

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  
 )  
(Vermont Yankee Nuclear Power Station) )

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NRC STAFF'S BRIEF IN OPPOSITION TO  
THE STATE OF VERMONT'S APPEAL OF LBP-15-4

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March 20, 2015

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this brief in opposition to the appeal filed by the State of Vermont, through the Vermont Department of Public Service (Vermont),<sup>1</sup> of the Atomic Safety and Licensing Board's (Board's) Memorandum and Order LBP-15-4.<sup>2</sup> In LBP-15-4, the Board rejected Vermont's proposed contention that sought to require Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, Entergy or the licensee) to maintain the Emergency Response Data System (ERDS) at the Vermont Yankee Nuclear Power Station (Vermont Yankee or VY) after its permanent shutdown. Since the Board correctly ruled that Vermont's proposed contention constituted an impermissible collateral attack on the Commission's regulations at 10 C.F.R. Part 50, Appendix E, § VI.2, the Commission should deny Vermont's Appeal and affirm LBP-15-4.

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<sup>1</sup> 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 (dated Feb. 23, 2015, filed via the NRC's E-Filing System Feb. 24, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15055A278) (Notice of Appeal); 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 (dated Feb. 23, 2015, filed via the NRC's E-Filing System Feb. 24, 2015) (ADAMS Accession No. ML15055A277) (Appeal).

<sup>2</sup> *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, LBP-15-4, 81 NRC \_\_ (Jan. 28, 2015) (slip op.).

## BACKGROUND

### I. The Emergency Response Data System

The ERDS is a direct near real-time electronic data link between the onsite computer system at a U.S. nuclear power plant and the NRC Operations Center that provides for the automated, timely, and accurate transmission of a limited data set of selected parameters in the event of a reactor emergency.<sup>3</sup> The licensee of an operating nuclear power reactor is required to activate ERDS “as soon as possible but not later than one hour after declaring an Emergency Class of alert, site area emergency, or general emergency.”<sup>4</sup> The purpose of ERDS is to provide a reliable and effective communication system that will allow the NRC to monitor critical parameters during an emergency at operating power reactors as a supplement to the existing requirement for voice transmission of this information over the Emergency Notification System (ENS).<sup>5</sup> Following the Three Mile Island, Unit 2, accident, the NRC found that requiring operating plants to install and maintain this supplemental system was justified because ERDS improves the availability, timeliness, and reliability of key information thus providing a significant improvement in the NRC’s ability to accurately and promptly assess the situation at a “reactor during an accident, particularly during the critical early hours before the NRC Site Team arrives . . . .”<sup>6</sup>

The requirement to install and operate ERDS, however, is explicitly limited by 10 C.F.R. Part 50, Appendix E, § VI.2 which states that, “[e]xcept for Big Rock Point and all nuclear power facilities that are shut down permanently or indefinitely, onsite hardware shall be provided at each unit by the licensee to interface with the NRC receiving system” (hereafter “the ERDS

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<sup>3</sup> See 10 C.F.R. Pt. 50, App. E, § VI.1.

<sup>4</sup> 10 C.F.R. § 50.72(a)(4).

<sup>5</sup> Emergency Response Data System, 56 Fed. Reg. 40,178, 40,178 (Aug. 13, 1991) (Final rule).

<sup>6</sup> *Id.* at 40,179. See also Emergency Response Data System, 55 Fed. Reg. 41,095, 41,095 (Oct. 9, 1990) (Proposed rule).

exception provision”).<sup>7</sup> The effective date of the ERDS rule was September 12, 1991,<sup>8</sup> and each licensee to which it is applicable is required to “complete implementation of the ERDS by February 13, 1993, or before initial escalation to full power, whichever comes later.”<sup>9</sup>

The ERDS exception provision at 10 C.F.R. Part 50, Appendix E, § VI.2 has historically been understood by the NRC and licensees as excepting all reactors that are permanently shutdown and defueled from the requirement to maintain ERDS. Neither the NRC nor licensees have understood the ERDS exception provision as drawing a distinction between permanently shutdown plants with spent fuel stored in their spent fuel pools (SFPs) and permanently shutdown plants without spent fuel stored in their SFPs. For instance, the plants that were permanently shut down before the ERDS implementation deadline of February 13, 1993 did not install ERDS even though they stored spent fuel in their SFPs for years after the ERDS implementation deadline.<sup>10</sup> Examples include Indian Point Nuclear Generating Station, Unit 1,<sup>11</sup>

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<sup>7</sup> The only text in the Statements of Consideration for the final ERDS rulemaking that directly discusses the ERDS exception provision is:

Th[e ERDS] rule applies to all licensed nuclear power reactor facilities, except Big Rock Point and those that are permanently or indefinitely shut down. However, units shut down for maintenance, or authorized for fuel loading only, or low power operations, are required to report under ERDS. Big Rock Point is exempt because configuration of the facility does not make available as transmittable data a sufficient number of parameters for effective participation in the ERDS program.

56 Fed. Reg. at 40,178.

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

<sup>9</sup> 10 C.F.R. Pt. 50, App. E, § VI.4.d.

<sup>10</sup> See NRC Staff Answer to Atomic Safety and Licensing Board Question Asked During December 1, 2014 Contention Admissibility Oral Argument, at 2-3 (Dec. 8, 2014) (ADAMS Accession No. ML14342A336).

<sup>11</sup> See SECY-96-001, *Approval of Decommissioning Plan and Amendment of License for Indian Point Unit 1, Consolidated Edison Company of New York, Inc.*, at 1 (Jan. 2, 1996) (ADAMS Accession No. ML992950095); Letter from Entergy to NRC, Notification of Unit 1 Transfer of 160 Spent Fuel Assemblies from the Spent Fuel Pool to the Indian Point Independent Spent Fuel Storage Installation (Dec. 11, 2008) (ADAMS Accession No. ML091130457).



Humboldt Bay Power Plant, Unit 3,<sup>12</sup> Dresden Nuclear Power Station, Unit 1,<sup>13</sup> La Crosse Boiling Water Reactor,<sup>14</sup> Rancho Seco Nuclear Generating Station,<sup>15</sup> Shoreham Nuclear Power Station,<sup>16</sup> Yankee Nuclear Power Station,<sup>17</sup> Trojan Nuclear Plant,<sup>18</sup> and San Onofre Nuclear Generating Station, Unit 1.<sup>19</sup> Additionally, plants that were permanently shut down after having installed ERDS subsequently removed all references to ERDS from their emergency plans (EPs) following their permanent shutdown. Examples include Zion Nuclear Power Station, Units 1 and 2,<sup>20</sup> Maine Yankee Atomic Power Station,<sup>21</sup> Millstone Power Station, Unit 1,<sup>22</sup> Kewaunee

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<sup>12</sup> See Letter from Pacific Gas and Electric Co. to NRC, Revision 10 to the Defueled Safety Analysis Report and Revision 31 to the Humboldt Bay Quality Assurance Plan, at Enclosure 1, p.1-1 – 1-2 (Feb. 4, 2014) (ADAMS Accession No. ML14035A514).

<sup>13</sup> See Letter from Exelon to NRC, Defueled Safety Analysis Report Update, Revision 7, at Attachment 2, p.1-4 (June 20, 2014) (ADAMS Accession No. ML14171A360); Letter from Exelon to NRC, Request for Exemption from the Secondary Offsite Accident Liability Insurance Requirement of 10 CFR 140.11(a)(4), at 2 (Dec. 18, 2001) (ADAMS Accession No. ML020240026).

<sup>14</sup> See Letter from Dairyland Power Cooperative to NRC, LACBWR Decommissioning Plan and Post-Shutdown Decommissioning Activities Report (D-Plan/PSDAR) Revision - March 2014, at Enclosure 1, p.1-3 – 1-4 (Mar. 12, 2014) (ADAMS Accession No. ML14079A352).

