UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
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| ENTERGY NUCLEAR VERMONT YANKEE, LLC AND ENTERGY NUCLEAR OPERATIONS, INC. | ) | Docket No. 50-271-LA-3 |
| | ) | August 7, 2015 |
| (Vermont Yankee Nuclear Power Station) | ) | |

**STATE OF VERMONT'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE A NEW CONTENTION AND ADD BASES AND SUPPORT TO EXISTING CONTENTIONS**

## INTRODUCTION

On July 6, 2015, the State of Vermont ("State") moved for leave to file a new contention and to supplement the bases and support for existing Contentions I, III, and IV.[1] The Atomic Safety and Licensing Board ("Board") held oral argument in this matter on July 7, 2015. The U.S. Nuclear Regulatory Commission ("NRC") Staff ("Staff") and Entergy Nuclear Operations, Inc. ("Entergy") filed Answers to the State's motion on July 31, 2015.[2] The State now submits this Reply.[3]

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[1] State of Vermont's Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV (July 6, 2015) (ADAMS Accession No. ML15187A350).

[2] NRC Staff's Answer to the State of Vermont's Motion for Leave to File a New and Amended Contentions (July 31, 2015) (ADAMS Accession No. ML15212A281) ("Staff Answer"); Entergy's Answer Opposing the State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV (July 31, 2015) (ADAMS Accession No. ML15212A828) ("Entergy Answer").

[3] 10 C.F.R. § 2.309(i)(2).

Entergy and Staff make two overarching arguments, both of which lack merit. First, they argue that the State's motion is untimely. They assert that the granting of an exemption request does not present new facts relevant to this License Amendment Request ("LAR") and therefore the State should have filed this contention before the granting of the exemption.[4] Besides reducing the exemption decision to a ministerial non-event, contrary to the Commission's view that exemptions are an "extraordinary" equitable remedy,[5] this argument makes no sense because it is difficult to imagine any factual development more relevant here than the granting of Entergy's requested exemption.

Second, Entergy and Staff assert that the State's motion should be denied because the State's new contention is inadmissible.[6] Repeatedly asserting that license amendments are "separate," "distinct," "independent," and "unrelated" to exemption requests, Entergy and Staff ask this Board to turn a blind eye to an exemption that is directly relevant here. The position of Staff and Entergy is that this Board should intentionally disregard directly relevant information. That is not the Board's role. This Board has a legal duty to evaluate whether granting the LAR is consistent with the provisions of 10 C.F.R. § 50.75(h). Now that the exemption has been granted, the LAR is *not* consistent with 50.75(h) and should be denied.

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[4] Staff Answer at 15-19; Entergy Answer at 7-9.

[5] *In the Matter of Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-01, 77 N.R.C. 1, 9 (2013).

[6] Staff Answer at 19-28; Entergy Answer at 9-20.

## I. The State's Motion Is Timely Because the Granting of an Exemption Request Is New Information

Entergy and Staff's argument on timeliness falls short. The *request* for an exemption is different from the *granting* of an exemption. When the State filed its initial Petition, Entergy had requested an exemption, but the exemption had not yet been granted. The granting of the exemption was not noticed in the Federal Register until June 23, 2015.[7] On that date, the State had new information directly relevant to this proceeding and promptly filed a new contention. The State's motion thus meets all three requirements of 10 C.F.R. § 2.309(c)(1).

Staff's Answer asserts that the granting of the exemption was not new information, but rather "a confirmation of previously-available information."[8] In other words, Staff presents Entergy's January 6, 2015 exemption request as a *fait accompli* the day it was filed. According to Staff, the actual decision to grant the exemption request was apparently ministerial.

This view of exemption requests cannot be reconciled with the requirement in 10 C.F.R. § 50.12 that exemption requests will not even be "consider[ed]"—let alone granted—"unless special circumstances are present."[9] As the Commission has previously noted:

> Although our regulations . . . authorize exemptions, we consider an exemption to be an "extraordinary" equitable remedy to be used only

[7] 80 Fed. Reg. 35992-35995 (June 23, 2015).

