**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE**
**DISTRICT OF COLUMBIA CIRCUIT**

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| THE STATE OF VERMONT, VERMONT YANKEE NUCLEAR POWER CORPORATION, and GREEN MOUNTAIN POWER CORPORATION,<br><br>Petitioners,<br><br>v.<br><br>U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,<br><br>Respondents. | No. 15-1279 |

**PETITIONERS' OPPOSITION TO MOTION TO DISMISS**

Petitioners, the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation, oppose Respondents' Motion to Dismiss. On August 13, 2015, Petitioners filed a timely Petition for Review under the Hobbs Act, challenging a Nuclear Regulatory Commission decision exempting the owner of the Vermont Yankee Nuclear Power Station from important regulatory requirements designed to safeguard funds put in place for radiological decommissioning of Vermont Yankee. Respondents, the Nuclear

Regulatory Commission and the United States of America, concede that the "exemption was final when it was issued" (Motion to Dismiss at 2), thus triggering this Court's jurisdiction. Respondents nonetheless ask this Court to dismiss Petitioners' timely challenge to final agency action on the basis of another proceeding that "could potentially" make review before this Court unnecessary. *Id.* at 3. Respondents are incorrect, and their motion to dismiss should be denied. In the alternative, although it is Petitioners' position that this matter is ripe for review by this Court and should proceed on schedule, if the Court agrees with Respondents' arguments for judicial economy, the Court should at most temporarily hold this matter in abeyance.

Nuclear Regulatory Commission ("NRC or "Commission") regulations establish that the sole purpose of nuclear decommissioning trust funds is to fund the activities necessary to safely remove nuclear power plants from service and reduce residual radioactivity to a level that allows unrestricted use of the property. 10 C.F.R. § 50.2, 50.82(a)(8)(i)(A); *see also General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018-01, 24018 (1988) ("Decommissioning activities do not include the removal and disposal of spent fuel which is considered to be an operational activity or the removal and disposal of nonradioactive structures and materials beyond that necessary to terminate the NRC license."). Despite that unequivocal language, on June 23, 2015, NRC Staff

granted a request by the owner of the Vermont Yankee Nuclear Power Station ("Vermont Yankee"), Entergy Nuclear Operations, Inc. ("Entergy"), that effectively allows Entergy to circumvent the very purpose of those important regulations.[1] That decision (the "Exemption Decision"), which was immediately effective, allows Entergy to make seemingly unlimited withdrawals from the Vermont Yankee Nuclear Decommissioning Trust Fund ("Decommissioning Fund") for non-decommissioning purposes. This directly threatens the viability of the Decommissioning Fund for its intended purpose and further delays the release of the site for unrestricted use.

The Commission made the Exemption Decision without a hearing or the opportunity for notice and comment, foreclosing any public participation in the exemption proceeding. The Commission also denied requests by interested parties to participate, including Petitioners here—despite Petitioners' clear interests in the

[1] NRC Staff, which is separate from the Commissioners (though subject to the Commissioners' supervision), made that decision under authority delegated to it by the Commission. NRC Staff's position is that its actions in granting exemptions are not subject to appeal to the Commission and function as final agency actions. *See, e.g.*, Exhibit 1 (June 16, 2015 Ltr. from William Dean re: Vermont Yankee Nuclear Power Station—Request for Public Participation on Entergy's January 6, 2015 Decommissioning Trust Fund Exemption Request (ADAMS Accession No. ML15162B001)).

stewardship of the Fund.[2] The Petition seeks the Court's review of the flawed Exemption Decision.

Respondents concede that the Exemption Decision was a final order. Motion to Dismiss at 2 ("This exemption was final when it was issued."). Indeed, Entergy has used—and continues to use—the Exemption Decision to withdraw millions of dollars from the Decommissioning Fund for non-decommissioning expenses.[3] Yet Respondents claim that Petitioners retroactively made a once-final agency action non-final by filing a separate request with the Commission after initiating proceedings in this Court.[4] That argument is premised on the mistaken

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[2] As explained in the Petitioners' submissions to the Commission seeking participation, the State of Vermont has an interest in protecting its residents and taxpayers from the potential consequences of leaving a nuclear site contaminated, and the Vermont Yankee Nuclear Power Corporation and Green Mountain Power Corporation have a direct financial interest in their contractual right to recover 55% of all unused funds from the decommissioning trust fund for their ratepayers.

[3] *See*, *e.g.*, Exhibit 2 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (Oct. 27, 2015)); Exhibit 3 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (Sept. 14, 2015)); Exhibit 4 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (Aug. 13, 2015)); Exhibit 5 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (July 16, 2015)).

[4] *See* Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear Operation, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Nov. 4, 2015) (attached as Exhibit A to Respondents' Motion to Dismiss).

assumption that Petitioners filed a motion for reconsideration with the Commission, a misapprehension that colors Respondents' entire motion to dismiss. Petitioners did no such thing. Reconsideration of the Exemption Decision was not available, and the request to the Commission seeks a comprehensive review—that the Commission views as discretionary—of the central issues related to the Decommissioning Fund, only one of which is the Exemption Decision. Moreover, the Commission in the exercise of its discretion might not grant the review Petitioners have sought, and even if it does grant some review, there is no guarantee that review would include the substance of the Exemption Decision challenged here.[5]

[5] NRC Staff highlights this point in its December 7, 2015 Answer to Petitioners' separate request to the Commission for a comprehensive review, noting "[t]he Commission has stated that simply because the Commission *may* exercise its [*sua sponte* review] authority 'in no way implies that parties have a *right* to seek [ ] review on that . . . ground.'" Exhibit 6 at 22 (footnote omitted) (NRC Staff Answer to the Vermont Petition for Review of Entergy Nuclear Operation Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund ("NRC Staff Answer")). That line of argument—that Vermont has no right to have the Commission conduct a comprehensive review of the many decommissioning requirements that Staff is evaluating on a piecemeal basis—is echoed in other portions of the NRC Staff Answer and in Entergy's Answer. *See, e.g.*, *id.* at 2 ("Vermont is not entitled to a hearing on the [NRC] Staff's grant of the exemption to the NRC regulations."); Exhibit 7 at 3, 4, 13, 14, 16, 18, 19, 20, 23, 24, 29, 32, 34, 36, 37, 39, 40, 43 (Entergy's Answer Opposing November 4, 2015 Petition Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation ("Entergy's Answer") (repeatedly arguing that the Commission "summarily reject" or "summarily dismiss" Petitioners' request for review). As Petitioners outlined in their

Respondents' motion seeks to deprive Petitioners of any means for review of the Exemption Decision: they urge the Court to dismiss the instant action on the basis that it would be a "pointless waste of judicial energy" to proceed before a "final order" issues in the NRC proceeding (Motion to Dismiss at 8-9), then argue that even if a final order issues, review by this Court *still* would be improper (Motion to Dismiss at 11-12)—while the NRC Staff is arguing to the Commission that the NRC proceeding should not take place at all (*supra* note 6). Because dismissal at this juncture could foreclose Petitioners' ability to ever obtain review of the Exemption Decision, in direct contravention of the Hobbs Act and the Administrative Procedure Act, Respondents' motion to dismiss should be denied. If, however, the Court is inclined to await the Commission's decision whether to initiate the proceedings sought by Petitioners, it should at most stay this action pending a decision by the Commission on Petitioners' request.

## I. THIS COURT HAS JURISDICTION TO REVIEW THE NRC'S FINAL AGENCY ACTION

Respondents' motion to dismiss relies exclusively on the misconception that Petitioners filed a reconsideration request with the Commission. But Petitioners' filing with the Commission is not a motion to reconsider—it is a petition seeking a

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submission to the Commission, it is Petitioners' position that a number of federal statutes and regulations require and empower the Commission to address the issues raised by Petitioners' filing.

comprehensive review. The Commission views that review as discretionary and thus may grant, deny, or ignore it. Respondents also disregard the fact that the Exemption Decision has neither been tolled nor stayed, and every month Entergy withdraws millions of dollars from the Decommissioning Fund that it is using for non-decommissioning activities based on the Exemption Decision. Thus, the decision under review is a final agency action that this Court has jurisdiction to consider.

### A. Petitioners' filing with the Commission is not a motion for reconsideration

Respondents incorrectly claim that "there is no 'qualitative difference' between a 'reconsideration' request and Vermont's petition before the NRC." Motion to Dismiss at 10. Petitioners' filing with the Commission, however, is practically, procedurally, and functionally different than a motion for reconsideration.

