

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	Docket No. 50-271-LA-2
ENTERGY NUCLEAR VERMONT)	
YANKEE, LLC AND ENTERGY)	ASLBP No. 15-937-02-LA-BD01
NUCLEAR OPERATIONS, INC.)	
)	June 12, 2015
(Vermont Yankee Nuclear Power Station))	

**THE STATE OF VERMONT'S BRIEF IN SUPPORT OF
NOTICE OF APPEAL OF ATOMIC SAFETY AND LICENSING BOARD'S
MAY 18, 2015 MEMORANDUM AND ORDER DENYING
PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST**

Aaron Kisicki
Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620
Tel: (802) 828-3785
aaron.kisicki@state.vt.us

Counsel for the State of Vermont

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INTRODUCTION

Pursuant to 10 CFR § 2.311(b) and (c), the State of Vermont (“State”), represented by the Vermont Department of Public Service, hereby submits to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) the following brief in support of its notice of appeal of the Atomic Safety and Licensing Board’s (“ASLB” or “Board”) May 18, 2015 Memorandum and Order (“ASLB Order”) ¹ denying the State’s February 9, 2015 Petition for Leave to Intervene, and Hearing Request (“LAR Petition”). The ASLB clearly erred in denying the LAR Petition. The Board acted prematurely and in an arbitrary and capricious manner when it found that the State’s Contention One was moot in advance of the NRC’s reconsideration of Entergy’s directly related exemption request. It also erred in finding that the State’s Contention Two did not provide sufficient information to show that a genuine dispute exists with Entergy on a

¹ ASLB Memorandum and Order (Denying Hearing Request)(May 18, 2015)(NRC Agencywide Document Access Management System [ADAMS] Accession No. ML15138A270).

material issue of fact or law. Lastly, the ASLB should have properly found that a hearing right on the related exemption request was triggered pursuant to federal law and NRC precedent.

BACKGROUND

On March 14, 2014, Entergy filed a request for exemptions from portions of 10 CFR § 50.47 and Part 50, Appendix E at VY (“Exemption Request”).² Entergy sought the requested exemptions to “allow VY to reduce emergency planning requirements and subsequently revise the VY Emergency Plan consistent with the anticipated permanently defueled condition of the station.”³ To date, the Exemption Request has not been noticed in the Federal Register. On June 12, 2014, Entergy filed its LAR seeking to revise the VY site emergency plan (“SEP”) and Emergency Action Level (“EAL”) scheme to reflect a permanently defueled condition.⁴ Entergy explicitly conceded the LAR was “predicated on approval of requests for exemptions” that were filed three months earlier, but had not been approved or granted by the NRC at the time of filing.⁵

On November 14, 2014, NRC Staff issued a recommendation to the NRC to approve Entergy’s Exemption Request.⁶ The LAR was noticed in the Federal Register on December 9,

² See Letter from Christopher Wamser, Entergy Site Vice President, to NRC Document Control Desk (March 14, 2014)(BVY 14-009)(ML14080A141).

³ *Id.* at 1.

⁴ See Letter from Christopher Wamser, Entergy Site Vice President, to NRC Document Control Desk, (June 12, 2014)(BVY 14-033)(ML14168A302).

⁵ *Id.* at 2.

⁶ See Memorandum from Mark A. Satorius, Executive Director for Operations, to NRC Commissioners (November 14, 2014)(SECY 14-0125)(ML14227A711).

2014.⁷ The Federal Register notice made neither reference to the Exemption Request, nor provided an opportunity for public comment regarding the same. On February 9, 2015, the State filed its LAR Petition and supporting declarations and comments in response to the LAR.⁸ The LAR Petition contained two contentions: one, the LAR was not ready for review as the predicate exemptions had not been ruled upon by NRC at the time of filing; and two, the LAR failed to adequately account for all credible emergency scenarios and increases the risk to public health and safety.

On March 2, 2015, the NRC approved the Staff's recommendation to grant the Exemption Request, on a 3-1 vote – 21 days after the State submitted its LAR Petition and supporting comments speaking directly to concerns and objections it had over the exemption request, but four days before the deadline for Entergy and NRC Staff to file answers to the LAR Petition.⁹ The NRC's voting record and supporting comments provided no analysis in response to the State's comments submitted on February 9, much less gave any indication that the Commissioners reviewed the comments or were aware of the directly related LAR before the ASLB.