[8] Staff Answer at 15; *id.* at 18 (same).

[9] 10 C.F.R. § 50.12(a)(2).

"sparingly."

> The reason for this high standard is simple. Every NRC regulation has gone through the rulemaking process, including public notice-and-comment, and its underlying rationale has been explained in our Statements of Consideration. Although our authority under the Atomic Energy Act of 1954, as amended (AEA), and other statutes to adopt rules of general application "entails a concomitant authority to provide exemption procedures in order to allow for special circumstances," our rules presumably apply until an exemption requester has met the high burden we place upon such requests. Our exemption regulations are in place to provide equitable relief only when supported by compelling reasons—they are not intended to serve as a vehicle for challenging the fundamental basis for the rule itself. Challenges to the rule itself are more appropriately lodged through a request for rulemaking.[10]

Far from a ministerial "confirmation" of the licensee's application, the evaluation of an exemption request should be searching. And it should lead to denials of such requests in all instances where the licensee has failed to meet its "high burden" of demonstrating that it meets all of the requirements for an exemption.[11]

The Commission's directive that exemptions are "extraordinary" and are to be used "sparingly"[12] belies Staff's position that the NRC review of an exemption request is essentially a ministerial "confirmation" of the licensee's application. In addition, the State raised numerous arguments with the NRC for denying the exemption. Indeed, just weeks before this exemption was granted, the State and two utilities, the Vermont Yankee Nuclear Power Corporation and Green Mountain Power, "formally request[ed] the opportunity for public participation on Entergy's

[10] *Honeywell*, CLI-13-01, 77 N.R.C. at 9.

[11] *Id.*

[12] *Id.*

January 6, 2015 exemption request" before the NRC made a decision on the matter.[13] The two utilities have an existing 55% interest in the alleged "excess" funds that Entergy is dipping into to fund spent fuel management. That request further noted a number of reasons why "Entergy's exemption request [was] premature" and should be denied.[14] These and other arguments make clear that the granting of Entergy's exemption request was not ministerial or merely "confirmatory."

Further, it is the granting of a request here that constitutes the new and material information in this proceeding. Staff compares this situation to *Powertech*, which it describes as "rejecting a contention as impermissibly late for its failure to explain how the information in a draft supplemental environmental impact statement is materially different from the information contained in the applicant's previously-available environmental report."[15] This comparison fails for three reasons.

First, Staff has ignored the relevant holding in *Powertech*. In that case, as here, Staff and Applicant opposed admission of a contention because it was

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[13] Letter from Vermont Attorney General's Office, Vermont Department of Public Service, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power to William Dean, Director, NRC Office of Nuclear Regulatory Regulation (June 5, 2015).

[14] *Id.* at 2 (citing, among other things, the need for Entergy to amend the Master Trust Agreement before it can use the decommissioning trust fund for spent fuel management expenses, and further noting that 18 C.F.R. § 35.32(6) requires FERC authorization before the trust fund can be used for anything other than decommissioning expenses).

[15] Staff Answer at 16 (citing *Powertech USA, Inc.* (Dewey-Burdock in Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 111-12 (2013)).

untimely based on the fact that the Petitioner should have filed the contention at the time the Applicant filed an allegedly flawed model of air emissions and not at the time Staff adopted that model for the Draft Supplemental Environmental Impact Statement ("DSEIS"). However, in language particularly relevant to the issue here, the Board held:

> As to the air emissions model, the Oglala Sioux Tribe's contention *was timely* because the revised mobile source inventory used to model air emissions first appeared in the DSEIS. *It is irrelevant that it was based on data submitted to the Staff in July 2012.* The use of the Powertech submission by the NRC Staff first occurred in the DSEIS.[16]

There is no requirement that a petitioner file a contention based on an Applicant's filing. Under *Powertech*, a contention based on when Staff makes "use" of the data—here, by granting Entergy's exemption request—is timely.[17]

Second, the portion of *Powertech* that Staff cites relates to a contention that was deemed untimely due to specific NRC requirements for environmental contentions.[18] NRC Regulations require that an environmental contention must be based on the Environmental Report and can only be based on the DSEIS to the extent the DSEIS differs from the Environmental Report.[19] No such pleading requirement applies here, particularly since Entergy has not filed an Environmental Report.