Petitioners asked the Commission to exercise its general supervisory authority to convene a proceeding to review actions related to the Decommissioning Fund. That request is not a motion for reconsideration, nor the functional equivalent of one. Respondents emphasize the fact that the Commission ordered briefing on Petitioners' filing (Motion to Dismiss at 6 n.4), but fail to recognize that a briefing schedule in no way binds the Commission to make a

decision, or even hold a hearing, on any of the issues raised in Petitioners' filing. Respondents seem to suggest that the mere *possibility* of Commission review requires dismissal here since the Commission *could* overturn the Exemption Decision and thus "nullify" the efforts of this Court. Motion to Dismiss at 8 (citing *United Transp. Union v. ICC*, 871 F.2d 1114, 1117 (D.C. Cir. 1989)). But that multi-layered hypothetical cannot be the test. There are many things that could nullify this Court's efforts before a decision is rendered. For instance, the U.S. Department of Energy could finally meet its contractual obligation to remove all spent fuel from Vermont Yankee, thus eliminating the need for Entergy to withdraw money from the Decommissioning Fund for spent fuel management expenses. That would likely moot this case, but until that occurs, this Court maintains jurisdiction.

NRC Staff and Entergy recently filed Answers strenuously arguing that the Commission should not undertake the requested review. In particular, although the Commission argues in its motion to dismiss this Petition that "there is no 'qualitative difference' between a 'reconsideration' request and Vermont's petition before the NRC" (Motion to Dismiss at 10), NRC Staff has argued quite the opposite in its Answer filed with the Commission, positing that Vermont's request for a comprehensive review "is more akin to a request that the Commission

exercise its supervisory authority and order a discretionary hearing outside of the traditional hearing process." NRC Staff Answer at 25.

Further, Respondents' motion to dismiss fails to recognize that NRC regulations narrowly circumscribe the circumstances under which a motion for reconsideration can be filed. First, such a motion is permitted only in Subpart C of Part 2 of 10 C.F.R., which is restricted to "adjudications conducted under the authority of the Atomic Energy Act." 10 C.F.R. § 2.300. Second, NRC Staff, in granting the exemptions at issue here and rejecting Petitioners' efforts to participate in the exemption review process, has denied that a decision on an exemption is an "adjudication" as to which the right to seek an adjudicatory hearing exists.[6] Third, the only mention of the right to seek "reconsideration" appears in a portion of Subpart C of Part 2 of 10 C.F.R. that is limited to decisions by licensing boards on motions filed by parties and is narrowly tailored. 10 C.F.R. § 2.323(e). Fourth, other provisions of Subpart C that relate to review of decisions are limited to appeals to the Commissioners of decisions of licensing boards and explicitly disallow a petition for reconsideration of a decision of the Commissioners following review of a decision of a licensing board. 10 C.F.R.

[6] *See, e.g.*, Exhibit 1.

§ 2.241(d). Quite simply, no direct means for reconsideration or review of the Exemption Decision was available at the agency level.

That point was emphasized by NRC Staff in a letter from William Dean, Director of the Office of Nuclear Reactor Regulation, to Petitioners, which states in part that "a petitioner may seek a hearing on license amendments, but not on exemption requests." Exhibit 1 at 2. That "long-standing regulatory position" of the Commission foreclosed any opportunity for Petitioners to voice their concerns about the exemption request. *Id.* Such a hearing would have provided Petitioners the opportunity to make a substantive record and compel the NRC Staff to produce a rational basis for its decision to allow Entergy to use the Decommissioning Fund for purposes unrelated to decommissioning.

Unlike a motion for reconsideration—which requires a ruling from the Commission—an appeal to the Commission's supervisory authority may go unheard, unanswered, or be ignored in certain circumstances.[7] Because Petitioners' filing with the Commission is not a reconsideration request, Respondents' arguments are not aided by their reliance on precedent that parties

[7] The Commission's supervisory authority empowers it to address a wide range of matters (*see, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), 11 N.R.C. 514, 516 (1980); *see also, e.g., Safety Light Corp., et al.* (Bloomsburg Site Decontamination & License Renewal Denials), 36 N.R.C. 79, 85 (1992)), but there is no guarantee it will do so.

may not seek "both agency *reconsideration* and judicial review of an agency's order." *See, e.g.*, *Wade v. FCC*, 986 F.2d 1433, 1433 (D.C. Cir. 1993) (emphasis added). Those cases are premised on the fact that the agency must act on a motion to reconsider. That precedent, and—as Respondents concede—the Hobbs Act's finality requirement, is "grounded in concerns for judicial economy." Motion to Dismiss at 8. In other words, since a reconsideration request must be addressed and resolved by the agency, it would not be efficient for a court to proceed with a petition for review until after the agency acts. That is not the case here, where there is no guarantee that the Commission will act.

Respondents place undue reliance on *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1405 (9th Cir. 1996), in which the Ninth Circuit addressed an appeal of a notice of violation of child labor laws under the Fair Labor Standards Act of 1938. In that case, an automobile dealer received a notice of violation which "advised each dealer of its option to file an 'exception' to the Administrator's decision, which would initiate a referral to an Administrative Law Judge ("ALJ") for hearing." *Id.* The dealers concurrently filed the "exception" and an action in the district court challenging the notice. *Id.* Noting that the structured appeals process established by the Fair Labor Standards Act provided that an ALJ decision must issue before judicial action may be commenced, the court held that the appeal to the ALJ was functionally the same as a motion to reconsider. Here, by contrast,

there is no appeal process within the NRC that Petitioners could pursue before seeking review in this Court. *Acura* is also distinguishable because that court held that there was not yet a final decision since the "exception" process served to toll the impact of the challenged action until a final decision issued. That is not the case here—it is undisputed that the Exemption Decision is currently in effect.

Another important distinction between the reconsideration cases relied upon by Respondents and this case is the recourse available to Petitioners if the Commission refuses to grant review or grants only a limited review. If the Commission declines to convene the proceeding Petitioners requested, Entergy or the Commission may argue that any review of that decision should be limited and not reach the merits of the underlying proceeding. *See I.C.C. v. Bd. of Locomotive Engineers*, 482 U.S. 270, 278 (1987). Dismissal of this appeal now could therefore render the Exemption Decision immune to any meaningful review. Such an outcome is contrary to both the Hobbs Act and the Administrative Procedure Act.

Instead, this case is similar to *Craker v. Drug Enforcement Administration*, 714 F.3d 17 (1st Cir. 2013), in which the First Circuit recognized that despite the general rule that "a petition for review filed during the pendency of a motion for agency reconsideration is 'incurably premature,'" there is a clear distinction in the applicability of that rule between cases in which "the governing statute or the implementing regulations expressly provided for agency reconsideration" and

situations in which no such "procedural guarantees" exist. *Id.* at 24. Thus, in *Craker*, the court held that even when direct (if limited) reconsideration was available, dismissal of a petition filed during pendency of the reconsideration motion was not appropriate since reconsideration "may or may not have been permitted in the agency's discretion" and thus "broader reconsideration of the factual and legal bases for the agency's final order remained only, at the time of the filing of the petition for review, a mere possibility." *Id.* at 25. The court further noted that concerns regarding judicial economy are "considerably diminished" in cases "where the reconsideration process is ad hoc." *Id.* Surely they are diminished further still—if not eliminated—here, where not even an "ad hoc" reconsideration process exists at the agency level.

In an analogous situation in the Tenth Circuit, a municipality brought action under the Administrative Procedure Act challenging a decision of the Department of Labor. *See City of Colo. Springs v. Solis*, 589 F.3d 1121 (10th Cir. 2009). That court found that the Administrative Procedure Act's tolling rule was inapplicable "because the [Department of Labor] ha[d] not established a rehearing or reconsideration process" and so there existed "no 'discretionary review period specifically provided by the agency' of which the City could avail itself." *Id.* at 1141. The court therefore "conclude[d] that the [Department of Labor's initial] decision was a 'final agency action' subject to judicial review." *Id.* Similarly,

since no right exists here for moving to reconsider, or even review, the Exemption Decision at the agency level, the NRC Staff's decision constituted final action. Petitioners were required under the Hobbs Act to appeal (as they did) within 60 days of that final agency action.

Further, Respondents' motion to dismiss fails to recognize that there are a number of circumstances in which motions filed with a lower court do *not* deprive an appellate court of jurisdiction. *See Stone v. I.N.S.*, 514 U.S. 386, 402-03 (1995). Granted, "[t]he majority of post-trial motions, such as Rule 59 render the underlying judgment nonfinal both when filed before an appeal is taken (thus tolling the time for taking an appeal), and when filed after the notice of appeal (thus divesting the appellate court of jurisdiction)." *Id*. Crucially, however, the Supreme Court has explained that "[o]ther motions, such as Rule 60(b) motions filed more than ten [now 28] days after judgment, do not affect the finality of a district court's judgment, either when filed before the appeal (no tolling), or afterwards (*appellate court jurisdiction not divested*)." *Id*. at 403 (emphasis added). By analogy, while a timely filed motion to reconsider could make a final agency action non-final, that is not the case for Rule 60(b) motions—when a Rule 60(b) motion is filed, "appellate court jurisdiction [is] not divested." *Id*.[8] That is

[8] Indeed, this Court has held that, once appellate jurisdiction has been triggered, Rule 60(b) motions cannot be decided until the case is remanded by this

in part because, like here, the Commission has discretion to rule on Petitioners' filing, just as a district court has such discretion over a Rule 60(b) motion. *See Computer Professionals for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996). And there is no set time for petitioning the Commission—just as Rule 60(b) motions only need to be filed within a "reasonable time." Fed. R. Civ. P. 60(c)(1). Just as a Rule 60(b) motion at a district court would not deprive an appellate court of jurisdiction, this Court is not deprived of jurisdiction by Petitioners' filing.

