UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-271-LA-3
ENTERGY NUCLEAR VERMONT YANKEE, LLC AND ENTERGY NUCLEAR OPERATIONS, INC.	)	November 5, 2015
	)	
(Vermont Yankee Nuclear Power Station)	)	

STATE OF VERMONT'S RESPONSE TO NRC STAFF'S MOTION TO VACATE LBP-15-24

INTRODUCTION

According to NRC Staff, LBP-15-24 is "moot because the Atomic Safety and Licensing Board . . . granted Entergy's motion to withdraw the [license amendment request] without prejudice and terminated the license amendment proceeding."[1] NRC Staff's characterization of the withdrawal fails to recognize that the Board imposed conditions on Entergy's withdrawal that link directly to the underlying decision.[2] Those conditions state that:

> (1) Entergy must provide written notice to Vermont of any new license amendment application relating to the decommissioning trust fund at the time such application is submitted to the NRC; and

[1] NRC Staff's Motion to Vacate LBP-15-24, at 1 (Oct. 26, 2015) (ADAMS Accession No. ML 15299A260) (Motion to Vacate).

[2] *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-28, 82 NRC at __, slip op. at 14.

(2) Entergy must specify in its 30-day notice if the disbursement includes one of the six line items or legal expenses *to which Vermont objected in its admitted contention.*[3]

To preserve the integrity of these conditions, the underlying order should not be vacated. The explicit reference to what "Vermont objected [to] in its admitted contentions" assumes the validity and ongoing relevance of the underlying decision that NRC Staff now seeks to vacate.

Additionally, NRC Staff's request ignores the fact that any vacatur of LBP-15-24 would vacate not only the admission of contentions, but also the granting of State's request to intervene. Such a result could unfairly deprive the State of its ability to enforce the conditions that the Board ordered in the LBP-15-28 decision. And depriving the State of its right to intervene would be particularly inappropriate at this time, given that Entergy and NRC Staff still have an opportunity to appeal those conditions to the Commission. Staff's requested vacatur, if granted, would create the untenable situation of depriving the State of its status as a party and thus preventing the State from defending the conditions that the Board ordered in LBP-15-28. The State clearly has a live, ongoing interest in this matter.

Further, the conditions themselves implicitly recognize that the legal issues involved in LBP-15-24 are "capable of repetition, yet evading review." Thus, this case is by no means moot. For these reasons, LBP-15-24 should not be vacated.

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

DISCUSSION

I. The underlying decision on contention admissibility is not moot because it formed the basis for ongoing conditions that the Board imposed on Entergy's withdrawal from this proceeding.

Recognizing that "a contention was admitted concerning expenses that are still part of Entergy's decommissioning plans," the Board now requires Entergy to specify when it plans to withdraw any one of six line items that Vermont argued are not decommissioning expenses.[4] This condition is necessary because the legal dispute regarding the propriety of those expenses was—and is—hotly contested, and still unresolved.[5]

A case is only moot "when the issues are no longer live, or the parties lack a cognizable interest in the outcome."[6] Here, the Board in effect recognized that live issues remain when it noted that the "withdrawal of the LAR [license amendment request] leaves Entergy and Vermont's legal dispute over the definition of decommissioning unresolved."[7]

The Board agrees that LBP-15-24 is still in dispute and the substance of that

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[4] *Entergy*, LBP-15-28, 82 NRC at __, slip op. at 11. These expenses include: "(1) a $5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of non-radiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof."

[5] *Id.* at 13.

[6] *In the Matter of Texas Utilities Elec. Co., et al.* (Comanche Peak Steam Elec. Station, Unit 2), 37 N.R.C. 192, 200 (Mar. 30, 1993) (internal quotations omitted).

[7] *Entergy*, LBP-15-24, 82 NRC at __, slip op. at 12.

dispute is very likely to come before the board in a similar proceeding.[8] That is precisely why the Board tailored the conditions of withdrawal in the way it did. Both conditions are calculated specifically to give Vermont notice and opportunity to challenge Entergy's contested uses of the NDT Fund. It is all but certain that Entergy and Vermont will litigate whether the six contested expense categories[9] constitute legitimate decommissioning expenses. Vacating the underlying decision that gave rise to these conditions makes no sense in these circumstances.

This case is significantly different than *San Onofre*, which involved matters that were guaranteed to not arise again.[10] There, the "case revolved around the circumstances under which Unit 2 would be permitted to restart."[11] But, because the plant was then permanently shut down, any "restart" was no longer a possibility, and thus no live controversy existed.[12] Here, by contrast, the State has an ongoing live controversy over Entergy's use of the NDT Fund, and the Board has imposed conditions on Entergy to ensure the State has ample notice to challenge Entergy's use of that Fund.