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[16] *Powertech*, 78 NRC at 93 (emphasis added).

[17] *Id.*

[18] *Id.* at 111-12.

[19] 10 C.F.R. § 2.309(f)(2); *see e.g.*, *L.P Louisiana Energy Services* (National Enrichment Facility), CLI-05-20, 62 N.R.C. 523, 532-33 (2005).

Third, Staff leaves out a crucial fact in *Powertech*: there, the intervenors were putting forth a contention that had previously been litigated and "rejected by the Board . . . because it lacked support."[20] Here, by contrast, the Board has yet to rule on any of the State's existing contentions. *Powertech* stands for nothing more than general law-of-the-case principles that preclude relitigation of matters that have already been decided.

## II. The State's New Contention Is Admissible

All three parties—Entergy, Staff, and the State—are in agreement that the Board's decision here must comply with 10 C.F.R. § 50.75(h)(5). That provision provides directly applicable requirements to this precise situation—where "a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions."[21] The regulations require that "the license amendment *shall be* in accordance with the provisions of paragraph (h) of this section."[22] Paragraph (h) specifically requires, among other things, that trust fund disbursements be restricted to "decommissioning expenses" and that the 30-day notice requirement is eliminated only for those expenses.[23] The parties further agree that this Board has a legal duty to determine whether Entergy's LAR is in

[20] *Powertech*, LBP-13-9, 78 NRC at 111.

[21] 10 C.F.R. § 50.75(h)(5).

[22] *Id.* (emphasis added).

[23] *Id.* § 50.75(h)(1)(iv).

fact "in accordance with the provisions of paragraph (h) of this section."[24] A LAR that fails to comply with the provisions of 50.75(h) must be denied.

When it comes to a determination of whether a LAR is "in accordance with the provisions of" 50.75(h), the parties' positions diverge. The State's position is simple: look at what regulatory regime actually applies if the LAR is granted. Entergy and Staff, by contrast, ask this Board to evaluate not what regulatory regime *actually* applies, but what regulations the LAR *says* will apply, ignoring reality. In essence, Entergy and Staff urge the Board to trust what the LAR says, not what it does. However, all parties to this proceeding know full well what happens if the Board grants this LAR—the current license conditions will *not* be replaced with requirements from 50.75(h). Entergy explicitly describes its LAR as replacing existing license conditions with regulations that are "substantially similar."[25] This is empirically false. If this LAR is granted, Entergy's current license conditions will *not* be replaced with similar provisions because Entergy has been exempted from them. This Board cannot allow form to trump substance by accepting Entergy and Staff's strained argument that the Board's inquiry should be so limited as to wholly ignore what actually happens if the LAR is approved.

In its Answer, Entergy attempts to back away from the representation in its LAR that it was replacing its license conditions with "substantially similar"

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[24] *Id.* § 50.75(h)(5).

[25] LAR at Attachment 1, p.2.

regulatory requirements.[26] Entergy asserts that it "did not identify a standard that would only allow the NRC to grant the LAR when the license condition and regulations are substantially similar" and that "[n]o such standard exists."[27] This strategic retreat rings hollow for two reasons.

*The LAR is incomplete and inaccurate.*

First, Entergy cannot deny that its LAR explicitly represents that "[t]he provisions in 10 CFR 50.75(h) include substantially similar decommissioning trust requirements as those found in VY OL License Condition 3.J."[28] Far from an off-hand remark, that is the entire thrust of this LAR. The explicit statement about 50.75(h) being "substantially similar" is followed by multiple references to where specific license conditions are "addressed" by the regulations.[29] This culminates in a three-and-a-half page table illustrating where each specific license condition is "addressed" by a specific regulation.[30] Entergy asserted that the LAR involved only "administrative changes to the license that will be consistent with the NRC's regulations at 10 CFR 50.75(h)" and that "[t]he proposed amendment is confined to administrative changes for providing consistency with existing regulations."[31] As

[26] Entergy Answer at 13 n.50.