### B. The Exemption Decision is final and Entergy has used—and will continue to use—it to make improper withdrawals from the Decommissioning Fund

The Supreme Court's two-part test to determine when an agency decision is reviewable as final action is unmistakably met here. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted). The first part of this test—final decision—

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Court. *See Envtl. Policy Institute v. Nat'l Coal Ass'n*, No. 93-5029, 1997 WL 404909, at *1 (D.C. Cir. June 27, 1997) (per curiam) (citing *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952) (per curiam) and *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992)).

is satisfied. Respondents concede that the Exemption Decision is the consummation of the agency's decisionmaking process (Motion to Dismiss at 2, 5 ("This exemption was final when it was issued.")), and nothing has rendered that decision in any way non-final, for the reasons explained *supra*. The second part of the Supreme Court's test also is met, as rights and legal consequences flow from the Exemption Decision—consequences that continue every month as Entergy withdraws millions of dollars from the Decommissioning Fund for non-decommissioning expenses.

Respondents fail to cite a single case in which a review petition was denied when the challenged agency action had immediate, sustained, and real impact on the petitioner—without a defined review process pending at the agency. Rather, the cases relied upon by Respondents uniformly feature an established administrative path that *guarantees* substantive review on the merits of the underlying decision.[9] Other cases that Respondents cite are inapposite because

[9] *See Blue Ridge Envtl. Def. League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012) (challenge to a "response-sheet" was premature because response sheets "do not constitute . . . the consummation of the administrative process"; review would have been available after response sheet became a final order); *City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998) (petitioner filed official request for reconsideration to the agency, which had jurisdiction to review it); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 980 (D.C. Cir. 1993) (petitioner filed official request for reconsideration to the agency, which had jurisdiction to review it); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 112 (D.C. Cir. 2002) (official reconsideration was filed and therefore court will "wait until the

they address challenges to preliminary agency actions before those actions are finalized or published in the Federal Register. *See W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985); *Pub. Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988).

In the cases cited by Respondent, judicial review was not available until the required direct administrative review process was completed. Here, by contrast, there is no required direct administrative review of the Exemption Decision—appeal to this Court was and is Petitioners' only avenue for guaranteed review of the merits of that ruling.

In fact, one of the cases relied upon by Respondents, *Gorman v. NTSB*, 558 F.3d 580 (D.C. Cir. 2009), supports Petitioners' position. In *Gorman*, when a request for reconsideration was filed after the agency's deadline for such requests,

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Commission *has resolved* its pending administrative requests" (emphasis added)); *Stone*, 514 U.S. at 392 (INS had official procedures for reconsideration of deportation orders); *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) (petitioner requested formal reconsideration and therefore review will be available "[w]hen the agency *acts* upon the petition for reconsideration" (emphasis added)); *United Transp. Union*, 871 F.2d at 1117 (agency review was ongoing and noting that "[t]he petition for reconsideration remains pending before the Commission"); *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (noting process whereby agency will "*issue[] its decision* on reconsideration" (emphasis added)); *Wade*, 986 F.2d at 1434 (noting "petition for reconsideration" is "pending" and agency thus "exercis[ing] . . . [its] jurisdiction"); *Locomotive Eng'rs*, 482 U.S. at 284-85 (agency had already acted on petition for reconsideration); *Acura*, 90 F.3d at 1406-08 (agency had structured appeals process requiring an administrative law judge, upon a request that had already been made, to rule on the issue).

and there was (like here) no guarantee that the agency would address the merits, this Court held that such a filing "does not vitiate the timely judicial petition." *Id.* at 588.

Unlike the cases Respondents rely upon, in which the impacts of agency decisions were tolled, no further agency action was required for the Exemption Decision to have effect here. Since the Commission issued the Exemption Decision, Entergy has proceeded to withdraw millions of dollars from the Fund.[10] In October alone, Entergy provided notice of an additional $6.6 million withdrawal from the Fund for expenses including spent fuel management.[11]

To date, the Commission has not tolled the Exemption Decision while Petitioners await a determination on their filing with the Commission. In their motion to dismiss, Respondents seek an outcome that could entirely inoculate the Exemption Decision from review. Such a result—especially given the practical, real world effects of the underlying decision—would fly in the face of the Hobbs Act and the Administrative Procedure Act and should not be permitted.

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[10] *See* Exhibits 2-5. Those letters reveal $25 million in disbursements but do not differentiate between decommissioning and spent fuel expenses, so it is impossible for Petitioners to determine exactly what percentage of those monies are for improper spent fuel activities. According to other public filings from Entergy, such expenses appear to be in the $10 million range for 2015.

[11] *See* Exhibit 2.

## II. AT MOST, THIS COURT SHOULD STAY THIS ACTION PENDING FINAL DISPOSITION FROM THE COMMISSION ON PETITIONERS' FILING

Although it is Petitioners' position that this matter should go forward on the usual schedule, at most this Court should simply stay the proceeding until the Commission rules—or decides not to rule—on Vermont's request seeking comprehensive review. Further, at that point, both matters could be consolidated and heard together. *See, e.g.*, *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 980 (D.C. Cir. 1996) (noting that this Court held a related matter "in abeyance pending Commission reconsideration" for later consolidation with another pending matter once the Commission issued its ruling); *see also, e.g.*, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (noting that "every court" can act in a way that creates "economy of time and effort for itself, for counsel, and for litigants" so long as it "weigh[s] competing interests and maintain[s] an even balance").

## CONCLUSION

For these reasons, Petitioners respectfully request that the Court deny Respondents' motion to dismiss, or, at most, stay this case pending further action from by the Commission.

Dated: December 11, 2015 Respectfully submitted,

THE STATE OF VERMONT

By its attorneys,

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UNITED STATES COURT OF APPEALS
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| v. | ) | |
| UNITED STATES NUCLEAR REGULATORY COMMISSION, and UNITED STATES OF AMERICA, | ) | |
| Respondents. | ) | |

**CERTIFICATE OF SERVICE**

I certify that on December 11, 2015, a copy of the above Petitioners' Opposition to Motion to Dismiss was filed with the Clerk of the Court and served upon the counsel of record through the CM/ECF System.

*/s/ Kyle H. Landis-Marinello*

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EXHIBIT 1

**UNITED STATES**
**NUCLEAR REGULATORY COMMISSION**
**WASHINGTON, D.C. 20555-0001**

June 16, 2015

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SUBJECT: VERMONT YANKEE NUCLEAR POWER STATION – REQUEST FOR PUBLIC PARTICIPATION ON ENTERGY'S JANUARY 6, 2015, DECOMMISSIONING TRUST FUND EXEMPTION REQUEST

Dear Messrs. Griffin, Recchia, Zamore and Ms. Ancel:

I am responding to your letters dated June 4 and June 5, 2015, regarding your request for public participation in NRC's review of Entergy's decommissioning trust fund exemption request.

The June 4, 2015, letter (of which Messrs. Griffin and Recchia were signatories) stated that the U.S. Nuclear Regulatory Commission (NRC) staff should withdraw its conclusions contained in NRC letters dated April 16 and April 21, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML15097A361 and ML15107A074, respectively), regarding the adequacy of the Vermont Yankee Nuclear Power Station (VY) decommissioning trust fund (DTF). Specifically, it is asserted that the staff's conclusions are inappropriate to support Entergy Nuclear Operations' (Entergy's) cancellation of $110 million in credit lines and parental guarantees and that the cancellation should not be allowed until after a full evaluation has been completed that determines that the DTF will cover all appropriate decommissioning costs at VY.

In accordance with the NRC regulations, the staff has a well-established review process to ensure that licensees have sufficient funding in their DTF. The NRC's review of the site-specific cost estimate, as submitted with the VY Post Shutdown Decommissioning Activities Report, and Entergy's 2013 decommissioning funding status report determined that Entergy provided reasonable assurance that sufficient funding for radiological decommissioning, as defined in Title 10 of the *Code of Federal Regulations* (10 CFR) 50.2, of VY will be available for the decommissioning process. Further, in accordance with NRC regulations, the staff conducts reviews of DTF reports submitted by Entergy on an annual basis to confirm that VY continues to maintain sufficient funding for radiological decommissioning. Entergy submitted their most

recent report on March 30, 2015 (ADAMS Accession No. ML15092A141). The staff is currently reviewing this report to ensure that VY will have sufficient funding to complete radiological decommissioning. Entergy must continue to submit these annual reports in accordance with NRC regulations, and the staff will continue to evaluate them, to ensure that Entergy demonstrates reasonable assurance of having the funds necessary to complete radiological decommissioning throughout the remaining life of the license. If the funds do not cover the projected decommissioning cost, the status report must include a plan to obtain additional funds to cover the cost.

