at 37:4-9, 42:12-45:3, 56:14-57:1, 76:11-18, 77:3-78:21, 79:14-80:13, 81:17-82:21.

83 Contrary to the State's characterization of Section 50.54(q)(3), that provision merely requires licensees to "perform and retain" their analyses under that regulation, and Section 50.54(q)(5) requires Entergy to report changes to its emergency plan and provide a summary of the analysis supporting those changes. It does not, as the State alleges, require Entergy to "submit" the analysis for NRC review and approval prior to making those changes. *See* Appeal at 12-13. As shown below, Entergy nonetheless submitted its full Section 50.54(q)(3) analysis to the NRC, and therefore, has done more than the regulations require.

February 5, 2015. On February 23, 2015, Entergy submitted its revised Emergency Plan (Revision 55) and the Section 50.54(q)(3) evaluations for ERDS-related and other changes to the NRC.[84] Thus, Entergy completed the required Section 50.54(q)(3) evaluations prior to terminating the VYNPS ERDS link. Accordingly, there is neither a legal nor factual basis for the State's argument that Entergy's alleged failure to conduct the required Section 50.54(q)(3) evaluation prior to terminating the VYNPS ERDS link justifies overturning the Board's Order.

For these reasons, the Board correctly determined that the State's reliance on Sections 50.47 and 50.54(q)(3) constitutes a collateral attack on Appendix E, Section VI.

4. The State Has Not Shown that the Board Erred in Rejecting Arguments Regarding the Purported Safety Benefits of ERDS

In its Appeal, the State also discusses at length the reasons why it believes "ERDS provides a clear and substantial safety benefit historically recognized by the NRC in a wide variety of accident scenarios."[85] Even assuming *arguendo* that these claims are true, the Appeal fails to explain why they render the Board's interpretation of Appendix E, Section VI incorrect. The Board squarely addressed this argument, referring again to 10 C.F.R. § 50.72: "Vermont fails to explain how the ERDS link will protect the public health and safety in a regulatory regime that does not require the link to be activated."[86] The State, however, fails to even acknowledge, much less counter the Board's rejection of its safety-based argument. The Board correctly determined that the State's safety-based argument did not support admitting the contention.

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84 Although Section 50.54(q)(5) only requires licensees to submit a "summary" of the emergency plan changes made without NRC approval – and not the full Section 50.54(q)(3) evaluation – Entergy has nonetheless provided the full Section 50.54(q)(3) evaluation for changes reflecting the ERDS retirement to both the NRC and the State, consistent with its normal practice and the Board's suggestion in LBP-15-4. *See* LBP-15-4, slip op. at 23 n.106.

85 *See* Appeal at 6-9.

86 LBP-15-4, slip op. at 19 (relying on 10 C.F.R. § 50.72).

5. The State's Appeal Raises Issues that Are Beyond the Scope of LBP-15-4

Lastly, the State challenges the NRC Staff's technical review of the LAR,[87] the Staff's responses to the State's public comments on the LAR,[88] and the Staff's decision to approve and issue the license amendment during the appeal period.[89] Significantly, these are all *NRC Staff* actions that occurred *after* the Board's issuance of LBP-15-4. These challenges to the Staff's actions do not identify any errors committed by the Board, and therefore, provide no basis for overturning the Board's decision.[90]

C. The Commission Should Affirm the Board's Decision Based on Additional Reasons Set Forth in the Record

As Entergy and the NRC Staff argued before the Board, in addition to impermissibly collaterally attacking Appendix E, Section VI, the State's contention fails to satisfy several other admissibility criteria. Although the Board acknowledged that Entergy and the NRC Staff had raised alternative grounds to reject the State's contention, the Board did not need to consider those alternative grounds, given its rejection of the contention as a collateral attack on an NRC regulation.[91] The Board could have rejected the State's contention for any of these additional

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87 *See* Appeal at 17-19 (challenging the Staff's determination that Appendix E, Section VI does not require continued use of ERDS at a permanently defueled facility and interpretation of the VYNPS Emergency Plan).

88 *See id.* at 16 ("The NRC Staff made a number of statements that are either incorrect in part, or altogether erroneous in its response" to the State's public comments on the LAR).

89 *See id.* at 19 ("Issuance of the license amendment was premature, failed to consider a safety analysis required by NRC regulation, ASLB Order, and the NRC Staff's own guidance documents").