On March 6, 2015, Entergy and NRC Staff separately filed answers in opposition to the State's Petition.¹⁰ Both Entergy and NRC Staff argued that NRC's approval of the Staff's

⁷ See *Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations*, (79 FR 73109)(December 9, 2014).

⁸ See State of Vermont's Petition for Leave to Intervene, and Hearing Request (Feb. 9, 2015)(ML15040A726). The December 9, 2104 LAR *Federal Register* notice requested public comments on or before January 8, 2015. On January 8, 2015, NRC issued a 30 day extension of the public comment period to February 9, 2015. See Notice from James Kim, Plant Licensing IV-2 and Decommissioning Transition Branch (Jan. 8, 2015)(ML15008A098).

⁹ See Commission Voting Record re Request by Entergy Nuclear Operations, Inc., for Exemptions From Certain Emergency Planning Requirements (Mar. 2, 2015)(ML15062A135); Memorandum from Annette L. Vietti-Cook to Mark A. Satorius re Staff Requirements – SECY 14-0125 (Mar. 2, 2015)(ML15061A516).

exemption request recommendation made the LAR Petition's first contention moot.¹¹ However, Entergy asserted the State had the opportunity to comment on the Exemption Request prior to the State filing the LAR Petition, and that the "Staff will notify the State and provide it an opportunity to submit comments before the NRC publishes an Environmental Assessment and Finding of No Significant Impact in the *Federal Register*, and final notice after the exemption is issued."¹² In stark contrast to Entergy, the NRC Staff argued flatly that "Vermont is [n]ot [e]ntitled to [c]omment on the [e]xemption."¹³

On March 12, 2015, the State filed a petition for reconsideration of the March 2 Commission approval of the NRC Staff's recommendation with respect to exemption request ("Reconsideration Petition").¹⁴ The Reconsideration Petition articulated three bases for NRC consideration. First, the exemption request was directly related to the LAR, triggering a right to a hearing and review of the exemptions and LAR together; second, the Commission was required to analyze the environmental impacts of the exemption request and LAR pursuant to the National Environmental Policy Act ("NEPA") prior to issuing its approval of the exemption request; and third, the Commission should have considered all existing obligations Entergy has to the State when it reviewed the exemption request. The State also filed a motion to stay the ASLB proceeding pending the Commission's reconsideration of its exemption request approval

¹⁰ See Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015) (ML15065A300); NRC Staff's Answer to State of Vermont's Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015)(ML15065A364).

¹¹ See Entergy's Answer at 16-17; NRC Staff's Answer at 21-22.

¹² Entergy Answer at 12-13.

¹³ NRC Staff Answer at 27.

¹⁴ State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests (Mar. 12, 2015)(ML15071A485).

contemporaneously with the Reconsideration Petition.¹⁵ The ASLB ultimately denied the State's motion to stay on March 16, 2015.¹⁶

The State filed its reply to Entergy and Staff's opposition to the LAR petition on March 17, 2015, emphasizing the pending motion for reconsideration at the Commission, the hearing right on the exemption request triggered by the direct relationship of the exemption request on the LAR, and the LAR-specific issues raised in the State's LAR Petition.¹⁷ The ASLB then held oral argument regarding admissibility of the State's contentions on April 8, 2015, despite the State's numerous pleadings that the ASLB should stay the proceeding pending a Commission ruling on the motion to reconsider, and that the State has the right to a hearing on the related exemption request.¹⁸ On May 18, 2015, the ASLB issued its order denying the LAR Petition – prior to any ruling by the Commission on the State's Reconsideration Petition – leading to this appeal.

¹⁵ State of Vermont's Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration (Mar. 12, 2015)(ML15071A487). Entergy filed a motion in opposition to the State's motion on March 13, 2015 arguing the State had failed to engage in consultation with the parties in advance of filing of the motion, pursuant to 10 C.F.R. §2.323(b), and the ASLB denied the State's motion on those grounds the same day. *See* Entergy's Answer Opposing the State of Vermont's Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration (Mar. 13, 2015)(ML15072A462); ASLB Order (Denying Motion to Stay the Proceeding)(Mar. 13, 2015)(ML15072A182). The State then refiled its motion after consultation with the parties. *See* State of Vermont's Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration (Mar. 13, 2015)(ML15072A460).

¹⁶ ASLB Order (Denying Motion to Stay the Proceeding and Extending the Deadline for Reply)(Mar. 16, 2015)(ML15075A306).