Further, based on its reasonable assurance determination, the NRC staff also concluded that there is no longer a need for Entergy to maintain lines of credit for operations and operational maintenance costs for VY. Entergy provided adequate assurance that funds will be available for radiological decommissioning and spent fuel management, and the NRC had no objection to the request for consent to cancel the two lines of credit. The staff communicated its approval to Entergy by letter dated April 16, 2015.

Also, the NRC staff's review of the parent company guarantee removal concluded that the parent company guarantee could be canceled because the bases for maintaining the guarantee were no longer applicable. Specifically, Entergy was originally required to obtain the parent guarantee to address a decommissioning funding shortfall in 2009; however, the shortfall has been eliminated and there is no longer a need for the parent company guarantee. NRC communicated this to Entergy by letter dated April 21, 2015.

As stated in your June 5, 2015, letter, the Vermont Attorney General's Office, the Vermont Department of Public Service, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power requested an opportunity for public participation in the NRC review of Entergy's exemption request. That exemption request seeks permission to use the DTF to pay for spent fuel management expenses and eliminates a 30-day notice requirement.

The Commission's regulatory framework establishes a clear distinction between exemptions and license amendments. These two regulatory actions are governed by separate regulations, subject to separate regulatory reviews, and are evaluated using separate standards and separate processes for public participation. This is not only a long-standing regulatory position, it has been the staff's position in litigation involving the State of Vermont. Approximately 2 months before it wrote the June 5, 2015, letter, the State filed a petition for intervention and a request for hearing asserting that it should have a hearing on license amendments and exemptions for the VY DTF (ADAMS Accession No. ML15110A484). As the NRC staff stated in its pleadings (ADAMS Accession No. ML15135A523), a petitioner may seek a hearing on license amendments, but not on exemption requests. In a prior petition for intervention, filed approximately 4 months before the June 5, 2015, letter, the State also petitioned for intervention and a hearing on license amendments and exemptions regarding VY emergency planning (ADAMS Accession No. ML15040A723). The staff argued in its pleading in that matter that the State had no right to a hearing on the exemption, a position upheld by the Atomic Safety and Licensing Board established to hear the matter. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-18, __ NRC __ (slip op.) (May 18, 2015) (ADAMS Accession No. ML15138A270).

I would also like to take this opportunity to document some of the information that my staff discussed with the State of Vermont officials and staff, as well as other state representatives, during a May 29, 2015, telephone conference call. As the staff stated in that call, it is reviewing the regulatory requirements associated with the use by Entergy of the first 3 percent of the DTF to pay for spent fuel management planning costs. Based on the results of its review, the NRC staff will take appropriate regulatory action, if warranted. Further, based on the State's January 26, 2015, letter, the staff initiated a further review of the VY site-specific cost estimate. This review is ongoing.

On a separate note, in accordance with the regulatory processes governing requests for enforcement action under Section 2.206 of Title 10 of the *Code of Federal Regulations*, the NRC will formally respond by letter to the questions that were raised in the January 27, 2015, letter, submitted by the State of Vermont and the Vermont Office of the Attorney General. The staff will issue its letter upon completion of the Final Director's Decision associated with a 2.206 petition that was filed in March 2013, by Mr. Timothy Judson, President of Citizens Awareness Network, on behalf of the Alliance for a Green Economy, Citizens Awareness Network, Pilgrim Watch, and Vermont Citizens Action Network.

The NRC understands your interest and concern in the pending decommissioning of VY and looks forward to continuing to work with all parties involved to ensure, first and foremost, the health and safety of the public. If you have any further questions or concerns, please contact Mr. James Kim at (301) 415-4125 or by e-mail at James.Kim@nrc.gov.

Sincerely,

/RA/ for W.D.

William M. Dean, Director
Office of Nuclear Reactor Regulation

Docket No. 50-271

I would also like to take this opportunity to document some of the information that my staff discussed with the State of Vermont officials and staff, as well as other state representatives, during a May 29, 2015, telephone conference call. As the staff stated in that call, it is reviewing the regulatory requirements associated with the use by Entergy of the first 3 percent of the DTF to pay for spent fuel management planning costs. Based on the results of its review, the NRC staff will take appropriate regulatory action, if warranted. Further, based on the State's January 26, 2015, letter, the staff initiated a further review of the VY site-specific cost estimate. This review is ongoing.

On a separate note, in accordance with the regulatory processes governing requests for enforcement action under Section 2.206 of Title 10 of the *Code of Federal Regulations*, the NRC will formally respond by letter to the questions that were raised in the January 27, 2015, letter, submitted by the State of Vermont and the Vermont Office of the Attorney General. The staff will issue its letter upon completion of the Final Director's Decision associated with a 2.206 petition that was filed in March 2013, by Mr. Timothy Judson, President of Citizens Awareness Network, on behalf of the Alliance for a Green Economy, Citizens Awareness Network, Pilgrim Watch, and Vermont Citizens Action Network.

The NRC understands your interest and concern in the pending decommissioning of VY and looks forward to continuing to work with all parties involved to ensure, first and foremost, the health and safety of the public. If you have any further questions or concerns, please contact Mr. James Kim at (301) 415-4125 or by e-mail at James.Kim@nrc.gov.

Sincerely,
***/RA Jennifer Uhle for/***

William M. Dean, Director
Office of Nuclear Reactor Regulation

Docket No. 50-271

cc: Listserv

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**ADAMS Accession No. ML15162B001**

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| NAME | JKim | PBlechman | ABowers (RTurtil for) | BMizuno | MKhanna |
| DATE | 6/11/15 | 6/12/15 | 6/12/15 | 6/12/15 | 6/12/15 |
| OFFICE | NRR/DORL/DD | NRR/DIRS/D | NRR/DORL/D(A) | NRR/D | |
| NAME | GWilson | SMorris | LLund | WDean (JUhle for) | |
| DATE | 6/12/15 | 6/15/15 | 6/12/15 | 6/16 /15 | |

**OFFICIAL RECORD COPY**

EXHIBIT 2

Entergy

**Entergy Nuclear Vermont Yankee, LLC**
Vermont Yankee
320 Governor Hunt Rd.
Vernon, VT
802-257-7711

BVY 15-053

October 27, 2015

Mr. William M. Dean, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555

SUBJECT: Pre-Notice of Disbursement from Decommissioning Trust
Vermont Yankee Nuclear Power Station
Docket No. 50-271
License No. DPR-28

Dear Mr. Dean:

In accordance with Vermont Yankee Nuclear Power Station (VYNPS) Renewed Facility Operating License Condition 3.J.a.(iii), the decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given thirty (30) days prior written notice to the NRC.

Article IV, Section 4.05 of the Master Decommissioning Trust Agreement by and between Entergy Nuclear Vermont Yankee, LLC (ENVY) and The Bank of New York Mellon, successor by operation of law to Mellon Bank, N.A. as Trustee, provides that no disbursements or payments shall be made by the Trustee, other than Administrative Expenses in accordance with Section 4.02 of the Master Trust Agreement, until the Trustee has first given the NRC thirty (30) days prior written notice of payment; provided, however, that no disbursement or payment from the Master Trust shall be made if the Trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter provides the NRC written notification of The Bank of New York Mellon's intent, upon receipt of a completed Disbursement Certificate from ENVY, to make a disbursement from the VYNPS nuclear decommissioning trust in an amount not to exceed (without a supplemental 30-day notice to the Director) $6,600,000, for the period of October 2015. The disbursement request includes, among other things, expected site-specific decommissioning costs related to emergency planning contractor costs, insurance, and property taxes.[1]

[1] These cost items are identified in the Site Specific Decommissioning Cost Estimate that was submitted to the NRC with the Vermont Yankee Nuclear Power Station Post-Shutdown Decommissioning Activities Report (PSDAR) on December 19, 2014. *See* PSDAR, App. C, Table C at lines 1a.2.23/1b.2.23, 1a.4.1/1b.4.2, and 1a.4.2/1b.4.3 (ADAMS Accession No. ML14357A110).

The disbursement from the VYNPS nuclear decommissioning trust in the amount described above is planned to be made thirty (30) days following the date of this letter, unless the trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter contains no new regulatory commitments.

Should you have any questions concerning this letter or require additional information, please contact Mr. Glen Metzger at 412-234-0573 or Mr. Christopher Wamser at 802-451-3102.

Sincerely,

David Ryan
Managing Director
The Bank of New York Mellon

Christopher Wamser
Site Vice President
Entergy Nuclear Vermont Yankee, LLC

cc: U.S. Nuclear Regulatory Commission
Attn: Document Control Desk
Washington, DC 20555-0001

Mr. Daniel H. Dorman
Regional Administrator, Region 1
U.S. Nuclear Regulatory Commission
2100 Renaissance Blvd, Suite 100
King of Prussia, PA 19406-2713

Mr. James S. Kim, Project Manager
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Mail Stop O8D15
Washington, DC 20555

Mr. Christopher Recchia, Commissioner
Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, Vermont 05602-2601

EXHIBIT 3

**Entergy Nuclear Vermont Yankee, LLC**
Vermont Yankee
320 Governor Hunt Rd.
Vernon, VT
802-257-7711

BVY 15-051

September 14, 2015

Mr. William M. Dean, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555

SUBJECT: Pre-Notice of Disbursement from Decommissioning Trust
Vermont Yankee Nuclear Power Station
Docket No. 50-271
License No. DPR-28

Dear Sir:

In accordance with Vermont Yankee Nuclear Power Station (VYNPS) Renewed Facility Operating License Condition 3.J.a.(iii), the decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given thirty (30) days prior written notice to the NRC.