<sup>15</sup> See Letter from Sacramento Municipal Utility District to NRC, Biennial Update to Rancho Seco License Termination Plan, at Attachment, p.1-2 (Oct. 30, 2014) (ADAMS Accession No. ML14310A197).

<sup>16</sup> See Order Terminating the Facility Operating License, 60 Fed. Reg. 19,309, 19,309-10 (Apr. 17, 1995).

<sup>17</sup> See Letter from Yankee Atomic Electric Co. to NRC, Revision 2 to the Yankee Nuclear Power Station Post-Shutdown Decommissioning Activities Report, at Enclosure 1, p.1-2 (Feb. 25, 2014) (ADAMS Accession No. ML14069A184).

<sup>18</sup> See Letter from Portland General Electric Co. to NRC, PGE- 1061, "Trojan Nuclear Plant Decommissioning Plan and License Termination Plan (PGE- 1078)," Revision 9, at Enclosure, p.1-2 (Mar. 6, 2001) (ADAMS Accession No. ML010780220); NRC Report, Completion of Spent Fuel Transfer to the Independent Spent Fuel Storage Installation (Sept. 4, 2003) (ADAMS Accession No. ML032470783).

<sup>19</sup> See Letter from Southern California Edison to NRC, Docket No. 50-206; Defueled Safety Analysis Report; San Onofre Nuclear Generating Station Unit 1, at Enclosure, p.1-2 (July 1, 2014) (ADAMS Accession No. ML14184B327).

<sup>20</sup> See Letter from Zion Solutions to NRC, Request for Exemption to Revised Emergency Planning Rule, at Enclosure 2, p.52 (June 20, 2012) (ADAMS Accession No. ML12173A316) (stating that the ERDS requirement is no longer applicable to Zion as a decommissioning plant per 10 C.F.R. Part 50, Appendix E, § VI.2).

<sup>21</sup> See Letter from Maine Yankee Atomic Power Co. to NRC, Changes to the Maine Yankee Emergency Plan, at Attachment A, p.6 (Oct. 29, 1997) (Legacy ADAMS Accession No. 9711040143) ("Since Maine Yankee has been permanently shut down, it is no longer required to have an ERDS system.").

Power Station,<sup>23</sup> Crystal River, Unit 3,<sup>24</sup> and San Onofre Nuclear Generating Station, Units 2 and 3.<sup>25</sup>

As explained above, ERDS is a data link between an operating nuclear power plant and the NRC; however, ERDS data may also be forwarded from the NRC to an interested State upon the State's execution of a Memorandum of Understanding (MOU) with the NRC.<sup>26</sup> Such an MOU exists between the NRC and the State of Vermont.<sup>27</sup> This MOU states that "[t]he NRC will provide user access to ERDS data to one user terminal for the State of Vermont during emergencies," that Vermont will establish a capability to receive ERDS data from the NRC, and that Vermont may only seek clarification of the ERDS data from the NRC.<sup>28</sup> Whereas the data provided from the NRC to the State are governed by MOUs, the data provided from the facility directly to the State are governed by the facility's EP. In the case of VY, its EP provides that it communicates to Vermont in an emergency through its "InForm Notification System," which

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<sup>22</sup> See Letter from Northeast Nuclear Energy to NRC, Millstone Nuclear Power Station, Unit Nos. 1, 2, and 3 Notification of Changes to Emergency Response Data System, at 1 (Dec. 27, 2000) (ADAMS Accession No. ML010050379) ("Millstone Unit No. 1 is being decommissioned and therefore its data link has been terminated.").

<sup>23</sup> See Letter from NRC to Dominion Energy Kewaunee, Inc., Kewaunee Power Station - Termination of Emergency Response Data System Feed to the U.S. Nuclear Regulatory Commission (Feb. 18, 2015) (ADAMS Accession No. ML14363A302) (acknowledging the termination of ERDS at the Kewaunee Power Station).

<sup>24</sup> See Letter from Duke Energy to NRC, Crystal River Unit 3 - Revisions to the Radiological Emergency Response Plan and Implementing Procedures, at Enclosure 2, p.3 (Sept. 25, 2014) (ADAMS Accession No. ML14274A266) ("[ERDS] reference was removed throughout the [Radiological Emergency Response Plan], since the requirements for ERDS, as defined by 10 CFR 50, Appendix E, Section VI.2, do not apply to permanently shut down nuclear power facilities.").

<sup>25</sup> See Letter from Southern California Edison to NRC, Docket Nos. 50-206, 50-361, 50-362, and 72-41; Revision to Emergency Plan Implementing Procedures; San Onofre Nuclear Generating Station (SONGS), Units 1, 2, 3, and the Independent Spent Fuel Storage Installation, at Attachment 4, p.1 (Aug. 26, 2014) (ADAMS Accession No. ML14245A032) (removing ERDS from the emergency plan).

<sup>26</sup> See 56 Fed. Reg. at 40,180.

<sup>27</sup> See Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Vermont, 62 Fed. Reg. 6,281 (Feb. 11, 1997).

<sup>28</sup> *Id.* at 6,282. The MOU also provides that it "may be terminated upon 30 days written notice by either party." *Id.*

sends emergency notification forms through the internet or, as a backup, VY communicates through the “Nuclear Alert System,” which is a system of dedicated phone circuits, or the commercial phone system.<sup>29</sup> The VY EP does not state that ERDS data are provided from VY to Vermont; it only states that ERDS data are provided from VY to the NRC.<sup>30</sup>

## II. Procedural History

VY is a boiling-water reactor (BWR) located in the Town of Vernon, Windham County, Vermont.<sup>31</sup> On September 23, 2013, Entergy informed the NRC that it would permanently cease operations at VY and that the plant’s permanent shutdown would occur in approximately the fourth quarter of 2014.<sup>32</sup>

On March 24, 2014, in support of the planned permanent shutdown of VY, Entergy submitted a license amendment request (LAR) pursuant to 10 C.F.R. § 50.90 requesting changes to the VY EP that would reduce the minimum required on-shift staffing and Emergency Response Organization (ERO) staffing at VY after its permanent shutdown and defueling.<sup>33</sup> Entergy stated that this reduction in its VY staffing would be commensurate with the reduced

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<sup>29</sup> Letter from Entergy to NRC, Emergency Plan Change, Revision 55, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28, at Attachment 1, p.40 (Letter dated Feb. 23, 2015; EP effective date Feb. 5, 2015) (ADAMS Accession No. ML15076A074) (VY EP Rev. 55). See *also id.* at Attachment 1, p.90-92 (describing the type of information communicated from VY to the State of Vermont).

<sup>30</sup> See Letter from Entergy to NRC, Emergency Plan Change, Revision [54], Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28, at Attachment, p.42 (Dec. 19, 2013) (ADAMS Accession No. ML14339A646).

<sup>31</sup> See Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Renewed Facility Operating License, Renewed Operating License No. DPR-28, at 2 (Mar. 21, 2011) (ADAMS Accession No. ML052720265).

<sup>32</sup> Letter from Michael Perito, Senior Vice President, Chief Operating Officer, Entergy, to the NRC, Notification of Permanent Cessation of Power Operations, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Sept. 23, 2013) (ADAMS Accession No. ML13273A204).