¹⁷ The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition and Entergy Answers to Petition for Leave to Intervene and Hearing Request (Mar. 17, 2015)(ML1576A546).

¹⁸ ASLB Notice and Order (Scheduling and Providing Instructions for Oral Argument)(Apr. 1, 2015)(ML15091A399); Official Transcript of Proceedings (Apr. 8, 2015)(ML15104A384).

STANDARD OF REVIEW

The State files this appeal as a matter of right pursuant to 10 C.F.R. § 2.311(c).¹⁹ Where, as here, a petition to intervene is denied and the principal error upon which the appeal is based is a legal error or abuse of discretion, the Commission does not defer to the decision of the ASLB:

Our rules of practice provide for an automatic right to appeal a licensing board decision deciding standing and contention admissibility, on the question whether a petition to intervene and request for hearing should have been granted, or denied in its entirety. Here, FirstEnergy argues that the Board should have denied Petitioners' hearing request because Petitioners submitted no admissible contentions. In examining contention admissibility, we generally defer to the Board unless we find either an error of law or abuse of discretion.²⁰

DISCUSSION

The ASLB erred when it rejected the State's two contentions. First, it acted prematurely, arbitrarily, and capriciously when it dismissed Contention One as moot, without adequately evaluating all possible outcomes of the Commission's pending reconsideration of the exemption request. Second, the Board erred when it found that Contention Two did not provide sufficient information to show that a genuine dispute exists over a material issue of law or fact. These errors are compounded by the ASLB's failure to recognize the State's right to a hearing on the directly related exemption request as part of the Board's review of the instant LAR.

I. The ASLB Erred When It Dismissed Contention One as Moot and Failed to Recognize the State's Right to Hearing on the Exemption Request as Part of the License Amendment Proceeding

The ASLB rested its denial of the LAR Petition in large part on a broad assumption about the outcome of the Commission's reconsideration of its approval of the NRC Staff's recommendation to grant the exemption request. The lynchpin of the ASLB Order with respect

¹⁹ *In re All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents*, 77 N.R.C. 39, 44 (2013).

²⁰ *In re FirstEnergy Nuclear Operating Co.*, 75 N.R.C. 393, 396-397 (2012)(footnotes omitted).

to rejection of Contention One and a hearing right on the exemption request was that the “the Board assumes the correctness of the Commission’s decision.”²¹ This assumption of Commission correctness was arbitrary, and deprived the State of a hearing right on both the exemption request and Contention One. The Administrative Procedures Act (“APA”),²² as applied to the Atomic Energy Act (“AEA”),²³ requires that ASLB actions or conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” are to be set aside and held unlawful.²⁴

A. The ASLB’s erred in dismissing Contention One as moot

The ASLB’s discussion of Contention One contains two sentences, and its analysis is a mere 14 words: “[b]ecause the Commission has now approved the pertinent regulatory exemptions, the contention is moot.”²⁵ This analysis is deficient at best and no analysis at all at worst, but it certainly violates the AEA and APA. In addition, the Commission has not approved the exemption request, but has merely accepted the Staff’s recommendation that the exemption request be granted by the Staff. The Staff has received considerable additional information from the State providing reasons why it should not proceed to grant the exemption and is proceeding to prepare an environmental analysis of the proposed exemption.

Here, the ALSB avoided addressing Contention One on the merits by arbitrarily assuming that Commission had rendered a final judgment on the exemption request. The record before the ASLB at the time of the Order did not support this assumption. The record showed

²¹ ASLB Order at 6.

²² 5 U.S.C. § 500 *et seq.*

²³ 42 U.S.C. § 2011 *et seq.*

²⁴ 5 U.S.C. § 706(2); *see also* 42 U.S.C. 2231 (AEA § 181).

²⁵ *Id.* at 7.

that the Commission had not rendered a decision on the Reconsideration Petition, and that, in fact, additional public input was being sought by the NRC on the NEPA issue directly raised in the Reconsideration Petition that could have a material impact on the Commission's review of the exemption request.²⁶ The Board had two legitimate options to pursue when faced with this ongoing uncertainty: either address all possible outcomes of the Commission's reconsideration of the exemption request on the merits, or withhold a decision on the LAR Petition until after the Commission ruled on the Reconsideration Petition. The ASLB did neither in this instance.