90 It is also well-settled that the NRC Staff's technical review of applications is not subject to challenge in adjudicatory proceedings. *See, e.g.*, *Pac. Gas & Elec. Co*. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), *review denied*, CLI-83-32, 18 NRC 1309 (1983) (stating that in operating license proceedings, the applicant's license application is in issue, not the adequacy of the Staff's review of the application). Moreover, to the extent the State is challenging the Staff's no significant hazards consideration determination, "there is no right of direct appeal to the Commission regarding the merits of the Staff's [NSHC] finding." *Pac. Gas & Elec. Co*. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), *rev'd on other grounds sub nom*. *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986). More generally, it is well settled that 10 C.F.R. § 50.58(b)(6) forbids any adjudicatory challenges to the Staff's NSHC determinations. *See, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001).

91 *See* LBP-15-4, slip op. at 13 n.65.

reasons as well, which would provide an independent basis for the Commission to affirm LBP-15-4.[92]

1. The Contention Raises Issues Outside the Scope of the Proceeding

The LAR that is the subject of this proceeding proposed to "revise the site emergency plan for the permanently defueled condition to reflect changes in the on-shift staffing and Emergency Response Organization staffing."[93] The State's contention, which focuses on the State's continued access to VYNPS plant data through ERDS or a similar alternative system, raises issues that are unrelated to the proposed licensing action.

The LAR does not request permission to stop transmitting plant data to the NRC via the ERDS. As part of the analysis that Entergy submitted with the LAR to show that the proposed staffing reductions would not reduce the effectiveness of the Emergency Plan, Entergy merely assumed that:

> The VY Emergency Response Data System (ERDS) link to the NRC will not be operational in a permanently shut down and defueled condition. The task of ERDS activation is therefore not included as an on-shift task requiring evaluation as part of this Staffing analysis.[94]

In addition, based on the assumption that ERDS would not be operational after permanent shut down and defueling, Entergy listed the task of "Activate ERDS" as "N/A," or not applicable, as one of 15 Emergency Plan tasks that the reduced on-shift staff must accomplish for the various analyzed accident scenarios.[95] Apart from this handful of references, the ERDS is not discussed elsewhere in the LAR submission, any NRC Staff Request for Additional

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92 *See, e.g.*, *Private Fuel Storage*, CLI-05-1, 61 NRC at 166 (noting that when it is acting as an appellate body, the Commission is free to affirm a Board decision on any ground finding support in the record, whether previously relied on or not).

93 79 Fed. Reg. at 42,546.

94 LAR, Attachment 4 at 8.

95 *Id.*, Attachment 4 at 21, 27, 33, 39, 45.

Information ("RAI"), Entergy's RAI responses, or the Staff's Safety Evaluation of the LAR (comprising over 200 pages of correspondence). The fact that the words "Emergency Response Data System" or "ERDS" appear a few times in Attachment 4 to the LAR does not somehow transform the LAR into a request to retire the system; no reasonable reading of Entergy's LAR submission could lead to that conclusion.

Accordingly, the Board could have rejected the State's contention for raising issues that are outside the scope of this proceeding.[96] The Commission can likewise affirm the Board's decision on these alternative grounds.

2. The Contention Is Not Supported by Sufficient Factual Information or Expert Opinion

The State also failed to proffer sufficient factual information or expert opinion in support of its contention. Rather, the State merely incorporates by reference public comments submitted by its State Nuclear Engineer and Decommissioning Coordinator on the LAR.[97] Only four sentences of the State's comments are relevant to the State's contention, however, and those sentences include only conclusory statements without any references or citations to any studies, analyses, or other sources.[98] The State asserts that, "[w]ithout timely access to the spent fuel

96 *See* 10 C.F.R. § 2.309(f)(1)(iii).

97 *See* State Reply at 7 (citing Comments from the Vermont Public Service Department Regarding the Following License Amendment Request Published in the Federal Register on July 22, 2014 at 3 (Aug. 21, 2014), *available at* ADAMS Accession No. ML14239A029 ("State Public Comments")).