<sup>33</sup> See Letter from Christopher J. Wamser, Site Vice President, Entergy, to the NRC, Proposed Changes to the Vermont Yankee Emergency Plan, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28, at 1-2 (Mar. 24, 2014) (ADAMS Accession No. ML14085A257) (LAR).

spectrum of credible accidents for reactors that are permanently shutdown and defueled.<sup>34</sup> This is because, for a reactor in a shutdown and defueled condition, the on-shift staffing is only required to ensure the safe storage of spent fuel in the SFP, as opposed to the safe operation of a reactor, and the ERO staffing is only required to ensure that the licensee effectively responds to accident scenarios that may credibly result from the storage of spent fuel in the SFP, as opposed to the diverse accident scenarios associated with an operating reactor.<sup>35</sup>

Pursuant to 10 C.F.R. Part 50, Appendix E, § IV.A.9, Entergy justified its LAR application's reduced on-shift staffing levels with a staffing analysis that examined the applicable accident scenarios for VY in its permanently shutdown condition, the plant actions and emergency plan implementation actions required to respond to these accident scenarios, the allocation of these actions among the requested on-shift personnel, and whether the allocation of these actions would conflict with either the on-shift personnel's emergency plan role or operational role.<sup>36</sup> This on-shift staffing analysis is the only portion of the LAR that refers to ERDS. Specifically, when listing the required emergency plan implementation tasks that must be accomplished by the requested on-shift personnel for each applicable accident scenario, Entergy listed the task of "Activate ERDS" as "N/A" or not applicable.<sup>37</sup> Entergy explained that "[t]he task of ERDS activation is . . . not included as an on-shift task requiring evaluation as part of this staffing analysis" because "[t]he VY [ERDS] link to the NRC will not be operational in a permanently shut down and defueled condition."<sup>38</sup>

On July 22, 2014, the Staff published a notice in the *Federal Register* providing the public with an opportunity to request a hearing regarding the VY staffing LAR by September 22,

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<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.* at Attachment 1, p.1-3.

<sup>36</sup> *Id.* at Attachment 4, p.10.

<sup>37</sup> *Id.* at Attachment 4, p.21, 27, 33, and 39.

<sup>38</sup> *Id.* at Attachment 4, p.8.

2014.<sup>39</sup> On September 22, 2014, Vermont contacted the NRC Office of the Secretary and provided its Hearing Request via email.<sup>40</sup> Vermont subsequently resubmitted its Hearing Request via the NRC's E-Filing System on September 24, 2014.<sup>41</sup>

Vermont's Hearing Request consisted of one proposed contention, which stated that:

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.<sup>[42]</sup>

Vermont asked that "either (1) the ERDS link to the NRC be retained during Vermont Yankee's permanently shut down and defueled period; or (2) an alternate means similar to ERDS be 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."<sup>43</sup>

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<sup>39</sup> Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 42,539, 42,539-42 (July 22, 2014).

<sup>40</sup> See Memorandum from Annette L. Vietti-Cook, NRC Office of the Secretary, to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, 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) (ADAMS Accession No. ML14273A498) (ASLBP Referral Letter).

<sup>41</sup> *Id.*

<sup>42</sup> Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request, at 3-4 (dated Sept. 22, 2014; filed via the NRC's E-Filing system Sept. 24, 2014) (ADAMS Accession No. ML14267A524) (Hearing Request).

<sup>43</sup> *Id.* at 5.

The Staff opposed the admission of the proposed contention and the granting of the requested relief. The Staff stated that the proposed contention boiled down to a concern that the ERDS connection between VY and the NRC would no longer be available following the permanent shutdown of VY.<sup>44</sup> Therefore, the Staff argued that Vermont's proposed contention was not within the scope of, or material to, the license amendment proceeding because the LAR had to do with a reduction in staffing and did not request the termination of ERDS.<sup>45</sup> The Staff also argued that the proposed contention constituted an inadmissible challenge to the Commission's regulations at 10 C.F.R. Part 50, Appendix E, § VI.2, which except from the ERDS requirement all permanently shutdown nuclear power facilities.<sup>46</sup> Entergy opposed Vermont's proposed contention arguing that it was untimely, was not within the scope of the LAR proceeding, lacked adequate support, and failed to raise a genuine dispute with the LAR.<sup>47</sup>

On January 12, 2015, pursuant to 10 C.F.R. § 50.82(a)(1)(i) and (ii), Entergy certified to the NRC that VY had permanently ceased operations and that fuel had been permanently removed from the VY reactor vessel and placed in the VY SFP.<sup>48</sup> Consequently, pursuant to 10 C.F.R. § 50.82(a)(2), the VY 10 C.F.R. Part 50 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel.

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<sup>44</sup> NRC Staff's Answer to Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request, at 8 (Oct. 20, 2014) (ADAMS Accession No. ML14293A114) (Staff's Answer).

<sup>45</sup> *Id.* at 9-12, 15-16. Subsequently, Entergy used the 10 C.F.R. § 50.54(q)(3) process to terminate the VY ERDS connection, which does not require prior NRC approval, as opposed to using the 10 C.F.R. § 50.90 license amendment process to request the NRC's prior approval to terminate the VY ERDS connection. See VY EP Rev. 55, at Attachment 9.2(3), p.6 of 7.

<sup>46</sup> Staff's Answer at 12-13. See also Transcript of Teleconference in the Matter of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), at 77-85 (Dec. 1, 2014) (ADAMS Accession No. ML14337A666) (Tr.).

<sup>47</sup> Entergy's Answer Opposing the State of Vermont's Notice of Intention to Participate, Petition to Intervene, and Hearing Request, at 1-2 (Oct. 20, 2014) (ADAMS Accession No. ML14293A701).

<sup>48</sup> Letter from Christopher J. Wamser, Site Vice President, Entergy, to the NRC, Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan. 12, 2015) (ADAMS Accession No. ML15013A426).

On January 28, 2015, in LBP-15-4, the Board denied Vermont's Hearing Request stating that Vermont's proposed contention "collaterally challenges an NRC regulation and therefore is not admissible."<sup>49</sup> The Board stated that the ERDS rule consists of an ERDS program and a schedule for the implementation of that program.<sup>50</sup> The Board further stated that the ERDS program excepts "all nuclear power facilities that are shut down permanently" from providing an ERDS link.<sup>51</sup> The Board concluded that, "[i]n light of the regulation's unambiguous purpose" to "enhance the NRC's ability to monitor 'what is taking place *at the reactor during an accident*,'" this regulatory exception "is most reasonably interpreted as exempting from the ERDS program all nuclear reactors that, like Vermont Yankee, have permanently ceased operations and defueled – i.e., that are permanently shut down."<sup>52</sup> Stated another way, the Board defined the term "shut down permanently" to mean a facility that "has permanently ceased reactor operations, and permanently removed fuel from the reactor vessel, as those terms are defined in 10 C.F.R. § 50.2."<sup>53</sup> Therefore, "[t]o the extent Vermont's contention would require Entergy to maintain the ERDS link or to create another ERDS-like system after Vermont Yankee's reactor is permanently shut down and defueled, it seeks to impose a requirement more stringent than the requirement imposed in Section VI" and is, thus, "an impermissible collateral attack on a regulation in derogation of 10 C.F.R. § 2.335(a) [that] must be rejected as inadmissible."<sup>54</sup>

The Board also rejected Vermont's argument that 10 C.F.R. Part 50, Appendix E, § VI merely implemented the mandatory roll-out of the ERDS program in 1991, creating obligations

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<sup>49</sup> *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op. at 1).

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.* at 12 (quoting 10 C.F.R. Pt. 50, App. E, § VI.2).

<sup>52</sup> *Id.* (quoting 56 Fed. Reg. at 40,179) (emphasis in original).

<sup>53</sup> *Id.* at 15-16.