The Board's one sentence analysis and conclusion was arbitrary because it failed to recognize all possible outcomes of the Commission on the Reconsideration Petition and render its conclusion on the merits. The ASLB attempted to address this fatal flaw in the Order by noting (in a footnote) that "[e]ven if the Commission were to grant reconsideration, this contention would remain moot because the Commission would have yet again addressed the exemptions."²⁷ This blanket reasoning is incorrect and fails to address the possible Commission actions that would not render Contention One moot.

For example, the Commission may rule that the exemption request should be included for review as part of a related LAR proceeding. Likewise, the exemption request may be denied after review of the completed environmental assessment. Under either scenario, the LAR could not be approved by NRC Staff, either by operation of the Commission's denial of the Staff's recommendation related to the exemption request, or without additional opportunity to petition the NRC for a hearing on the combined exemption and LAR. The ASLB instead chose, without

²⁶ See State of Vermont's Notice of Supplemental Authority (May 4, 2015)(ML15124A845)(alerting the Commission to the NRC Staff's issuance of a Draft Environmental Assessment and Finding of No Significant Impact that was not available at the time of the Commission's March 2, 2015 approval of the exemption request).

²⁷ ASLB Order at footnote 30.

authority or analysis, to evaluate only one possible outcome of the Reconsideration Petition to the exclusion of all others.

The ALSB's failure to consider and evaluate all possible outcomes of Commission's unknown response to the Reconsideration Petition has resulted in a premature and unnecessary denial of the State's right to a hearing on Contention One. The Board was neither required, by statute or regulation, to issue its Order before the Commission had completed its reconsideration of the exemption request, nor was it reasonable to limit its analysis to a single possible outcome from the NRC. The Board's conclusion that Contention One is moot should be set aside as a result.

B. The ALSB erred when it failed to recognize the State's right to a hearing on the exemption request, and erred in its interpretation of applicable NRC precedent

Like its flawed mootness analysis, the ALSB acted arbitrarily and erroneously when it failed to recognize the State's right to a hearing on the exemption request directly related to the LAR. It did so for the same reasons discussed above: the ALSB failed to consider all possible outcomes of the Commission's reconsideration of the exemption request, and how those alternative outcomes could affect the State's hearing rights on the exemption. More importantly, the Board's analysis of the relevant NRC decisions discussing hearing rights attached to exemption requests is clearly erroneous. The Commission's disposition on the exemption request itself does not affect the NRC's established test to determine whether a hearing right is triggered.

The Board recognized in its Order, as did the parties throughout the proceeding, that *Private Fuel Storage* ("PFS") currently stands as the seminal NRC decision addressing hearing rights attached to certain exemption requests. The State has discussed *PFS* and its application in

this proceeding in both its Reconsideration Petition and its reply to NRC Staff and Entergy answers to the LAR Petition.²⁸ A review of that analysis is appropriate here.

Although NRC has generally held that an intervenor has no right to a hearing to challenge an exemption request, it has created a clear exception to this rule.²⁹ The Commission has held that when an exemption request is “directly related” to a licensing amendment action, and an intervenor raises an admissible contention related to the exemption, that contention should be subject to a hearing.³⁰ In *PFS*, the NRC granted a hearing on an exemption request that was made during the pendency of a licensing proceeding for a proposed Independent Spent Fuel Storage Installation (“ISFSI”). Key to the decision was whether the exemption request was a direct part of an initial license or licensing amendment request:

[I]t is not true that the Commission only grants a hearing on exemption requests that are directly related to an already-admitted contention. The proper focus is on *whether the exemption is necessary for the applicant to obtain an initial license or amend its license*. Where the exemption is thus a direct part of an initial licensing or licensing amendment action, there is a potential that an interested party could raise an admissible contention on the exemption, triggering the right to a hearing under the AEA.³¹

A hearing right clearly exists where a licensing action is predicated on an exemption request:

“[b]ecause resolution of the exemption request directly affects the licensability of the proposed

²⁸ See Reconsideration Petition at 4-6; State Reply at 2-6.

²⁹ See 42 U.S.C. § 2239(a)(1) and *In the Matter of Commonwealth of Edison Co. (Zion Nuclear Power Station)*, CLI-00-05, 51 NRC 90, 98.