Other case law NRC Staff relies upon is readily distinguishable. First, *Private Fuel Storage* held an issue moot because "[t]here [was] no outstanding

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[8] *Entergy*, LBP-15-24, 82 NRC at __, slip op. at 11.

[9] *See supra* note 5.

[10] *See S. California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3)*, 50-361-CAL, 2013 WL 9638164, at *4 (N.C.M.E.C.H.L.I.E.N. Dec. 5, 2013).

[11] *Id.* at *3

[12] *Id.*

controversy for the Commission to resolve on appeal."[13] That holding was not remarkable since the parties involved had independently resolved their underlying dispute.[14] Here, by contrast, Entergy's use of the Vermont Yankee decommissioning fund is left unresolved, which is a primary reason the Board imposed conditions on Entergy's withdrawal from this proceeding. NRC Staff also relies on *Louisiana Energy Services* and *Rochester Gas and Elec. Corp.*, but in those cases, like *San Onofre*, the withdrawal was predicated on the total abandonment of a project.[15] Here, by contrast, Entergy will be subject to the 30-day notice license requirement, as well as the conditions placed upon it by the Board here, until decommissioning is complete—which is currently scheduled for nearly 60 years from now.[16]

Further, NRC Staff repeatedly asserts that LBP-15-24 should be vacated because there was no opportunity to appeal that decision,[17] but that is incorrect. Staff claims that review was "cut short" because the license amendment request was withdrawn.[18] This ignores, however, the fact that both Entergy and NRC Staff

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[13] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005).

[14] *Id.* ("[C]ounsel for the State of Utah notified the Board by e-mail that neither the State nor PFS objected to the staff's safeguards designations.")

[15] *Louisiana Energy Services, L.P. Corp.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998); *Rochester Gas and Elec. Corp.* (Sterling Power Project Nuclear Unit No. 1), ALAB-596, 11 NRC 867, 868 (1980).

[16] Vermont Yankee Nuclear Power Station Post-Shutdown Activites Report (PSDAR) at 8 (Dec. 19, 2014) (ADAMS Accession No. ML14357A110).

[17] *See, e.g.*, Motion to Vacate at 5-6.

[18] *Id.* at 6, 9.

had an opportunity to appeal LBP-15-24 within 10 days of the Board's decision in LBP-15-28 allowing conditional withdrawal of the license amendment request.[19] Entergy and NRC Staff had that opportunity; they just chose not to exercise it. They had—and continue to have—a live controversy in light of the conditions the Board granted in LBP-15-28 on the basis of the Board's earlier ruling in LBP-15-24.

Vacating the underlying opinion would strip the conditions of any context. Because the conditions are dependent on the analysis undertaken in the underlying decision, that underlying decision should not be vacated.[20] The underlying decision provides a firm understanding for the parties—both now and in the distant future—of the basis for the imposition and function of the new 30-day notice reporting conditions. And, as noted earlier, NRC Staff's request ignores the fact that any vacatur of LBP-15-24 would vacate the granting of State's request to intervene. The State must have an ability to enforce the conditions that the Board ordered in the LBP-15-28 decision. This Board necessarily has continuing jurisdiction to enforce those conditions. And depriving the State of its party status would unfairly prevent the State from defending the conditions that the Board ordered in LBP-15-28 (if either Entergy or Staff appeals that decision) or enforcing the conditions. Vacatur is inappropriate under these circumstances, and the Board should deny Staff's motion.

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[19] *Id.* at 5 ("The Commission granted Entergy's motion for extension . . . providing that any party may appeal LBP-15-24 within ten days after the Board's ruling on Entergy's Motion to Withdraw.").

[20] *Pac. Gas & Elec. Co.* (Stanislaus Nuclear Project, Unit 1), 17 N.R.C. 45, 55 (Jan. 19, 1983) (imposing conditions, but not vacating the underlying decision).

II. This case fits squarely into the "capable of repetition, yet evading review" exception to mootness.

The NRC has recognized an exception to the mootness doctrine when a case is "'capable of repetition, yet evading review'—that exception applies whenever the challenged action was too short in duration to be litigated and there is a reasonable expectation that the same party will be subjected to the same action again."[21] *Davis-Besse* and *Advanced Medical Systems* stand "for the general proposition that an appeal is not moot if there is a possibility of similar acts recurring in the future."[22] As the Board previously pointed out, "these cases refer to instances where the same litigants likely will be subject to similar future action."[23] The use of the words "possibility" and "likely" make clear that Vermont need not prove Entergy *will* resubmit a license request, but only that it is "possible" or "likely." That standard is easily met here. The Board effectively recognized such a possibility when it created Condition 1, which requires Entergy to notify Vermont if they submit a new license amendment request.[24] And that is necessarily the case in a situation like this where, unlike a plant or project that has been abandoned, a

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[21] *Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041),* 37 N.R.C. 181, 185 (Mar. 30, 1993) (citing *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911)); *Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 109 (1978); *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1170 (D.C.Cir.1984)); *see also Advanced Med. Sys., Inc. v. U.S. Nuclear Regulatory Comm'n*, 30 F.3d 133 (6th Cir. 1994)).