<sup>54</sup> *Id.* at 13.

and exceptions that applied only to nuclear reactor facilities existing in 1991.<sup>55</sup> The Board stated that this interpretation “def[ies] common sense” because it would mean that the ERDS requirement would not apply prospectively to newly built reactors contrary to 10 C.F.R. § 50.47(e), which states that the holder of a combined license for a newly built reactor must comply with 10 C.F.R. Part 50, Appendix E.<sup>56</sup> Furthermore, the Board reasoned that the exception provision of 10 C.F.R. Part 50, Appendix E, § VI.2, is written in broad terms and that nothing suggests that it was intended to only apply to plants operating in 1991.<sup>57</sup>

Finally, the Board agreed with the Staff and Entergy that, “before Entergy may change its emergency plan to discontinue the ERDS link, section 50.54(q)(3) requires Entergy to ‘perform and retain an analysis that concludes that the removal of ERDS is not a reduction in [emergency plan] effectiveness’<sup>58</sup> and which analysis is “subject to review by the NRC Staff.”<sup>59</sup> Therefore, the Board concluded that the opportunity for relief available to Vermont is not through this license amendment proceeding but, instead, “if Vermont has a credible basis to question the adequacy of Entergy’s compliance with 10 C.F.R. § 50.54(q)(3), it may petition for enforcement action under 10 C.F.R. § 2.206 . . . .”<sup>60</sup> The Board also stated that, “[t]o promote public confidence in the emergency planning process, we encourage the Staff and Entergy to make the [10 C.F.R. § 50.54(q)(3)] analysis available to Vermont.”<sup>61</sup>

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<sup>55</sup> *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op. at 17).

<sup>56</sup> *Id.* at 18.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 21 (quoting Memorandum from Robert J. Lewis, Director, Division of Preparedness and Response, Office of Nuclear Security and Incident Response, NRC, at 2 (June 2, 2014) (ADAMS Accession No. ML14099A520)).

<sup>59</sup> *Id.* at 23.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at n.106. Because the Board rejected Vermont’s proposed contention as a collateral attack on the ERDS exception provision, it did not consider whether it was inadmissible on the alternative grounds that it “(1) falls outside the scope of this proceeding; (2) is not material to findings the NRC Staff



One of the three Board judges dissented from the Board holding that Vermont's proposed contention was an inadmissible collateral attack on the ERDS exception provision of 10 C.F.R. Part 50, Appendix E, § VI.2. Instead, the dissenting judge stated that, "[a] more logical reading of Section VI.2 is that the 'exemption clause' only applies to those plants that were already shut down at the time of the rulemaking and not to plants at which an ERDS was later installed."<sup>62</sup>

At about the same time as this Board decision, on January 26, 2015, Entergy completed a 10 C.F.R. § 50.54(q)(3) analysis, which found that, for VY in its permanently shutdown and defueled condition, "removing ERDS would not reduce the effectiveness of the VY Emergency Plan" and that "[a] revised VY Emergency Plan that reflects the retirement of ERDS would continue to comply with the requirements of 10 CFR 50.47(b)(6), 50.72(c)(3), and the remaining applicable requirements of Appendix E to 10 CFR Part 50."<sup>63</sup> Therefore, this analysis concluded that the removal of ERDS "can be implemented without prior NRC approval."<sup>64</sup> On February 4, 2015, the NRC granted the VY reduction-in-staffing LAR.<sup>65</sup> On February 23, 2015, Entergy provided Revision 55 of the VY EP to the NRC.<sup>66</sup> Consistent with Entergy's 10 C.F.R. § 50.54(q)(3) analysis of the removal of ERDS from VY in its permanently shutdown condition,

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must make on the LAR; (3) is unsupported by adequate factual information or expert opinion; and (4) fails to raise a genuine dispute of material law or fact with the LAR." *Id.* at 13 n.65.

<sup>62</sup> See *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op.) (Wardwell, J., dissenting, at 2) (Dissent).

<sup>63</sup> See VY EP Rev. 55, at Attachment 9.2(3), p.6 of 7.

<sup>64</sup> *Id.*

<sup>65</sup> See Letter from NRC to Vice President, Operations, 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) (ADAMS Accession No. ML14346A065).

<sup>66</sup> See Letter from Entergy to NRC, Emergency Plan Change, Revision 55, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Feb. 23, 2015) (ADAMS Accession No. ML15076A074). The effective date of Revision 55 of the VY EP was February 5, 2015.

Revision 55 of the VY EP no longer contained any references to ERDS because “ERDS is not applicable to nuclear power facilities that are shut down.”<sup>67</sup>

On February 23, 2015, Vermont sent copies of its appeal of LBP-15-4 via email to the parties.<sup>68</sup> On February 24, 2015, Vermont filed its appeal via the NRC’s E-Filing System.<sup>69</sup>

### DISCUSSION

Pursuant to 10 C.F.R. § 2.311(c), since LBP-15-4 denied Vermont’s Hearing Request, it is appealable by Vermont “on the question as to whether the [hearing] request . . . should have been granted.” On appeal, the Commission defers to a Board’s contention admissibility rulings unless the appeal points to an “error of law or abuse of discretion” on the part of the Board.<sup>70</sup>

Vermont proffers “three contested issues” in its Appeal.<sup>71</sup> Two of these issues have to do with whether the Board was correct in denying Vermont’s Hearing Request as an inadmissible collateral attack on the ERDS exception provision of 10 C.F.R. Part 50, Appendix E, § VI.2. The Commission should affirm the Board’s interpretation of this regulation and, consequently, its holding that, since Vermont’s proposed contention seeks requirements in excess of those required by this regulation, as properly interpreted, it must be denied.

The third issue identified by Vermont for Commission review is whether the NRC was correct in granting the VY reduction-in-staffing LAR without first reviewing Entergy’s 10 C.F.R. § 50.54(q)(3) analysis of its termination of the VY ERDS and whether Entergy was allowed to

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<sup>67</sup> VY EP Rev. 55, at Attachment 9.1(2), p.20-21, 52 of 52. Although the VY EP no longer contains references to ERDS, it still provides for ENS, *see id* at Attachment 1, p.41-42, which is required to be used to provide notifications to the NRC Operations Center, *see* 10 C.F.R. § 50.72(a)(1).

<sup>68</sup> *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, at 2 (Feb. 24, 2015) (ADAMS Accession No. ML15055A276).

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g., Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014) (citations omitted).

<sup>71</sup> Appeal at 5.

terminate the VY ERDS without first submitting this analysis to the NRC.<sup>72</sup> As an initial matter, this issue is beyond the scope of the limited appeal right of 10 C.F.R. § 2.311(c) because it is a challenge to alleged Staff actions occurring after the Board ruling and, thus, does not point to errors allegedly made in the Board's ruling. The Commission should additionally reject this issue because 10 C.F.R. § 50.54(q)(3) explicitly allows a licensee to change its EP without prior NRC approval and, therefore, this issue is without merit. Finally, although Vermont had argued in its Reply Brief that Entergy had not yet completed a 10 C.F.R. § 50.54(q)(3) analysis, the Board was correct in rejecting this argument as untimely<sup>73</sup> and, even if it had been timely raised, this argument is inadmissible because it is unsupported in derogation of the Commission's contention admissibility requirements at 10 C.F.R. § 2.309(f)(1).

I. The Commission's Regulations Unambiguously Except Permanently Shutdown Reactors such as VY from the ERDS Requirement

Vermont's proposed contention seeks to require Entergy to maintain ERDS at VY after that facility's permanent shutdown and defueling and up until all of its spent fuel has been transferred to dry cask storage.<sup>74</sup> On its face, this argument appears to directly contradict 10 C.F.R. Part 50, Appendix E, § VI.2, which states that nuclear power facilities that are shut down permanently are not required to maintain ERDS. A contention that calls for requirements in excess of those imposed by the Commission's regulations, for instance, in this case, requiring the maintenance of ERDS where it is not otherwise required, is an inadmissible collateral attack on the Commission's regulations.<sup>75</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op. at 22).

<sup>74</sup> See Hearing Request at 3-4, 5; Tr. at 21-22; Appeal at 3, 11, 20.