Article IV, Section 4.05 of the Master Decommissioning Trust Agreement by and between Entergy Nuclear Vermont Yankee, LLC (ENVY) and The Bank of New York Mellon, successor by operation of law to Mellon Bank, N.A. as Trustee, provides that no disbursements or payments shall be made by the Trustee, other than Administrative Expenses in accordance with Section 4.02 of the Master Trust Agreement, until the Trustee has first given the NRC thirty (30) days prior written notice of payment; provided, however, that no disbursement or payment from the Master Trust shall be made if the Trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter provides the NRC written notification of The Bank of New York Mellon's intent, upon receipt of a completed Disbursement Certificate from ENVY, to make a disbursement from the VYNPS nuclear decommissioning trust in an amount not to exceed (without a supplemental 30-day notice to the Director) $7,000,000 at VYNPS, for the period of September 2015.

The disbursement from the VYNPS nuclear decommissioning trust in the amount described above is planned to be made thirty (30) days following the date of this letter, unless the trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter contains no new regulatory commitments.

Should you have any questions concerning this letter or require additional information, please contact Mr. Glen Metzger at 412-234-0573 or Mr. Christopher Wamser at 802-451-3102.

Sincerely,

David Ryan
Managing Director
The Bank of New York Mellon

Chris Wamser
Site Vice President
Entergy Nuclear Vermont Yankee, LLC

cc: U.S. Nuclear Regulatory Commission
Attn: Document Control Desk
Washington, DC 20555-0001

Mr. Daniel H. Dorman
Regional Administrator, Region 1
U.S. Nuclear Regulatory Commission
2100 Renaissance Blvd, Suite 100
King of Prussia, PA 19406-2713

Mr. James S. Kim, Project Manager
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Mail Stop O8D15
Washington, DC 20555

Mr. Christopher Recchia, Commissioner
Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, Vermont 05602-2601

EXHIBIT 4

**Entergy Nuclear Vermont Yankee, LLC**
Vermont Yankee
320 Governor Hunt Rd.
Vernon, VT
802-257-7711

BVY 15-047

August 13, 2015

Mr. William M. Dean, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555

SUBJECT: Pre-Notice of Disbursement from Decommissioning Trust
Vermont Yankee Nuclear Power Station
Docket No. 50-271
License No. DPR-28

Dear Sir:

In accordance with Vermont Yankee Nuclear Power Station (VYNPS) Renewed Facility Operating License Condition 3.J.a.(iii), the decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given thirty (30) days prior written notice to the NRC.

Article IV, Section 4.05 of the Master Decommissioning Trust Agreement by and between Entergy Nuclear Vermont Yankee, LLC (ENVY) and The Bank of New York Mellon, successor by operation of law to Mellon Bank, N.A. as Trustee, provides that no disbursements or payments shall be made by the Trustee, other than Administrative Expenses in accordance with Section 4.02 of the Master Trust Agreement, until the Trustee has first given the NRC thirty (30) days prior written notice of payment; provided, however, that no disbursement or payment from the Master Trust shall be made if the Trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter provides the NRC written notification of The Bank of New York Mellon's intent, upon receipt of a completed Disbursement Certificate from ENVY, to make a disbursement from the VYNPS nuclear decommissioning trust. The disbursement is payment for decommissioning and operational irradiated fuel management costs, as incurred, not to exceed (without a supplemental 30-day notice to the Director) $6,000,000 at VYNPS, for the period of August 2015. ENVY has confirmed (or prior to the corresponding disbursement shall have confirmed) that the payments to be disbursed are for legitimate decommissioning and operational irradiated fuel management expenses.

The disbursement from the VYNPS nuclear decommissioning trust in the amount described above is planned to be made thirty (30) days following the date of this letter, unless the trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter contains no new regulatory commitments.

Should you have any questions concerning this letter or require additional information, please contact Mr. Glen Metzger at 412-234-0573 or Mr. Christopher Wamser at 802-451-3102.

Sincerely,

David Ryan
Managing Director
The Bank of New York Mellon

Chris Wamser
Site Vice President
Entergy Nuclear Vermont Yankee, LLC

cc: U.S. Nuclear Regulatory Commission
Attn: Document Control Desk
Washington, DC 20555-0001

Mr. Daniel H. Dorman
Regional Administrator, Region 1
U.S. Nuclear Regulatory Commission
2100 Renaissance Blvd, Suite 100
King of Prussia, PA 19406-2713

Mr. James S. Kim, Project Manager
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Mail Stop O8D15
Washington, DC 20555

Mr. Christopher Recchia, Commissioner
Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, Vermont 05602-2601

EXHIBIT 5

Entergy

**Entergy Nuclear Vermont Yankee, LLC**
Vermont Yankee
320 Governor Hunt Rd.
Vernon, VT
802-257-7711

BVY 15-044

July 16, 2015

Mr. William M. Dean, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555

SUBJECT: Pre-Notice of Disbursement from Decommissioning Trust
Vermont Yankee Nuclear Power Station
Docket No. 50-271
License No. DPR-28

Dear Sir:

In accordance with Vermont Yankee Nuclear Power Station (VYNPS) Renewed Facility Operating License Condition 3.J.a.(iii), the decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given thirty (30) days prior written notice to the NRC.

Article IV, Section 4.05 of the Master Decommissioning Trust Agreement by and between Entergy Nuclear Vermont Yankee, LLC (ENVY) and The Bank of New York Mellon, successor by operation of law to Mellon Bank, N.A. as Trustee, provides that no disbursements or payments shall be made by the Trustee, other than Administrative Expenses in accordance with Section 4.02 of the Master Trust Agreement, until the Trustee has first given the NRC thirty (30) days prior written notice of payment; provided, however, that no disbursement or payment from the Master Trust shall be made if the Trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter provides the NRC written notification of The Bank of New York Mellon's intent, upon receipt of a completed Disbursement Certificate from ENVY, to make a disbursement from the VYNPS nuclear decommissioning trust. The disbursement is payment for decommissioning and operational irradiated fuel management costs, as incurred, not to exceed (without a supplemental 30-day notice to the Director) $12,000,000 at VYNPS, through July 2015. ENVY has confirmed (or prior to the corresponding disbursement shall have confirmed) that the payments to be disbursed are for legitimate decommissioning and operational irradiated fuel management expenses.

The disbursement from the VYNPS nuclear decommissioning trust in the amount described above is planned to be made thirty (30) days following the date of this letter, unless the trustee receives prior written notice of objection from the NRC Director of the Office of Nuclear Reactor Regulation.

This letter contains no new regulatory commitments.

Should you have any questions concerning this letter or require additional information, please contact Mr. Glen Metzger at 412-234-0573 or Mr. Christopher Wamser at 802-451-3102.

Sincerely,

David Ryan
Managing Director
The Bank of New York Mellon

Chris Wamser
Site Vice President
Entergy Nuclear Vermont Yankee, LLC

cc: U.S. Nuclear Regulatory Commission
Attn: Document Control Desk
Washington, DC 20555-0001

Mr. Daniel H. Dorman
Regional Administrator, Region 1
U.S. Nuclear Regulatory Commission
2100 Renaissance Blvd, Suite 100
King of Prussia, PA 19406-2713

Mr. James S. Kim, Project Manager
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Mail Stop O8D15
Washington, DC 20555

Mr. Christopher Recchia, Commissioner
Vermont Department of Public Service
112 State Street – Drawer 20
Montpelier, Vermont 05602-2601

EXHIBIT 6

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 |
| | ) | |
| (Vermont Yankee Nuclear Power Station) | ) | |

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# NRC STAFF ANSWER TO THE VERMONT PETITION FOR REVIEW OF ENTERGY NUCLEAR OPERATION INC.'S PLANNED USE OF THE VERMONT YANKEE NUCLEAR DECOMMISSIONING TRUST FUND

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Beth Mizuno
Anita Ghosh
Jeremy Wachutka
Matthew Ring

Counsel for the NRC Staff

December 7, 2015

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

# NRC STAFF ANSWER TO THE VERMONT PETITION FOR REVIEW OF ENTERGY NUCLEAR OPERATION INC.'S PLANNED USE OF THE VERMONT YANKEE NUCLEAR DECOMMISSIONING TRUST FUND

## INTRODUCTION

Pursuant to the U.S. Nuclear Regulatory Commission (NRC) Secretary's November 10, 2015 scheduling order,[1] the NRC staff (Staff) files this answer to the Petition filed on November 4, 2015 by the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation (collectively, Vermont) challenging various aspects of the decommissioning of the Vermont Yankee Nuclear Power Station (Vermont Yankee or VY) by the holder of the VY operating license, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, Entergy or the licensee).[2]

In its Petition for Review, Vermont asks the Commission to exercise its inherent supervisory authority and initiate an adjudicatory hearing. Vermont wants that hearing to address its concerns regarding Entergy's use of the VY decommissioning trust fund and, first and foremost, the Staff's grant of a regulatory exemption to Entergy that allows it to use excess

[1] Order (Nov. 10, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15314A822).