³⁰ *In the Matter of Private Fuel Storage, LLC (“PFS”)*, CLI-01-12, 53 NRC 459, 476; see also, e.g., *In the Matter of Honeywell International, Inc.*, CLI-13-1, 77 NRC 1, 7 (“But when a licensee requests an exemption in a related license amendment application, we consider the hearing rights of the amendment application to encompass the exemption request as well.”).

³¹ *PFS* at 470 (emphasis added).

ISFSI, the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties.”³²

Entergy’s LAR flatly states that the request is dependent on granting of the Exemption Request.³³ If the Exemption Request is denied, the LAR must also be denied. The LAR would otherwise authorize activities that fall below the safety requirements of currently applicable regulations. Because “the exemption is necessary for the applicant to . . . amend its license,” it “trigger[s] the right to a hearing under the AEA.”³⁴

A proper examination of the LAR’s potential impact on public health and safety cannot be made independent of the Exemption Request – a point repeatedly stressed in the State’s LAR Petition. The two must be reviewed together. The use of an exemption “cannot remove a matter germane to a licensing proceeding from consideration in a hearing, assuming an interested party raises an admissible contention thereon. To hold otherwise would exclude critical safety questions from licensing hearings merely on the basis of an ‘exemption’ label.”³⁵

The ASLB attempts to avoid confronting the clear mandate from the NRC to grant a hearing right to the State on the exemption request by drawing a single distinction between the facts in *PFS* and the current proceeding.³⁶ In *PFS*, the NRC Staff granted an exemption during the review of a related LAR. Here, the Commission itself approved the related exemption request, and, as the ASLB stated, the Board assumed the correctness of the Commission approval

³² *PFS* at 467.

³³ See footnote 5 (Energy’s LAR was “predicated on approval of requests for exemptions”).

³⁴ *Id.* at 470.

³⁵ *Id.*

³⁶ ASLB Order at 5.

absent direction to the contrary. This reasoning does not, however, remove the Board from the requirement of recognizing the State's hearing right.

Whether the Commission was correct in approving the exemption has no bearing on the exclusive question of whether the exemption is sufficiently related to the LAR to trigger a hearing right. The Commission did not consider the question of whether a hearing right was triggered by the exemption when it reviewed Entergy's request. Its review was limited to the recommendation placed before it by the NRC Staff. NRC approval of the exemption request was simply not "correct" on the question of a hearing right, as implied by the ASLB Order.

The request to consolidate the LAR and exemption request for comprehensive review was submitted to the ASLB in the State's LAR Petition and Reply, not to the Commission. The Petition, in particular, raised safety concerns arising from the exemption request that were germane to the LAR, and were posed to the ASLB at the outset of the proceeding. There is, in short, no material difference between the circumstances here and those in *PFS* that would justify denying the State's recognized right to a hearing on the exemption request as part of an LAR proceeding. The State therefore respectfully requests that the Commission grant it a right to a hearing on the exemption request directly related to the license amendment request.

II. The ASLB Erred In Determining That Contention Two Did Not Provide Sufficient Information to Show That a Genuine Dispute Exists on a Material Issue of Law or Fact

The State's LAR Petition outlines a number of health and safety concerns arising exclusively from the LAR in Contention Two. Chief among those concerns are the omission of implementing procedures of the revised VY site emergency plan and Emergency Action Level scheme, and the lack of analysis of a number of credible hostile action scenarios, and the impact of those omissions on the Entergy's obligations pursuant to 10 C.F.R. § 50.54(q)(4) and

Appendix E to Part 50.³⁷ State experts discussed these concerns and their impact on the State's and Entergy's ability to adequately protect public health and safety in declarations supporting the LAR Petition.³⁸ The ASLB declined to admit Contention Two, finding that the core issues raised failed to genuinely dispute the LAR.³⁹ The Board erred when it found that Contention Two failed to show a genuine dispute.

A request for hearing on a petition for leave to intervene must set forth with particularity the contentions sought to be raised.⁴⁰ Each contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a

³⁷ See LAR Petition at 7-9.

³⁸ See LAR Petition, Attachment A, Comments and Declarations of the Vermont Department of Public Service Regarding Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme License Amendment Request BY 14-033 ("Leshinskie Declarations")(Feb. 9, 2015)(ML15040A728); Attachment B, Comments and Declarations of the Vermont Division of Emergency Management and Homeland Security on BVY 14-033 Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme ("Bornemann Declarations")(Feb. 9, 2015)(ML15040A724); Attachment C, Comments and Declarations of the Vermont Department of Health on Entergy Vermont Yankee's License Amendment Request for the Emergency Planning Zone in Letter BVY 14-033 Dated June 12, 2014 and SECY-14-0125 Dated November 14, 2014 (Feb. 9, 2015)(ML15040A729).