[27] *Id.*

[28] LAR at Attachment 1 p.2.

[29] *Id.*; *accord id.* at Attachment 1, p.3.

[30] *Id.* at Attachment 1, pp.3-6.

[31] *Id.* at Attachment 1, pp.7-8.

the State's motion explains, now that the exemption has been granted, these representations are inaccurate. Entergy's license conditions will *not* be replaced by "substantially similar decommissioning trust requirements."[32]

This is precisely why Entergy's LAR does not comply with the requirement in 10 C.F.R. § 50.9(a) that an application for a license amendment "shall be complete and accurate in all material respects" and the similar requirement in § 50.90 that an application for a license amendment "fully describ[e] the changes desired." Given the granting of the exemption, the LAR now on file in this proceeding is inaccurate and does not fully describe the changes desired.

This is material. Were Entergy to submit an accurate LAR "fully describing the changes desired"—as it is legally required to do—the LAR would reflect the now-granted exemption. It would thus be missing the provisions of 50.75(h)(1)(iv) that restrict disbursements to "decommissioning expenses" and that allow elimination of the 30-day notice requirement only for those expenses. Such a LAR does not comply with the requirement in 50.75(h)(5) that "the license amendment *shall be* in accordance with the provisions of paragraph (h) of this section."[33]

Further, Entergy is incorrect that the State's identification of inaccuracies and omissions in Entergy's LAR seeks "to elevate form over substance."[34] According

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[32] *Id.* at Attachment 1, p.2.

[33] 10 C.F.R. § 50.75(h)(5) (emphasis added). Notably, that language does not say "shall be in accordance with the provisions of (h) *from which Applicant has not been exempted*."

[34] Entergy Answer at 12 n.47.

to Entergy, "[t]he NRC is well aware of the issuance of the exemptions, whether that action is discussed in the LAR or not."[35] To begin, simply because someone at the NRC might know about Entergy's exemption request does not relieve Entergy of its legal obligation to the NRC, to this Board, and to the public to present complete and accurate information. More importantly, Entergy ignores the fact that it was *the State* who informed the NRC that Entergy's LAR must be evaluated in light of its exemption request. When Staff acted on this LAR on February 17, 2015, it gave no indication it was aware of Entergy's January 6, 2015 exemption request.[36] Had the State not filed comments and intervened in this matter, Staff may have granted the LAR without ever even *considering* the matters at issue in this proceeding.

*The 2002 rule requires substantially similar regulatory provisions before deletion of licensing conditions.*

Second, Entergy is incorrect in its claim that there is "[n]o . . . standard" requiring that its license conditions be replaced with "substantially similar" requirements from 50.75(h)(5).[37] This gets at the heart of the 2002 rule, as clarified by the 2003 rule. The *only* reason the NRC was willing to allow applicants to delete license conditions governing trust funds was because any such amendment would have to "be in accordance with the provisions of paragraph (h),"[38] which includes the

[35] *Id.*

[36] 80 Fed. Reg. 8355-03 (Feb. 17, 2015).

[37] Entergy Answer at 12 n.50.

[38] 10 C.F.R. § 50.75(h)(5).

explicit restriction on trust fund disbursements to "decommissioning expenses" and only eliminates the 30-day notice requirement for those expenses.[39] When those restrictions are not in place—as is the case now that Entergy's exemption request has been granted—the 2002 rule *prohibits* a LAR from being granted.[40]

That is why Entergy and Staff are forced to argue here that the Board must turn a blind eye to the exemption decision: Entergy and Staff's *only* argument for granting this LAR is that the Board should ignore the on-the-ground legal reality and instead evaluate a fictional scenario in which Entergy has never applied for, nor was granted, an exemption.[41] When the exemption was granted, the situation presented in Entergy's LAR—a one-for-one swap of its license conditions for regulations—moved from being hypothetical to being *counterfactual*.