[22] *San Onofre*, 2013 WL 9638164, at *3.

[23] *Id.*

[24] *Entergy*, LBP-15-28, 82 NRC at __, slip op. at 14.

licensee remains subject to the exact same license requirements that prompted this proceeding.[25]

NRC has recognized that "[t]he crucial question . . . is to what degree one can be certain that the same or related practices will not recur . . . . A company bears a heavy burden in showing that past conduct will not be repeated."[26] Entergy's withdrawal of the license amendment request does not create any certainty that it will refrain from seeking to discontinue 30-day notice obligations to the State in the future. The 30-day notice requirement of Entergy's current operating license is tied to the existence of the decommissioning fund. Entergy plans to make withdrawals from the fund at least through license termination at the conclusion of SAFSTOR decommissioning in 2073.[27] More importantly, Entergy has made no meaningful showing that it will not seek to terminate its notice obligation during the next 60

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[25] Further, the underlying decision dealt with narrow issues confined to the specific facts surrounding the Vermont Yankee plant and Entergy's documented plans to utilize the Vermont Yankee decommissioning trust fund. Thus, vacating the decision does not serve the function of "eliminat[ing] any future confusion and dispute over [LBP-15-24's] meaning or effect." *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), 50 N.R.C. 219, 222 (Sept. 10, 1999). The meaning and effect of LBP-15-24 was clear, specific to the parties involved, and has been effectuated by the conditions that the Board imposed. The prospect that this dispute may well recur provides reason enough to preserve the underlying decision as authority in any subsequent proceedings.

[26] *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3) *and the Cleveland Elec. Illuminating Co. et al.* (Perry Nuclear Power Plant, Units 1 & 2), 10 N.R.C. 265, 399-400 (Sept. 6, 1979).

[27] PSDAR at 8.

years.[28] Entergy is in no way restrained from someday arguing again that the administrative burden to provide the required notice is too significant to continue.[29]

NRC Staff misunderstand the "yet evading review" portion of the mootness exception. Staff argues that because a member of the public will have an opportunity in the future to request a hearing in the event Entergy resubmits a license amendment request, it would not evade review. In support of this proposition, NRC Staff references a footnote in the *San Onofre* case, but again, the footnote's relevant context is absent. The footnote in *San Onofre* stated "a challenge to a *different* licensee's request to relocate its surveillance frequencies would not evade future review" because a different licensee would trigger the public hearing procedure.[30] But here, by contrast, any future hearing would deal with the same issues, and will be re-litigated by the exact same parties. The only reason the case is evading review is the decision by Entergy—supported by NRC Staff—to withdraw

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[28] Entergy only states that it "*currently* has no plans to reinitiate this license amendment proceeding at a future date." Entergy's Motion to Withdraw at 5 (emphasis added). That statement concedes its plans may well change at any moment.

[29] NRC Staff argue that "the possibility that an issue might arise in the future is not grounds to continue with an appeal in a proceeding where no live controversy remains between the litigants." Motion to Vacate at 6. But they mischaracterize the authority they cite for that proposition. *San Onofre* stated in the very next sentence that "[the board] ha[s] recognized an exception to the mootness doctrine when the *same litigants* are likely to be subject to similar future action." *San Onofre*, CLI-13-9, 78 NRC at 557. Here, it is a given that any re-litigation of the underlying issues will inevitably involve the exact same parties, and thus the possibility of future litigation is a reason to deny NRC Staff's motion.

[30] *San Onofre*, CLI-13-10, 78 NRC at 568 n.35 (emphasis added).

its license amendment request, instead of appealing the Board's decision.[31]

CONCLUSION

For these reasons, the Board should deny Staff's motion to vacate LBP-15-24.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Montpelier, Vermont
this Fifth of November 2015

[31] Allowing vacatur in these circumstances, where Entergy is free to file an identical future license amendment request, could also encourage improper forum-shopping. *See Entergy*, LBP-15-28, slip op. at 10 n.59 ("Of course, a quick resubmission of this specific LAR without any change in circumstances would create the appearance of forum shopping." (citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-726, 17 NRC 755, 758-59 (1983)). This provides additional justification to not grant vacatur here.

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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 Response to NRC Staff's Motion to Vacate LBP-15-24 have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding, this Fifth of November 2015.

/Signed (electronically) by/
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Dated at Montpelier, Vermont
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