[2] Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear Operation, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Nov. 5, 2015) (ADAMS Accession No. ML15309A758) (Petition or Petition for Review).

decommissioning trust funds to pay for spent fuel management expenses. As explained below, the Petition should be denied for the following reasons: the grant of the exemption was supported by a safety evaluation and environmental review; the exercise of supervisory authority to initiate an adjudicatory hearing is unwarranted, particularly given the decommissioning rulemaking currently underway;[3] Vermont is not entitled to a hearing on the Staff's grant of the exemption to the NRC regulations; Vermont's Petition suffers from numerous procedural defects; the concerns Vermont raises are not appropriate for an adjudication but can be pursued via an enforcement or rulemaking petition; and Vermont's environmental law challenges are meritless.

Because Vermont's Petition challenges the Commission's decommissioning process as it has been applied to VY, the Staff is prefacing its argument with a discussion of the decommissioning regulations, decommissioning funding, and the VY decommissioning trust fund regulatory exemptions and license amendments.

## BACKGROUND

### I. The Decommissioning Funding Requirements at 10 C.F.R. § 50.75

In 1988, the Commission promulgated the rule at 10 C.F.R. § 50.75 to address the identified need for applicants and licensees to provide, as part of the application for an operating license and during operations thereafter, "financial assurance," which is defined as "reasonable assurance of the availability of funds for decommissioning."[4] The regulation achieves this by setting the "formula amount" that must be provided for, at a minimum, as financial assurance for

[3] *See* Regulatory Improvements for Decommissioning Power Reactors, 80 Fed. Reg. 72,358 (Nov. 19, 2015) (advance notice of proposed rulemaking; request for comment).

[4] *See* General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,034 (June 27, 1988) (final rule); 10 C.F.R. § 50.75(a); 10 C.F.R. § 50.33(k).

decommissioning[5] and the methods by which this amount may be covered.[6] One such method is the use of a decommissioning trust fund (DTF) that would contain money equal to the formula amount when the licensee terminates operations.[7] As originally promulgated, the regulation did not include the requirements of 10 C.F.R. § 50.75(h).

II. The Decommissioning Regulation at 10 C.F.R. § 50.82

Whereas 10 C.F.R. § 50.75 discusses the covering of a "formula amount" for financial assurance while a plant is operating, 10 C.F.R. § 50.82 discusses the requirements applicable to plants during decommissioning, including the covering of a site-specific decommissioning cost estimate for financial assurance.[8]

Pursuant to 10 C.F.R. § 50.82(a)(1), the decommissioning process starts when the licensee certifies to the NRC that (1) it has determined to permanently cease operations and (2) it has permanently removed fuel from the reactor vessel. Upon the docketing of these certifications, the licensee's license no longer authorizes operation of the reactor or emplacement or retention of fuel in the reactor vessel.[9] At this point, the "operating stage" of the reactor's lifecycle ends and its "decommissioning stage" begins[10] and the licensee is required to complete decommissioning within 60 years.[11]

Prior to the Commission's 1996 rulemaking establishing its current decommissioning rules, a licensee was required to amend its operating license by submitting a detailed

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[5] 10 C.F.R. § 50.75(b)(1).

[6] 10 C.F.R. § 50.75(b)(3).

[7] 10 C.F.R. § 50.75(e)(1).

[8] Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278 (July 29, 1996) (final rule).

[9] 10 C.F.R. § 50.82(a)(2).

[10] *See* 61 Fed. Reg. 39,278, 39,278-79.

[11] 10 C.F.R. § 50.82(a)(3).

"decommissioning plan" to the NRC for approval, along with a supplemental environmental report that addressed environmental issues not previously considered.[12] This plan was due within two years of the beginning of decommissioning. [13]The NRC would then review this submittal, prepare a safety evaluation report, prepare a NEPA analysis, and either reject or approve it.[14] The NRC would also provide an opportunity for a hearing.[15] This process prohibited a licensee from performing major decommissioning activities before the approval of its decommissioning plan.[16]

In 1996, the Commission removed the requirement for a decommissioning plan and its accompanying safety and environmental reviews and, instead, recognized that licensees could perform major decommissioning activities as part of their existing operating licenses and the Commission's 10 C.F.R. § 50.59 change process.[17] The Commission made this change, in part, because: 1) the degree of regulatory oversight required for a nuclear power reactor during its decommissioning stage is considerably less than that required for the facility during its operating stage; 2) the 10 C.F.R. § 50.59 process and 10 C.F.R. § 50.82 would be amended to include additional criteria to ensure that concerns specific to decommissioning are considered by the licensee; and 3) the level of NRC oversight required would be commensurate with the status of the facility.[18]

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[12] 61 Fed. Reg. at 39,278.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id.* at 39,278-79.

[18] 61 Fed. Reg. at 39,279-80, 83 ("By maintaining certain requirements throughout the decommissioning process, licensees will be able to use the existing [10 C.F.R] § 50.59 process to perform decommissioning activities and thus provide comparable assurance that protection of the public health, safety, and the environment will not be compromised.").

As a result of the 1996 decommissioning rulemaking, the decommissioning regulations currently require that, first, within two years following the permanent cessation of operations, the licensee submit to the NRC, instead of a decommissioning plan, a "post-shutdown decommissioning activities report" (PSDAR).[19] The PSDAR must contain a description of, and schedule for, the licensee's planned decommissioning activities, a discussion that provides the reasons for concluding that the environmental impacts associated with the site-specific decommissioning activities will be bounded by previously issued environmental impact statements, and a site-specific decommissioning cost estimate (DCE), including the projected cost of managing irradiated fuel.[20] Upon its receipt of the PSDAR, the NRC provides notice of receipt, makes the PSDAR available for public comment, and holds a public meeting to discuss it.[21]

In essence, the pre-1996 decommissioning process required an affirmative NRC licensing action on a decommissioning plan, whereas the current decommissioning process requires the NRC to oversee a licensee's adherence to the regulations through its submission of a PSDAR.[22] Namely, the PSDAR "serves to inform and alert the NRC staff to the schedule of licensee activities for inspection planning purposes and for decisions regarding NRC oversight activities."[23] While the pre-1996 licensing process triggered an opportunity for a hearing, the current process does not.[24] Instead, an opportunity for hearing is afforded on the License

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[19] 10 C.F.R. § 50.82(a)(4)(i).

[20] *Id*.

[21] 10 C.F.R. § 50.82(a)(4)(ii).

[22] 61 Fed. Reg. at 39,282.

[23] *Id*.

[24] *Id*. at 39,278-80.

Termination Plan (LTP).[25] Additionally, the PSDAR process does not trigger a new NRC NEPA obligation because the licensee is required to demonstrate that the environmental impacts associated with decommissioning will be bounded by previously-issued environmental impact statements and because the decommissioning regulations otherwise prohibit major decommissioning activities that could result in significant environmental impacts not previously reviewed.[26]

Ninety days after the NRC has received the PSDAR, unless the NRC objects to it,[27] the licensee may commence major decommissioning activities consistent with the PSDAR and the Commission's 10 C.F.R. § 50.59 change process.[28] The NRC had determined based on its experience with licensee decommissioning activities that the 10 C.F.R. § 50.59 change process is sufficient because it "encompasse[s] routine activities that are similar to those undertaken during the decommissioning process."[29] The decommissioning regulations also provide additional restrictions prohibiting decommissioning activities that would (1) foreclose release of the site for possible unrestricted use, (2) result in significant environmental impacts not previously reviewed, or (3) result in there no longer being reasonable assurance that adequate funds will be available for decommissioning.[30] Moreover, when taking actions otherwise permitted under 10 C.F.R. § 50.59, the licensee is required to notify the NRC, and send a copy to the affected States, before performing any decommissioning activity inconsistent with, or

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[25] 61 Fed. Reg. at 39,280; Regulatory Guide 1.179, Standard Format and Content of License Termination Plans for Nuclear Power Reactors, Rev. 1 (June 2011) (ADAMS Accession No. ML110490419).

[26] 61 Fed. Reg. at 39,283.

[27] *See id*. at 39,279.

[28] 10 C.F.R. § 50.82(a)(5).

[29] 61 Fed. Reg. at 39,279.