³⁹ ASLB Order at 9.

⁴⁰ 10 C.F.R. § 2.309(f)(1).

material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, ***if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.***⁴¹

With respect to the genuine dispute requirements of 10 C.F.R. § 2.309(f)(1)(vi), a petitioner must “make a minimal showing that the material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate,” as opposed to a “bald or conclusory allegation that such a dispute exists.”⁴² The petitioner does not, however, need to demonstrate that it will prevail on the merits in the dispute, nor does the evidentiary support need to be of the quality necessary to withstand a summary disposition motion.⁴³ But like summary disposition, “support for a contention may be viewed the in light that is favorable to the petitioner and inferences that can be drawn from evidence may be construed in favor of the petitioner.”⁴⁴

Here, the State identified, with specificity and consistent with the requirements of 10 C.F.R. § 2.309(f)(1), two significant omissions contained in Entergy’s LAR, and explained in detail the impact of those omissions on the Entergy’s obligations under 10 C.F.R. § 50.54(q)(4) as they related to the effectiveness of the revised emergency plan and public health and safety. The ASLB, on the other hand, found that in both instances, the State was unable to show a genuine dispute with Entergy on an issue of fact or law. The ASLB’s findings are incorrect.

⁴¹ 10 C.F.R. 2.309(f)(1)(i)-(vi) (emphasis added).

⁴² *In the Matter of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.*, ASLB Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption) at 16 (“Contention Order”)(Sept. 22, 2006)(ML062650337)(quoting 54 Fed. Reg. at 33,171).

⁴³ *Id.* (quoting 54 Fed. Reg. at 33,170-71).

⁴⁴ *Id.* at 14 (citing *In the Matter of Arizona Public Service Company, et. al.*(*Palo Verde Nuclear Generating Station, Unit Nos. 1, 2 and 3*) 34 N.R.C. 149, 155 (Aug. 16, 1991)(CLI-91-12)).

The ASLB Order dismissed the State’s safety concern about the LAR’s lack of implementing procedures, stating simply that the Bornemann Declarations did “not explain the significance of those implementing details.”⁴⁵ To the contrary, both the LAR Petition and Bornemann Declarations explain the significance of the implementing procedures omission in plain and stark terms. The State would be unable to effectively execute its own Radiological Emergency Response Plan in harmony with the VY Emergency Plan in the event of an emergency, and it would be “impossible for those agencies and governmental agencies identified [in 10 C.F.R. §§ 50.47(b) and Part 50, Appendix E] to provide supplemental support to the licensee to understand how and when that support will be needed.”⁴⁶

The Bornemann Declarations satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) without further detailed analysis. At the contention admissibility stage of the proceeding, the petitioner is required only to “indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware.”⁴⁷ “A petitioner does not have to provide an exhaustive list of its experts or evidence to prove the merits of its contention at the admissibility stage.”⁴⁸

The genuine dispute of fact in this instance is clear and simple: Entergy submits that a revised emergency plan without companion implementing procedures does not reduce the emergency plan effectiveness or protection of public health and safety. The State disputes Entergy’s claim, and has identified the LAR’s omission and the adverse impacts of that omission

⁴⁵ ASLB Order at 9.

⁴⁶ Bornemann Declarations at 5; *see also* LAR Petition at 7.

⁴⁷ Contention Order at 14 (quoting 54 Fed. Reg. at 33,170).

⁴⁸ *Id.* (citing *Louisiana Energy Serv. L.P. (National Enrichment Facility)*, CLI-04-35, 60 NRC 619).

on the protection of public health and safety and Entergy's obligations under 10 C.F.R. § 50.54(q)(4).

In the same vein, the ASLB rendered the State's concern over the omission of credible threat analysis in admissible because the State's expert, Anthony Leshiniskie, did not "dispute any specific portion of Entergy's fuel handling accident analysis."⁴⁹ Again, the ASLB was incorrect. The Board erred on three levels in making this finding.