The reality is that Entergy is now exempted from the 50.75(h) provision that all disbursements must be "restricted to decommissioning expenses" and from the 50.75(h) provision that allows elimination of the 30-day notice requirement only for those expenses.[42] The LAR is thus not "in accordance with the provisions" of 50.75(h) and must be denied.

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[39] *Id.* § 50.75(h)(1)(iv).

[40] *Id.* § 50.75(h)(5).

[41] For instance, despite the fact that all of the parties and this Board are well aware that only the exempted version of 50.75(h) now applies to Entergy, not the entirety of 50.75(h), Staff nevertheless explicitly asks this Board to "only evaluate the exchange of the VY decommissioning trust license condition provisions for the decommissioning trust regulations, *in their entirety*." Staff Answer at 21 (emphasis in original).

[42] 10 C.F.R. § 50.75(h)(1)(iv).

## III. The State's Motion Raises Legitimate Additional Bases for Its Existing Contentions, Most Particularly the Request in Contention III for Consolidating This Matter with the Exemption Request

At a minimum, the State's new contention meets the requirements for admission. Further, the State's new contention and its additional bases and support for existing contentions highlight the basis for consolidating this matter with an evaluation of Entergy's exemption request, as the State's existing Contention III specifically requests. When an exemption request is "directly related" to a LAR, the State is entitled to a hearing on the exemption request.[43] That is the case here.

Staff nevertheless attempts to replace the Commission's test—whether matters are "directly related"—with an entirely different test in which matters must remain separate if "the approval of one would accomplish something independent of the approval of the other."[44] Staff cites no support for this argument. And there is no support: that is simply not the test set forth in *PFS*.

Finally, Entergy is incorrect in its argument that "now that the NRC has granted the Exemption Request, the State's arguments about hearing rights connected with that Exemption Request are moot and should be rejected."[45] The Commission squarely held in *PFS* that "exemption grants *do not* supersede hearing

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[43] *In the Matter of Private Fuel Storage, LLC* ("*PFS*"), CLI-01-12, 53 NRC 459, 476; *see also, e.g.*, *Honeywell*, CLI-13-01, 77 NRC at 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.").

[44] Staff Answer at 23.

[45] Entergy Answer at 19.

rights in licensing proceedings."[46] It is still well within this Board's authority—and indeed is the Board's duty—to consolidate these directly related matters for a hearing. To keep these matters improperly siloed, without analyzing how they relate to each other, would be precisely the type of "inadequate attention to decommissioning financial assurance" that the Commission has warned "'could result in significant adverse health, safety and environmental impacts.'"[47] To the extent there is any doubt as to the Board's authority, the Board can certify the question of consolidation to the Commission.

## CONCLUSION

For the reasons stated above and in the State's previous filings, the Board should grant the State's Motion for Leave, admit new Contention V, and allow amendment of the Bases and Support for Contentions I, III, and IV.

Respectfully submitted,

/Signed (electronically) by/
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[46] *PFS*, CLI-01-12, 53 NRC at 469 (emphasis added); *see also id.* at 474 ("[T]he Commission's rulemaking powers should not place the exemption itself beyond questioning in an otherwise litigable contention."); *id.* at 467 n.3 ("We are aware of no licensing case where we have declared exemption-related safety issues outside the scope of the hearing process altogether.").

[47] *Honeywell*, CLI-13-01, 77 NRC at 7 (citing Final Rule: *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018, 24019 (June 27, 1988)); *see id.* at 7 n.17 (noting that "'delays'" from inadequate funding "'may cause potential health and safety problems'" (quoting 53 Fed. Reg. at 24033)).

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Dated at Montpelier, Vermont
this Seventh day of August 2015

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**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the State of Vermont's Reply in Support of Motion for Leave to File a New Contention and Add Bases and Support to Existing Contentions have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding, this Seventh day of August 2015.

/Signed (electronically) by/
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Dated at Montpelier, Vermont
this Seventh day of August 2015