[30] 10 C.F.R. § 50.82(a)(6).

making any significant schedule change from, those actions and schedules described in the PSDAR, including changes that significantly increase the decommissioning cost.[31]

With respect to financial assurance during decommissioning, 10 C.F.R. § 50.82 provides that a DTF may only be used if:

> (A) The withdrawals are for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in [10 C.F.R.] § 50.2;
>
> (B) The expenditure would not reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise and;
>
> (C) The withdrawals would not inhibit the ability of the licensee to complete funding of any shortfalls in the decommissioning trust needed to ensure the availability of funds to ultimately release the site and terminate the license.[32]

Otherwise, the Commission acknowledged that, at the point when the licensee submits its decommissioning cost estimate (DCE), the licensee generally has "access to the balance of trust fund monies for the remaining decommissioning activities"[33] and is allowed "broad flexibility . . . ."[34]

During decommissioning, the NRC monitors the licensee's use of its DTF through annual financial assurance status reports, which must include the amount spent on decommissioning, the amount remaining in the DTF, and an updated estimate of the costs to complete

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[31] 10 C.F.R. § 50.82(a)(7).

[32] 10 C.F.R. § 50.82(a)(8)(i).

[33] 61 Fed. Reg. at 39,285.

[34] *Id.*

decommissioning.[35] If there is a shortfall between the amount remaining in the DTF, taking into account a 2% annual real rate of return, and the updated cost to complete decommissioning, then the licensee must provide additional financial assurance to cover the shortfall.[36] Similarly, the licensee must also submit to the NRC annual reports on the status of its funding for managing irradiated fuel, including a plan to obtain additional funds to cover any projected shortfalls.[37]

At least two years before the scheduled termination of the license (*i.e.*, the completion of decommissioning), the licensee is required submit to the NRC a license termination plan (LTP) as a license amendment request.[38] The LTP must include a site characterization, identification of the remaining dismantlement activities, plans for site remediation, detailed plans for the final radiation survey, an updated DCE, and a supplement to the environmental report.[39] Upon its receipt of the LTP, the NRC provides notice of receipt, makes the LTP available for public comment, and holds a public meeting to discuss it.[40] Unlike the PSDAR, the LTP requires NRC approval as a license amendment and, therefore, gives rise to a hearing opportunity and NRC NEPA obligations.[41] In essence, the LTP is analogous to the previously required "decommissioning plan" with the exception that it does not have to provide information regarding all dismantlement activities because, presumably, much of the dismantlement would have already been performed under the PSDAR and the 10 C.F.R. § 50.59 change process.[42] The

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[35] 10 C.F.R. § 50.82(a)(8)(v).

[36] 10 C.F.R. § 50.82(a)(8)(vi).

[37] 10 C.F.R. § 50.82(a)(8)(vii).

[38] 10 C.F.R. § 50.82(a)(9).

[39] *Id.*

[40] 10 C.F.R. § 50.82(a)(9)(iii).

[41] 61 Fed. Reg. at 39,280.

[42] *Id.*

Commission approves the LTP if it demonstrates that the remainder of the decommissioning activities will be performed in accordance with the Commission's regulations, will not be inimical to the common defense and security or to the health and safety of the public, and will not have a significant effect on the quality of the environment.[43] After this approval, the Commission will then terminate the license once it determines that the remaining dismantlement has been performed in accordance with the LTP and that the final radiation survey demonstrates that the radiological criteria for license termination have been met.[44]

As part of its rulemaking, the NRC received comments criticizing the decommissioning rule for not doing enough to ensure that licensees will have sufficient funds to complete decommissioning.[45] The Commission rejected these comments, stating that the decommissioning regulations adequately "preserve the integrity of the decommissioning funds by tying the rate of expenditure to specific parts of the decommissioning process."[46] However, the Commission acknowledged that it "believes that with electric utility deregulation becoming more likely, [the Commission] may need to require additional decommissioning funding assurance for those licensees that are no longer able to collect full decommissioning costs in rates or set their own rates."[47]

## III. The Promulgation of 10 C.F.R. § 50.75(h) to Address Licensees That Are Not Electric Utilities

In order to address the issue of deregulation and its effect on financial assurance, as noted in its 1996 decommissioning rulemaking, the Commission began to impose additional

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[43] 10 C.F.R. § 50.82(a)(10).

[44] 10 C.F.R. § 50.82(a)(11).

[45] 61 Fed. Reg. at 39,285.

[46] *Id.*

[47] *Id.*

requirements, in the form of license conditions, on licensees that were not electric utilities.[48] This enabled the Commission to find reasonable assurance that these non-utilities would have the funds available for the decommissioning process. Thus, when the rate-regulated Vermont Yankee Nuclear Power Corporation sought to transfer the VY license to Entergy, which is not an electric utility, the NRC required the addition of license conditions related to the VY DTF.[49] These license conditions are:

> a. Decommissioning Trust
>
> (i) The decommissioning trust agreement must be in a form acceptable to the NRC.
>
> (ii) With respect to the decommissioning trust funds, investments in the securities or other obligations of Entergy Corporation and its affiliates, successors, or assigns shall be prohibited. In addition, except for investments tied to market indexes or other non-nuclear-sector mutual funds, investments in any entity owning one or more nuclear power plants are prohibited.
>
> (iii) The decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of payment. The decommissioning trust agreement shall further contain a provision that no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director of the Office of Nuclear Reactor Regulation.

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[48] An electric utility is defined in 10 C.F.R. § 50.2 as "any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority."

[49] *See* Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment at Enclosure 1, p. 4-6, Enclosure 2, p. 8, Enclosure 3, p.7-8 (May 17, 2002) (ADAMS Accession No. ML020390198) (VY License Transfer Order).

> (iv) The decommissioning trust agreement must provide that the
>
> agreement cannot be amended in any material respect without 30 days prior written notification to the Director of the Office of Nuclear Reactor Regulation.
>
> (v) The appropriate section of the decommissioning trust agreement shall state that the trustee, investment advisor, or anyone else directing the investments made in the trust shall adhere to a "prudent investor" standard, as specified in 18 CFR 35.32(a)(3) of the Federal Energy Regulatory Commission's regulations.
>
> Entergy Nuclear Vermont Yankee, LLC shall take all necessary steps to ensure that the decommissioning trust is maintained in accordance with the application for approval of the transfer of this license to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., and the requirements of the Order approving the transfer, and consistent with the safety evaluation supporting the Order.[50]

Shortly after the addition of these DTF license conditions to the VY operating license, and based upon its lessons-learned from drafting such license conditions for Entergy and other licensees that were not electric utilities, the Commission issued a final rule promulgating similar regulatory requirements at 10 C.F.R. §§ 50.75(h)(1)-(4).[51] Like the VY DTF license conditions, the purpose of these new DTF regulatory requirements was to provide "assurance that an adequate amount of decommissioning funds will be available for their intended purpose" for facilities, such as VY, that were no longer rate-regulated.[52] The Commission found that such a generic rulemaking was preferable and more efficient than "applying specific license conditions

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[50] 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 7-8 (Mar. 21, 2011) (ADAMS Accession No. ML052720265) (VY Renewed Operating License).

[51] *See* Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002) (final rule).

[52] *Id*. at 78,332.

on a case-by-case basis" as had been done for VY and other facilities.[53] However, because of the existence of prior-issued DTF license conditions, one commenter on the proposed rule stated that, "it is not clear whether provisions in the proposed rule will supersede license conditions previously imposed in license transfer proceedings, or whether licensees with existing license conditions governing decommissioning trusts must apply to amend their licenses and whether these amendment applications would then be subject to hearings."[54] In response, the Commission stated that, "licensees will have the option of maintaining their existing license conditions or submitting to the new requirements"[55] and it promulgated 10 C.F.R. § 50.75(h)(4), which states that any license amendment that "does no more than delete specific license conditions relating to the terms and conditions of decommissioning trust agreements involves 'no significant hazards consideration.'"

The question regarding the interaction between site-specific DTF license conditions and the generic DTF regulations persisted, though, with the Nuclear Energy Institute writing to the NRC after the promulgation of the rule, in part, that "the rule language does not reflect the intent of the Commission that individual licensees should have the option of retaining their existing license conditions."[56] The Commission agreed with this comment and addressed it through a direct final rule, less than a year after the original rulemaking, by adding to the regulations 10 C.F.R. § 50.75(h)(5), which was to become effective on December 24, 2003, the same effective date as the originally promulgated 10 C.F.R. §§ 50.75(h)(1)-(4).[57] Section 50.75(h)(5) states:

> The provisions of paragraphs (h)(1) through (h)(3) of this section do not apply to any licensee that as of December 24, 2003, has existing license conditions relating to decommissioning

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[53] *Id*. at 78,334.

[54] *Id*.

[55] *Id*. at 78,335.

[56] Minor Changes to Decommissioning Trust Fund Provisions, 68 Fed. Reg. 65,386, 65,387 (Nov. 20, 2003) (final rule).

[57] *Id*.

> trust agreements, so long as the licensee does not elect to amend those license conditions. If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.

Taken together, the regulations at 10 C.F.R. § 50.75(h)(4)-(5) and their regulatory history allow a licensee with DTF license conditions to either maintain those conditions, in which case 10 C.F.R. § 50.75(h)(1)-(3) does not "apply" to the licensee, or, instead, "elect" to follow 10 C.F.R. § 50.75(h)(1)-(3) by deleting these license conditions via a license amendment request.