98 The State's comments regarding ERDS state in their entirety:

> The Time Motion Studies (TMS) included in this Attachment assume that Vermont Yankee's Emergency Response Data System (ERDS) link to the NRC will not be operational in the permanently shut down and defueled condition. ERDS is specifically identified in Vermont's Radiological Emergency Response Plan (RERP) as the means for the Public Service Coordinator, located at the State Emergency Operations Center (SEOC) during an emergency response condition, to assess Vermont Yankee conditions as part of Vermont's protective action decision-making process. While it is recognized that many of the ERDS parameters (*e.g.*, those related to the Reactor Coolant System and Safety Injection) are meaningless once Vermont Yankee is in a permanently shut down and defueled condition, the ERDS Radiation Monitoring System, Meteorological Data and Containment parameters related to the Spent Fuel Pool will still provide meaningful information. As a result, the State of Vermont requires that either 1) the ERDS link to the NRC be retained during Vermont

pool, radiological, and meteorological data currently available to the State's radiological response organizations via ERDS, the State would need significantly more time to obtain accurate data needed for State protective action recommendations."[99] The State does not, however, provide any factual information or expert opinion related to how quickly it believes it needs to obtain the data, how often it needs to receive updated data, how much longer it would take to obtain the data it needs without access to ERDS, or what the consequences would be if it does not obtain the data within whatever time period it believes it needs to receive the data. Consequently, the Board could have rejected the contention for the additional reason that it was insufficiently supported.[100]

3. The Contention Does Not Raise a Genuine Dispute of Material Law or Fact with the LAR

The State's contention also fails to raise a genuine dispute of material law or fact with the LAR. Indeed, the State does not challenge the actual proposed licensing action – *i.e.*, to revise the site Emergency Plan by reducing on-shift and ERO staffing after permanent shutdown and defueling. Nor does the State challenge any of the LAR's key assumptions or conclusions, including:

- The spectrum of credible accidents will be reduced once VYNPS is permanently defueled.[101]
- All ERO members will report to their respective emergency response facilities when activated.[102]

Yankee's permanently shut down and defueled period or 2) an alternate means similar to ERDS is made available to provide equivalent Radiation Monitoring System, Meteorological information and Containment parameters relevant to the Spent Fuel Pool conditions for as long as fuel remains within the Spent Fuel Pool.

State Public Comments at 3.

99 Petition at 5.

100 *See* 10 C.F.R. § 2.309(f)(1)(v).

101 LAR, Attachment 1 at 3.

102 *Id.*, Attachment 1 at 6.

- All functional responsibilities from eliminated ERO and on-shift positions can be satisfactorily reassigned to remaining staff positions.[103]

- The proposed staffing reductions will not impact Entergy's ability to respond to an emergency, address the risks to public health and safety, or to comply with the site emergency plan, site commitments, and applicable regulations.[104]

Although the State suggests that "[a] hearing is required whenever a license amendment request '*creates the possibility* of a new or different kind of accident,'" it does not identify what new or different kind of accident could potentially be created by Entergy's LAR, or why the Commission should adopt this alternative standard for evaluating requests for hearing in lieu of 10 C.F.R. § 2.309(f)(1).[105] Under the NRC's rules, "[a] contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal."[106] Therefore, the Board could have also rejected the State's contention for failing to raise a genuine dispute of material law or fact with the LAR.[107]

. . . .

Accordingly, in addition to rejecting the State's contention as an impermissible collateral attack on Appendix E, Section VI.2, the Board could have found the contention inadmissible for these additional reasons. These additional reasons provide an independent basis for upholding the Board's decision in LBP-15-4 to deny the State's Petition.

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[103] *Id.*, Attachment 1 at 8, 10.

[104] *Id.*, Attachment 1 at 8, 11.

[105] Petition at 5 (quoting *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d at 1270).

[106] *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 58 (2007).

[107] *See* 10 C.F.R. § 2.309(f)(1)(vi).

V. CONCLUSION

For the reasons discussed above, the State's Appeal fails to show that the Board erred as a matter of law or abused its discretion in denying the State's Petition in LBP-15-4. Additionally, there are several other grounds that support affirmation of the Board's decision to reject the State's Petition. Accordingly, the Commission should deny the Appeal and affirm the decision by the Board in LBP-15-4.

Respectfully submitted,

Signed (electronically) by Susan H. Raimo

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Dated in Washington, D.C.
this 20th day of March, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LA
	)	March 20, 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 "Entergy's Answer Opposing the State of Vermont's Appeal of Atomic Safety and Licensing Board's January 28, 2015 Memorandum and Order Denying the State's Request for Hearing and Petition to Intervene" were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Susan H. Raimo

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