First, the contentions and support outlined in the LAR Petition and Leshiniskie Declarations meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). With respect to the basis for the Board's rejection of the State's credible accident analysis omission concern, the State is not required to identify a specific portion of Entergy's fuel handling accident analysis to dispute. In the instance of contention born out of an applicant's failure to include information in an LAR, the petitioner is required to identify "each *failure* and the supporting reasons for the petitioner's belief."⁵⁰ This requirement makes sense because in the instance of a lack of information, there is no specific portion of the LAR to dispute. The lack of information in the record forms the basis of the contention. Both the LAR Petition and the Leshiniskie Declarations squarely identify Entergy's failure to provide an adequate analysis of credible and site-specific accident scenarios, and reasons for that belief.⁵¹

Second, the Leshiniskie Declaration identifies with specificity the portions of the LAR where additional information should exist, namely the accident scenario analysis section, and the section evaluating fuel transfer accidents. But again, Mr. Leshiniskie's ability to identify specific portions of the LAR at issue was limited by the LAR's omission of this critical information.

⁴⁹ ASLB Order at 9.

⁵⁰ 10 C.F.R. 2.309(f)(1)(vi) (emphasis added).

⁵¹ See LAR Petition at 8; Leshiniskie Declarations at 1-4.

Third, a review Entergy's fuel handling accident analysis, cited by the ASLB, reveals that no consideration was given to the existence of on-site high-burnup fuel in the analysis.⁵² The Leshinskie Declarations, on the other hand, sites to a number of evidentiary sources related to high-burnup fuel risks to support the contention. As discussed above, a genuine dispute with respect to issue of fact has been established and supported by ample evidence, justifying admission of Contention Two.

CONCLUSION

Based on the ASLB's errors, the State respectfully requests that the Commission hear the State's appeal of the Board's May 12, 2015 order denying the request for a hearing. The State also requests that the Commission find that the ASLB was in error in dismissing the LAR Petition's two contentions, and in failing to recognize the State's right to a hearing on the exemption request directly related to the license amendment request.

The State requests that the Commission consolidate this appeal and the pending petition for reconsideration of the NRC's approval of the Staff's recommendation to grant Entergy's exemption request, dated March 12, 2015. Review of this appeal and the Reconsideration Petition together is appropriate. Finally, the State urges the Commission to set aside the findings of the ASLB, recognize the State's right to a hearing on the exemption request as it relates to this proceeding, and permit the State to submit revised contentions to the ASLB in a proceeding that includes consideration of both the license amendment request and the directly related exemption request. The State requests that the scope of the consolidated hearing would include

⁵² Entergy's Technical Specifications Proposed Change No. 306, Eliminate Certain ESF Requirements During Movement of Irradiated Fuel (Nov. 14, 2013)(BVY 13-097)(ML13323A516), cited by the ASLB in its Order at 9, contains two filings: a letter from Letter from Christopher Wamser, Entergy Site Vice President, to NRC Document Control Desk and Attachments 1-3 (ML13323A518), and Attachments 4-5 (ML13323A519). An analysis of the impact of on-site high-burnup fuel is not present in either of the filings. Likewise, an analysis of a hostile action scenario that includes the use of an accelerant in the fuel pool is not found.

consideration of new or revised contentions addressing the license amendment request, the related exemption request, and whether the NRC Staff's draft EA and FONSI is adequate to support the exemption request.

Respectfully submitted,

/Signed (electronically) by/

Aaron Kisicki

Counsel for the State of Vermont

Vermont Department of Public Service

112 State Street – Drawer 20

Montpelier, VT 05620

(802) 828-3785

aaron.kisicki@state.vt.us

Dated at Montpelier, Vermont
This 12th day of June, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	Docket 50-271-LA-2
ENTERGY NUCLEAR VERMONT)	
YANKEE, LLC AND ENTERGY)	ASLBP No. 15-937-02-LA-BD01
NUCLEAR OPERATIONS, INC.)	
)	June 12, 2015
(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the State of Vermont's Brief in Support of Notice of Appeal of Atomic Safety and Licensing Board's May 18, 2015 Memorandum and Order Denying Petition For Leave To Intervene And Hearing Request, dated June 12, 2015, have been served upon the Electronic Information Exchange, the NRC's E-filing System, in the above-captioned proceeding, this 12th day of June, 2015.

/Signed (electronically) by/
Aaron Kisicki
Counsel for the State of Vermont
Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620
(802) 828-3785
aaron.kisicki@state.vt.us

Dated at Montpelier, Vermont
this 12th day of June, 2015