<sup>75</sup> *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012) ("This proposition contravenes our longstanding practice of rejecting, as a collateral attack, any contention calling for requirements in excess of those imposed by our regulations."); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000) (rejecting an "attempt[] to impose . . . a requirement more stringent tha[n] the one imposed by the regulations"); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995) ("[T]he Intervenor[s] are, in essence, contending that

Vermont attempts to avoid this result with respect to its proposed contention by providing two alternative interpretations of the 10 C.F.R. Part 50, Appendix E, § VI.2 exception provision. First, Vermont argues that “[t]he prospective nature of the § VI.2 points to a broader reading” of the regulation such that it should be interpreted as requiring ERDS at both operating reactors and permanently shutdown reactors that have previously had ERDS installed.<sup>76</sup> Under this interpretation, the ERDS exception provision would only except from the ERDS requirement those facilities that were shut down permanently and that had never installed ERDS. Second, Vermont argues that the ERDS exception provision is limited in time and only applies to plants that were permanently shut down as of the promulgation of the ERDS requirement in 1991.<sup>77</sup>

The Board stated that Vermont’s various interpretations of the ERDS exception provision were unreasonable and that the better interpretation was that it “exempt[s] from the ERDS program all nuclear reactors that, like Vermont Yankee, have permanently ceased operations and defueled . . . .”<sup>78</sup> In reaching this conclusion, the Board did not commit an error of law or abuse its discretion; instead, this conclusion is supported by (1) the plain language of the ERDS regulation, (2) the structure of the ERDS regulation, (3) the intent of the ERDS regulation, (4) the historical understanding of the ERDS regulation, and (5) common sense. Therefore, the Commission should affirm the Board’s ruling that, since the ERDS regulation, properly interpreted, does not require VY to maintain ERDS in its permanently shutdown condition, Vermont’s proposed contention seeking to require the maintenance of ERDS at VY constitutes an inadmissible collateral attack on this regulation.<sup>79</sup>

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those regulatory provisions are themselves insufficient to protect the public health and safety. This assertion constitutes an improper collateral attack upon our regulations.”) (footnote omitted)).

<sup>76</sup> Appeal at 5-9.

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op. at 12).

<sup>79</sup> See 10 C.F.R. § 2.335(a).

A. The Plain Language of the ERDS  
Exception Provision Supports the Board's Ruling

The ERDS exception provision states that, “[e]xcept for Big Rock Point and all nuclear power facilities that are shut down permanently or indefinitely, onsite hardware shall be provided at each unit by the licensee to interface with the NRC receiving system.”<sup>80</sup> This regulatory provision is written in the present tense and its language is broad and unconditional. Although the ERDS regulation does not define “shut down permanently,” 10 C.F.R. § 50.82(a)(2) states that a 10 C.F.R. Part 50 license “no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel” once the licensee has submitted its “certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel . . . .” Therefore, the plain language of the ERDS exception provision indicates, as the Board held in LBP-15-4,<sup>81</sup> that, upon the submission of these certifications, the licensee is no longer required to provide hardware at its units to interface with the NRC ERDS receiving system and, thus, may terminate ERDS.

Vermont attempts to read into the ERDS exception provision the additional limitation that, to be excepted, a nuclear power facility must have been shut down permanently as of 1991, but there is no support for this reading in the plain language of the regulation. Had the NRC intended this to be the case, it would have made this limitation explicit in the language of the regulation itself. For instance, in 10 C.F.R. Part 50, Appendix E, § VI.4, the NRC explicitly set a deadline of February 13, 1993 for the completion of ERDS implementation. This use of a deadline in the same rulemaking as the rulemaking giving rise to the ERDS exception provision demonstrates that the rule’s drafters knew how to limit the rule’s language in time when such a limitation was desired. The fact that the exception provision was not explicitly limited in time to

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<sup>80</sup> 10 C.F.R. Pt. 50, App. E, § VI.2.

<sup>81</sup> *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op. at 16 n.80) (“[W]e conclude the exception provision applies to licensees who certify permanent cessation of operations *and* permanent removal of fuel from the reactor vessel.”).

1991 demonstrates that it was not intended to be limited in time to 1991. Therefore, Vermont's attempt to retroactively or implicitly read this requirement into the provision should be denied.<sup>82</sup>

B. The Structure of the ERDS Regulation Supports the Board's Ruling

Vermont argues that the ERDS exception provision is limited to "the initial installation, startup, operation, and maintenance of the newly-created ERDS" in 1991, that it does not apply to licensees that had already installed ERDS after 1991, and that it was "rendered unnecessary as a result of § VI.4.d after February 13, 1993."<sup>83</sup> However, the structure of 10 C.F.R. Part 50, Appendix E, § VI belies this interpretation of the ERDS exception provision and, instead, supports the interpretation that the ERDS exception provision applies to all permanently shutdown nuclear power facilities regardless of when they were shut down.

Vermont's argument is dependent on reading the entirety of 10 C.F.R. Part 50, Appendix E, Section VI as an implementing procedure; however, Section VI is actually divided into four independent subsections: Subsection 1 provides a general description of ERDS; Subsection 2 provides a detailed description of the ERDS hardware and software; and Subsection 3 describes the maintenance of ERDS. Only Subsection 4 discusses how ERDS is to be implemented. Specifically, it states that all licensees must develop and submit an ERDS implementation plan by October 28, 1991 and must complete the implementation of ERDS by "February 13, 1993, or before initial escalation to full power, whichever comes later."<sup>84</sup> There is no indication that the implementation timing requirements of Subsection 4 apply to any of the other subsections. On the contrary, Subsections 1, 2, and 3, including the ERDS exception provision, all appear to be regulations of general applicability that are not limited in time. This is

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<sup>82</sup> Furthermore, the ERDS exception provision is part of a rule developed under the Administrative Procedure Act, which defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4) (emphasis added).

<sup>83</sup> Appeal at 9-11.

<sup>84</sup> 10 C.F.R. Pt. 50, App. E, § VI.4.d.

supported by the language of Subsection 4 itself which refers to Subsections 1 and 2 as “the requirements for ERDS.”<sup>85</sup> Furthermore, the Statements of Consideration refer to the ERDS rule as consisting, separately, of an ERDS program and a schedule for implementing the ERDS program.<sup>86</sup>

In conclusion, the Commission should interpret Subsections 1, 2, and 3, including the ERDS exception provision, as providing the requirements for the ERDS program, which are not constrained in time, and interpret Subsection 4 as providing the separate schedule for implementing the ERDS program. Consequently, the Commission should reject Vermont’s contrary interpretation of the ERDS regulation and affirm the Board’s ruling that Vermont’s proposed contention is an inadmissible collateral attack on this regulation.

C. The Regulatory Intent Supports the Board’s Ruling

Vermont also argues that the intent behind the ERDS rule supports interpreting the ERDS requirement broadly so that it is applicable to all operating and permanently shutdown facilities and, thus, that only those facilities that were permanently shutdown as of the rule’s promulgation in 1991 are excepted.<sup>87</sup> However, a close reading of the Statements of Consideration accompanying the final ERDS rule demonstrates that the ERDS rule was intended to apply only to operating facilities subject to reactor accidents and not to permanently shutdown facilities subject only to SFP accidents, regardless of when they were permanently shut down.

The Statements of Consideration demonstrate that the ERDS requirement was intended to apply only to operating reactors through such statements as: “[the NRC] is amending its regulations to require licensees of all operating nuclear power facilities except Big Rock Point to participate in the [ERDS] program” and “ERDS is a direct [electronic data link between computer

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<sup>85</sup> *Id.*

<sup>86</sup> See 56 Fed. Reg. at 40,178; 55 Fed. Reg. at 41,095.

<sup>87</sup> Appeal at 6-9.

data systems used by licensees of operating reactors and the NRC Operations Center (NRCOC) during the declaration of an alert or higher emergency classification.”<sup>88</sup> This is further supported by the Statements of Consideration stating that the purpose of ERDS is to transfer “reactor” data<sup>89</sup> and to improve the NRC’s understanding of what is happening at the “reactor.”<sup>90</sup> Also, when referring to the public health and safety, the Statements of Consideration only discuss “reactor” accidents.<sup>91</sup> The terms “spent fuel” and “spent fuel pool” do not appear in the Statements of Consideration and the Statements of Consideration do not address the risks of SFP accidents. The fact that the Statements of Consideration only discuss the risks posed by operating reactors and operating reactor accidents and not the risks posed by permanently shutdown reactors and SFP accidents refutes Vermont’s argument that the ERDS requirement should be interpreted as applying to both operating facilities as well as facilities that were shut down permanently after 1991.

Furthermore, there is no support for Vermont’s argument that “[p]lacing a limitation on the types of accident scenarios where ERDS should be employed would be patently contrary to the NRC’s stated charge of protecting public health and safety.”<sup>92</sup> On the contrary, the NRC has consistently drawn a distinction between the emergency planning requirements for operating facilities and those for permanently shutdown and defueled facilities. This is because the risk of an offsite radiological release is significantly lower and the types of possible accidents are

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<sup>88</sup> 56 Fed. Reg. at 40,178 (emphasis added).

<sup>89</sup> *Id.* at 40,179, 40,180, 40,182, 40,184.

<sup>90</sup> *Id.* at 40,179, 40,183.

<sup>91</sup> *See, e.g., id.* at 40,179 (“The NRC, in its mandated role to protect public health and safety, has a responsibility in the event of a reactor accident to monitor the actions of the licensee, who has the primary continuing responsibility for limiting the consequences of the accident.”); *id.* (“[T]he principal effect of ERDS will be a marked improvement in the availability, timeliness, and reliability of key information about what is taking place at the reactor during an accident, particularly during the critical early hours before the NRC Site Team arrives . . .”).

<sup>92</sup> Appeal at 8.



significantly fewer at permanently shutdown and defueled facilities than at operating facilities.<sup>93</sup> Additionally, for SFP accidents, which are the accidents of concern at permanently shutdown and defueled facilities, the NRC has found that there would be a significant amount of time before any radiological release.<sup>94</sup> This again refutes Vermont's argument that the ERDS requirement should apply to permanently shutdown facilities. Instead, it is apparent from the Statements of Consideration that what the NRC was concerned about with respect to the ERDS rule was fast-moving operating reactor accidents and not slow-moving SFP accidents.<sup>95</sup>

D. The Historical Understanding of the ERDS Exception Provision Supports the Board's Ruling

Consistent with the plain language of the ERDS exception provision of 10 C.F.R. Part 50, Appendix E, § VI.2, the overall structure of the ERDS rule, and the regulatory intent expressed by the ERDS rulemaking's Statements of Consideration, both the NRC and licensees have historically understood the ERDS requirement as being inapplicable to all permanently shutdown facilities. Contrary to this historic understanding, Vermont asserts that the ERDS requirement should be interpreted as being inapplicable to only permanently shutdown facilities that do not store spent fuel in their SFPs.<sup>96</sup> This interpretation is refuted by the fact that ERDS was not installed at the facilities that were permanently shut down as of the February 13, 1993 ERDS implementation deadline even though these facilities stored spent fuel in their SFPs at

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<sup>93</sup> See, e.g., SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements*, at 2 (Nov. 14, 2014) (ADAMS Accession No. ML14227A711) (SECY-14-0125) (approved by the Commission in SRM-SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements* (Mar. 2, 2015) (ADAMS Accession No. ML15061A516)). See also NUREG-1738, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants*, at x (Feb. 2001) (ADAMS Accession No. ML010430066) (finding that the relaxation of offsite emergency planning for permanently shutdown and defueled facilities would result in an acceptably small change in risk).

<sup>94</sup> See, e.g., The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,208 (Aug. 8, 2008).

<sup>95</sup> See 56 Fed. Reg. at 40,179 (discussing the "critical early hours" of the response to an operating reactor accident and the fact that "15-30 minutes old" information is insufficient for such a response).

<sup>96</sup> Appeal at 3, 11, 20.

that time.<sup>97</sup> Vermont also asserts that the ERDS requirement should be interpreted as being inapplicable to only facilities that were permanently shut down as of 1991.<sup>98</sup> This interpretation is refuted by the fact that the facilities that have permanently shut down after installing ERDS have then removed all references to ERDS from their EPs.<sup>99</sup> This consistent understanding of the applicability of the ERDS requirement over the course of its history supports the Board's holding that the ERDS requirement is inapplicable to all permanently shutdown facilities, regardless of whether they store spent fuel in their SFPs and regardless of when they were permanently shut down.<sup>100</sup>

E. The Board's Ruling is Based on Common Sense

Vermont's argument that the ERDS exception provision should be interpreted as being limited in time to facilities permanently shut down as of 1991 should also be rejected because such an interpretation would "defy[] common sense."<sup>101</sup> For instance, upon the docketing of the certifications<sup>97</sup> for permanent cessation of operations and permanent removal of fuel from the reactor vessel, a licensee's 10 C.F.R. Part 50 license no longer authorizes the operation of the reactor,<sup>102</sup> but the license is not terminated. Instead, the licensee may maintain its 10 C.F.R. Part 50 license for 60, or possibly more, years while it conducts decommissioning.<sup>103</sup> Therefore, taken to its logical extreme, if the ERDS exception provision were interpreted such that it did not apply to facilities that were permanently shut down and defueled after 1991, then the regulations

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<sup>97</sup> See *supra* at p.3-4.

<sup>98</sup> Appeal at 9.

<sup>99</sup> See *supra* at p.4-5.

<sup>100</sup> *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op. at 12).

<sup>101</sup> See *id.* at 18 (stating that if 10 C.F.R. Part 50, Appendix E, Section VI, in its entirety, were a one-time requirement that applied only to units existing in 1991, then this would mean that it was not intended to apply prospectively to newly built reactors, which interpretation would defy common sense).

<sup>102</sup> 10 C.F.R. § 50.82(a)(2).

<sup>103</sup> 10 C.F.R. § 50.82(a)(3).

would require even a 10 C.F.R. Part 50 licensee whose facility consisted solely of dry casks to maintain an ERDS connection with the NRC.<sup>104</sup>

Vermont attempts to avoid this result of its interpretation by stating that it only seeks a “finite extension of ERDS use” until “the spent fuel is transferred to dry cask storage and the credible risk of an emergency involving the potential release of radiation . . . has passed . . . .”<sup>105</sup> In making this concession, however, Vermont is no longer arguing how the existing ERDS exception provision should be interpreted, but is, in effect, arguing what the existing ERDS exception provision should say – *i.e.*, that it should say that nuclear power facilities that are shut down permanently and that don’t store spent fuel in their SFPs shall be exempt from the ERDS requirement. Vermont then asserts that the ERDS requirement should apply to permanently shutdown facilities until their spent fuel is transferred out of their SFPs to dry cask storage because exempting permanently shutdown facilities with spent fuel in their SFPs would only “save a relatively small amount of ongoing operating expenses.”<sup>106</sup> Not only is this statement unsupported by the record,<sup>107</sup> but, more importantly, this statement is irrelevant to the interpretation of the ERDS exception provision. Vermont is essentially arguing in favor of a change to the ERDS exception provision, which is otherwise plain on its face. Such an argument is not admissible in licensing proceedings<sup>108</sup> and, instead, should be pursued as a petition for rulemaking.<sup>109</sup>

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<sup>104</sup> See *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_\_ (slip op. at 15 n.76) (“[A] nuclear power ‘facility’ arguably exists until final decommissioning, which may take up to 60 years, or longer if approved by the Commission.”).

<sup>105</sup> Appeal at 11-12.

<sup>106</sup> *Id.* at 9.

<sup>107</sup> See Tr. at 38:11-17 (Entergy stating that the estimated costs to maintain all of the equipment and support personnel that are required to maintain ERDS from the time of VY’s permanent shut down to when all of its spent fuel is scheduled to be transferred to dry cask storage in 2020 is \$680,000).

<sup>108</sup> See 10 C.F.R. § 2.335(a).

<sup>109</sup> See 10 C.F.R. § 2.335(e).

II. Vermont's Arguments Related to 10 C.F.R. § 50.54(q)(3) Are Without Merit and Do Not Meet the Requirements for Contention Admissibility

A. Entergy Can Remove References to ERDS from the VY Emergency Plan Without Prior NRC Review and Approval

A substantial portion of Vermont's Appeal is premised on the argument that Entergy's staffing reduction license amendment must be preceded by the NRC's review and approval of Entergy's discontinuation of ERDS at VY;<sup>110</sup> however, this premise is incorrect. There are two types of changes to emergency plans: changes that require prior NRC review and approval and changes that do not. The discontinuation of ERDS at VY is a change that does not require prior NRC review and approval because Entergy has complied with the procedural requirements of 10 C.F.R. § 50.54(q)(3) for making this change without prior NRC review and approval.<sup>111</sup>

A licensee can make a change to its emergency plan without prior NRC approval if the licensee performs and retains an analysis demonstrating that the change will not result in a reduction in the effectiveness of the emergency plan and that the plan, as changed, will continue to meet the requirements of 10 C.F.R. Part 50, Appendix E, and the planning standards of 10 C.F.R. § 50.47(b).<sup>112</sup> The regulations define a reduction in effectiveness as a "change in an emergency plan that results in reducing the licensee's capability to perform an emergency planning function in the event of a radiological emergency"<sup>113</sup> and an "emergency

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<sup>110</sup> See, e.g., Appeal at 12-16, 19-20.

<sup>111</sup> See VY EP Rev. 55, at Attachment 9.2(3) (Entergy's 10 C.F.R. § 50.54(q)(3) analysis determining that revising the VY EP to reflect the retirement of ERDS would not reduce the effectiveness of the VY EP and that the VY EP, as revised, would continue to comply with regulatory requirements and, therefore, that the retirement of ERDS could be implemented without prior NRC approval).

<sup>112</sup> 10 C.F.R. § 50.54(q)(3). This analysis is subject to NRC inspection. See Enhancements to Emergency Preparedness Regulations, 76 Fed. Reg. 72,560, 72,579 (Nov. 23, 2011) (Final rule) ("[Section 50.54(q)(5)] requires the licensee to submit, as specified under § 50.4, a report of each such change, including a summary description of its evaluation, within 30 days of the change being put into effect. The NRC expects that the record of changes will fully describe each change made and will include documentation of the evaluation that determined the change was not a reduction in effectiveness. The NRC will use this record of changes during inspection oversight of the licensee's implementation of § 50.54(q)(2).").

<sup>113</sup> 10 C.F.R. § 50.54(q)(1)(iv).

planning function” as “a capability or resource necessary to prepare for and respond to a radiological emergency, as set forth in the elements of section IV. of appendix E to this part and, for nuclear power reactor licensees, the planning standards of § 50.47(b).”<sup>114</sup> The licensee must submit a report of each such change including a summary of its analysis to the NRC within 30 days after the change is put in effect.<sup>115</sup> If the licensee cannot perform and retain an analysis demonstrating that the change does not reduce the effectiveness of the EP, then the change cannot be made without prior NRC approval.<sup>116</sup> Instead, such a change must be submitted as a license amendment request for prior NRC review and approval in accordance with the requirements of 10 C.F.R. §§ 50.90 and 50.91.<sup>117</sup>

As a general matter, ERDS does not perform an emergency planning function because it is not typically used by licensees to prepare for or respond to a radiological emergency.<sup>118</sup> ERDS is a supplement to the ENS that provides the NRC with additional timely and accurate data regarding parameters critical to emergencies at operating power reactors so that the NRC may accurately and promptly assess the situation during an emergency.<sup>119</sup> Because the determination of whether a change to an EP reduces its effectiveness is based on whether there is a reduction in the licensee’s capability to prepare for and respond to a radiological emergency and because the ERDS requirement generally has to do with the NRC’s role in responding to a

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<sup>114</sup> 10 C.F.R. § 50.54(q)(1)(iii).

<sup>115</sup> 10 C.F.R. § 50.54(q)(5).

<sup>116</sup> 10 C.F.R. § 50.54(q)(4).

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

<sup>118</sup> See Memorandum from Robert J. Lewis, Director, Division of Preparedness and Response, Office of Nuclear Security and Incident Response, NRC, at 2 (June 2, 2014) (ADAMS Accession No. ML14099A520) (Lewis Memorandum).

<sup>119</sup> See 56 Fed. Reg. at 40,178.

radiological emergency, removing an EP's references to ERDS would not normally be a reduction in effectiveness.<sup>120</sup>

With respect to the removal of all references to ERDS from the VY EP for VY in its permanently shutdown and defueled condition, Entergy performed and retained an analysis demonstrating that this change would not result in a reduction in the effectiveness of the VY EP and that the VY EP, as changed, would continue to meet the requirements of 10 C.F.R. Part 50, Appendix E, and the planning standards of 10 C.F.R. § 50.47(b).<sup>121</sup> This analysis included Entergy's identification of all of the references to ERDS in the VY EP and its determination that "[t]he [VY Emergency Response Organization] and on-shift personnel . . . do not rely on ERDS to obtain plant data."<sup>122</sup> Since Entergy complied with the procedural requirements of 10 C.F.R. § 50.54(q)(3) in removing all of the references to ERDS from the VY EP, it is not required, contrary to Vermont's arguments, to obtain prior NRC review and approval for this change.<sup>123</sup>

B. Vermont Cannot Challenge the Staff's Grant of the VY Staffing License Amendment Request in this Appeal

The regulations at 10 C.F.R. § 2.311(c) provide that an order denying a petition to intervene and/or request for hearing "is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted." Vermont's assertion of error goes beyond the question of whether its Hearing Request should have been granted

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<sup>120</sup> See Lewis Memorandum at 2.

<sup>121</sup> See VY EP Rev. 55, at Attachment 9.2(3).

<sup>122</sup> *Id.* at p.1, 6 of 7.

<sup>123</sup> To the extent that Vermont's arguments are a challenge to the adequacy of Entergy's 10 C.F.R. § 50.54(q)(3) analysis itself, this is a question of NRC oversight subject to a 10 C.F.R. § 2.206 petition for agency action and not a question of NRC licensing subject to a 10 C.F.R. § 2.309 hearing request. See *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC \_\_, \_\_ (Dec. 19, 2014) (slip op. at 8-11); *Omaha Pub. Power Dist.* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC \_\_, \_\_ (Mar. 9, 2015) (slip op. at 7-8, 11) ("[H]earing rights do not attach to licensee changes made under Section 50.59 because those changes do not require NRC approval but are instead subject to normal NRC oversight through the inspection process. Accordingly, to the extent that the [petitioner] wishes to challenge a Section 50.59 analysis, we have consistently held that such challenges may only be taken by means of a petition for enforcement action under 10 C.F.R. § 2.206.").

because Vermont challenges the propriety of the Staff's subsequent action on the VY reduction-in-staffing LAR by stating that it "appeals the NRC Staff's granting of the requested license amendment in question without receipt or review of safety analysis the ASLB directed the licensee to conduct, pursuant to 10 CFR § 50.54(q)(3), compromising the health and safety of Vermont citizens."<sup>124</sup> Vermont complains that the Staff's grant of the license amendment after the Board's decision "was plainly made without review of a ERDS safety analysis."<sup>125</sup> Vermont concludes that "Entergy's failure to conduct the ERDS safety analysis and its disconnection of the VY ERDS feed . . . coupled with the NRC Staff's issuance of the LAR without review of the analysis . . . justifies overturning the [ASLB] Order and admitting the State's contention."<sup>126</sup>

Vermont's proposed contention challenges the VY license amendment that reduced onsite staffing to reflect the permanently shutdown and defueled status of the facility.<sup>127</sup> The Board dismissed this proposed contention on the grounds that the contention constituted a challenge to the Commission's regulations. Accordingly, on appeal, Vermont can argue that this Board decision was incorrect;<sup>128</sup> it cannot, however, argue that the Staff's later action on the LAR was incorrect.<sup>129</sup> As the Commission held in an earlier proceeding involving Vermont Yankee, "[t]he NRC has not, and will not, litigate claims about the adequacy of the Staff's safety

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<sup>124</sup> Notice of Appeal at 1-2.

<sup>125</sup> Appeal at 13.

<sup>126</sup> *Id.* at 14.

<sup>127</sup> Hearing Request at 4.

<sup>128</sup> See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 458 (2006) ("The purpose of an appeal to the Commission is to point out errors made in the Board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.").

<sup>129</sup> See *Pa'ina Hawaii, LLC (Materials License Application)*, CLI-08-3, 67 NRC 151, 168 n.73 (2008) ("[T]he issue in this proceeding is the adequacy of the Pa'ina application, not the adequacy of the Staff's safety review."); *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3)*, CLI-09-5, 69 NRC 115, 123 n.39 (2009).

review in licensing adjudications. . . . [T]he petitioner must show that a ‘genuine dispute exists *with the applicant/licensee* on a material issue of law or fact.’”<sup>130</sup>

C. Vermont’s 10 C.F.R. § 50.54(q)(3) Argument Was Untimely Raised

The Board correctly ruled as untimely Vermont’s argument that 10 C.F.R. § 50.54(q)(3) requires that Entergy complete its evaluation prior to removing references to ERDS from the VY EP.<sup>131</sup> Vermont did not raise this argument in its Hearing Request; Vermont only raised this argument in its Reply Brief.<sup>132</sup> New arguments raised in a reply, to which the Staff and the applicant have no right to respond, are routinely rejected as untimely.<sup>133</sup> Therefore, the Board was correct in rejecting this 10 C.F.R. § 50.54(q)(3) argument as untimely and this rejection should be affirmed by the Commission.

D. Vermont’s Public Health and Safety Claims Are Unsupported

Vermont has failed to provide support for its repeated claims before the Board<sup>134</sup> and now before the Commission<sup>135</sup> that access to ERDS data is critical to the State’s ability to protect the public health and safety of its citizens. Vermont does not explain how it uses ERDS, why ERDS is indispensable, or what information ERDS provides that the State cannot obtain from another source. Vermont only proffers vague, unparticularized, and unsupported

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<sup>130</sup> *Amergen Energy Co, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476-77 (2008) (emphasis in original) (quoting 10 C.F.R. § 2.309(f)(1)(vi)). In any event, the Staff was not required to review and approve Entergy’s 10 C.F.R. § 50.54(q)(3) analysis regarding the discontinuation of ERDS before it could approve the license amendment request regarding staffing reductions. See *supra* at 23-25.

<sup>131</sup> *Vermont Yankee*, LBP-15-4, 81 NRC at \_\_ (slip op. at 22).

<sup>132</sup> See 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 9-13 (Oct. 31, 2014) (ADAMS Accession No. ML14308A570) (Reply).

<sup>133</sup> See *American Centrifuge Plant*, CLI-06-10, 63 NRC at 472; *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004).

<sup>134</sup> Hearing Request at 4-5; Reply at 2-7.

<sup>135</sup> Appeal at 16-20.



statements that do not meet the contention admissibility requirement in 10 C.F.R.

§ 2.309(f)(1)(v).<sup>136</sup>

In its Hearing Request, Vermont asserted in conclusory fashion, without explanation, that in the absence of ERDS, it would require “significantly more time to obtain accurate data needed for State protective action recommendations.”<sup>137</sup> Vermont also referenced comments it had submitted to the NRC on the VY staffing LAR.<sup>138</sup> In those comments, the Vermont Public Service Department stated that ERDS is identified in the State’s Radiological Emergency Response Plan (RERP) “as the means for the Public Service Coordinator . . . to assess Vermont Yankee conditions as part of Vermont’s protective action decision-making process.”<sup>139</sup> Then, in its Reply Brief, Vermont cited two portions of its RERP in support of its claim that “ERDS notification [is] a critical part of the State’s [RERP].”<sup>140</sup> Those portions of the RERP (1) describe ERDS and identify the State representatives responsible for its operation<sup>141</sup> and (2) identify ERDS as one of several sources of information during an operating reactor event that the State can use to decide whether to advise members of the public to take potassium iodide

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<sup>136</sup> See *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 715 (2012); *Shieldalloy Metallurgical Corp.* (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-5, 65 NRC 341, 352 (2007) (rejecting vague, unparticularized contention unsupported by affidavit, expert, or documentary support); *USEC, Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 596-97 (2005) (while a petitioner need not prove its case at the contention admissibility stage, it is required to supply a factual basis for its contention).

<sup>137</sup> Hearing Request at 5.

<sup>138</sup> *Id.* at 3.

<sup>139</sup> 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) (ADAMS Accession No. ML14239A029).

<sup>140</sup> Reply at 9-10. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) (an intervenor may not use a reply brief to provide the factual basis for its contention).

<sup>141</sup> State of Vermont Emergency Operations Plan 2013, Incident Annex 9A, Vermont Radiological Emergency Response Plan, at 99-100 (Aug. 21, 2012) (ADAMS Accession No. ML14308A571) (Vermont RERP).

(KI) tablets.<sup>142</sup> The RERP does not identify ERDS as a source of information for any other emergency planning activity by Vermont.<sup>143</sup>

While Vermont's concerns may be appropriate where an operating reactor is involved, they are not applicable to VY, which is permanently shutdown and defueled. Vermont's argument that, without ERDS, it would need significantly more time to make its protective action recommendations may be of concern in a fast-moving operating reactor event, but it is not in a slow-moving SFP event.<sup>144</sup> Also, the Staff has determined that, for permanently shutdown and defueled facilities, there is a "low likelihood of any credible accident resulting in radiological releases requiring offsite protective measures."<sup>145</sup> Finally, although the ingestion of KI is an offsite protective measure for operating reactor accidents, it is not applicable in the unlikely event of an SFP accident because radioactive iodine isotopes are no longer present.<sup>146</sup> In the face of the Staff's analysis, Vermont's conclusory and abbreviated references to ERDS in the Vermont RERP do not support Vermont's claim that it needs ERDS in order to protect its citizenry from an SFP accident at a permanently shutdown and defueled VY.

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<sup>142</sup> *Id.* at 121-22. KI tablets can prevent or reduce the absorption by the thyroid gland of radioactive iodine that may be released in the event of an accident at an operating reactor. *See id.*

<sup>143</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) (a document relied on by an intervenor is subject to scrutiny for what it shows and what it does not show).*

<sup>144</sup> *See* SECY-14-0125 at 4-5.

<sup>145</sup> *Id.* at 5.

<sup>146</sup> *Id.* at Enclosure, p.5.

CONCLUSION

For the reasons stated above, the Commission should deny Vermont's Appeal of the Atomic Safety and Licensing Board's Memorandum and Order LBP-15-4.

Respectfully submitted,

**/Signed (electronically) by/**

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**Executed in Accord with 10 CFR 2.304(d)**

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Dated at Rockville, Maryland  
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  
 )  
(Vermont Yankee Nuclear Power Station) )

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF IN OPPOSITION TO THE STATE OF VERMONT'S APPEAL OF LBP-15-4," dated March 20, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 20th day of March, 2015.

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 20th day of March, 2015