## IV. Entergy's DTF License Amendment Request and Exemption Request

Based on 10 C.F.R. § 50.75(h)(4)-(5) and its regulatory history, on September 4, 2014, Entergy submitted a license amendment request (LAR) seeking to delete all of the VY DTF license conditions and, instead, be bound by the Commission's DTF regulations at 10 C.F.R. § 50.75(h)(1)-(3).[58] Entergy characterized this LAR as "confined to administrative changes for providing consistency with existing regulations."[59] On February 17, 2015, the NRC published in the *Federal Register* a notice of opportunity to request a hearing and petition for leave to intervene on the LAR.[60]

Separate from, and subsequent to the LAR, Entergy submitted an exemption request pursuant to 10 C.F.R. § 50.12.[61] The Exemption Request sought exemptions for VY from three

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[58] Letter from Christopher Wamser, Entergy, to NRC, Proposed Change No. 310 - Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28, at 1 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405) (LAR).

[59] *Id*. at Attachment 1, p. 8.

[60] 80 Fed. Reg. at 8,356.

[61] Letter from Christopher Wamser, Entergy, to NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan. 6, 2015) (ADAMS Accession No. ML15013A171) (Exemption Request).

provisions of the Commission's regulations. It sought to exempt VY from 10 C.F.R. § 50.82(a)(8)(i)(A) so as to allow Entergy to be able to make withdrawals from the VY decommissioning trust fund (DTF) for certain irradiated fuel management costs.[62] It also sought two exemptions from 10 C.F.R. § 50.75(h)(1)(iv) in the event that Entergy's prior-filed LAR were to be granted and, thus, that 10 C.F.R. § 50.75(h)(1)(iv) were to become applicable to VY.[63] Specifically, it sought an exemption from the requirement of 10 C.F.R. § 50.75(h)(1)(iv) that "[d]isbursements . . . from the trust . . . are restricted to decommissioning expenses . . . until final decommissioning has been completed." It also sought an exemption from the 10 C.F.R. § 50.75(h)(1)(iv) requirement, if it were to become applicable to VY, to provide 30-days' notice of these disbursements.[64] Thus, Entergy's Exemption Request sought to allow Entergy to make withdrawals from the VY DTF for certain spent fuel management expenses and to do so without having to provide 30-days' notice, similar to the manner in which Entergy is allowed to make decommissioning withdrawals from the VY DTF.[65] On June 17, 2015, the Staff granted the Exemption Request finding that it met the requirements for a specific exemption.[66]

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[62] *Id*. at 1-2.

[63] *Id*. (acknowledging that Entergy had previously submitted an LAR seeking VY to be bound by 10 C.F.R. § 50.75(h)(1)-(3) and, therefore, requesting exemptions from 10 C.F.R. § 50.75(h)(1)(iv) "[s]ince approval of [the LAR] would result in 10 [C.F.R. §] 50.75(h)(1) through (h)(3) being applicable to [VY] . . . ."). *See also Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC __, __ (Aug. 31, 2015) (slip op. at 5) ("The two exemptions from 10 C.F.R. § 50.75(h)(1)(iv)—which allow Entergy to use the decommissioning trust fund for spent fuel management without providing a 30-day notification—have no practical effect because, unless the LAR is approved, 10 C.F.R. § 50.75(h) does not currently apply to Entergy.").

[64] *See Vermont Yankee*, LBP-15-24, 82 NRC at __ (slip op. at 40) (providing a chart explaining the practical effects of the LAR and the Exemption Request).

[65] Exemption Request at 2 (seeking to treat "disbursements for irradiated fuel management . . . the same as those for radiological decommissioning.").

[66] Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992 (June 23, 2015) (exemption, issuance).

The regulation at 10 C.F.R. § 50.12 provides that a specific exemption from the regulatory requirements of Part 50 may be granted if: the requested exemption is authorized by law, does not present an undue risk to the public health and safety, and is consistent with the common defense and security; and the application of the regulations in the particular circumstances conflicts with other rules or regulations, would not serve the underlying purpose of the regulations or would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulations were adopted.

When it granted the exemption from 10 C.F.R. § 50.82(a)(8)(i),[67] the Staff discussed each of the criteria in 10 C.F.R. § 50.12 and explained why it concluded that the criteria were met. The Staff found that granting the exemption would not result in a violation of law or regulation.[68] The Staff further found that the exemption would not present an undue risk to public health and safety because it would not adversely affect the licensee's ability to complete radiological decommissioning. The Staff noted that withdrawals from the DTF would still be subject to the constraints of 10 C.F.R. § 50.82(a)(8)(i)(B) and (C). Subsection (B) prohibits expenditures that would reduce the value of the DTF below that necessary to place and maintain the reactor in safe storage. Subsection (C) prohibits withdrawals that would inhibit the ability of the licensee to complete funding of any shortfalls in the DTF. The Staff further noted that withdrawals from the DTF are reviewed on an annual basis. The Staff also determined that the exemption would not result in any new accident precursors or any change in the consequences of postulated accidents, the types or amounts of effluents that may be released

[67] The Staff's review of the exemptions that would have been applicable had the LAR been granted (exemptions from 10 C.F.R. § 50.75(h)(1)(iv)) are not discussed herein as the LAR has been withdrawn.

[68] 80 Fed. Reg. at 35,993.

offsite, or any significant increase in occupational or public radiation exposure.[69] The Staff noted that the exemption would not adversely affect security at the site and so would not be inconsistent with common defense and security.[70]

Finally, the Staff determined that special circumstances presented by the situation justified the grant of the exemption.[71] The underlying purpose of the restriction in 10 C.F.R. § 50.82(a)(8)(i)(A) was to ensure that the DTF contained sufficient funds to complete radiological decommissioning.[72] The Staff performed an independent cash flow analysis of the DTF and confirmed that there was reasonable assurance of adequate funding to complete radiological decommissioning and to pay for spent fuel management. Accordingly, the Staff concluded that application of the regulatory prohibition against the use of the DTF for spent fuel management expenses was not necessary to achieve the underlying purpose of the rule. Furthermore, the Staff explained that because the DTF contains more money than needed to cover the cost of radiological decommissioning and because those excess funds could be used for spent fuel management, preventing the use of the DTF for spent fuel management expenses would create an unnecessary financial burden with no corresponding safety benefit. The Staff also stated that if Entergy could not use the DTF for spent fuel management, it would have to obtain additional funding or would have to modify its decommissioning approach and method, and that either option would impose an unnecessary and undue burden in excess of that contemplated when the regulation was adopted.

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[69] *Id.*

[70] *Id.*

[71] *Id.* at 35,993-94.

[72] *Id.* at 35,993.

The Staff also conducted an environmental review and determined that this action belongs in a category of actions that the Commission has declared to be subject to a categorical exclusion.[73] The Commission has determined, by rule, that these actions do not individually or cumulatively have a significant effect on the human environment, and, therefore, do not require an environmental assessment (EA) or environmental impact statement (EIS).[74] Substantively identical exemption requests have previously been granted for Kewaunee Power Station,[75] San Onofre Nuclear Generating Station, Units 2 and 3,[76] and Crystal River Unit 3 Nuclear Generating Plant.[77] As a result of the grant of the Exemption Request, Entergy was able to make withdrawals from the VY DTF for spent fuel management expenses, but still had to provide 30-days' notice of these withdrawals since Entergy's LAR had not yet been granted and, consequently, VY License Condition 3.J.a.(iii) requiring these notifications was still in effect.[78]

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[73] *Id*. at 35,994.

[74] 10 C.F.R. § 51.22.

[75] *See* License Exemption Request for Dominion Energy Kewaunee, Inc., 79 Fed. Reg. 30,900 (May 29, 2014).

[76] *See* Southern California Edison Company; San Onofre Nuclear Generating Station, Units, 2 and 3, 79 Fed. Reg. 55,019 (Sept. 15, 2014).

[77] *See* Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 5,795 (Feb. 3, 2015). *See also* SRM-SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements* (Mar. 2, 2015) (ADAMS Accession No. ML15061A516) ("The Commission continues to support the current practice of approving appropriately justified exemptions from certain emergency planning requirements while plants are transitioning to decommissioning based on site-specific evaluations.").

[78] *See Vermont Yankee*, LBP-15-24, 82 NRC at __ (slip op. at 40) (providing a chart explaining the practical effects of the LAR and the Exemption Request).

On August 13, 2015, Vermont challenged the grant of the Exemption Request in the U.S. Court of Appeals for the District of Columbia Circuit.[79] Based on the fact that Vermont had filed the instant Petition, the NRC moved to dismiss for lack of finality.[80]

V. Litigation Before the Atomic Safety and Licensing Board

On April 20, 2015, Vermont filed a Hearing Request challenging the licensee's LAR and request for exemptions. In the LAR, Entergy sought to have the provisions of 10 C.F.R. § 50.75(h)(1)-(3) applied to its license. Entergy also sought exemptions from 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A).[81] Vermont proffered four contentions that alleged that (1) the LAR involved significant safety and environmental hazards, failed to show compliance with 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(B) and (C), and failed to provide adequate protection of public health and safety,[82] (2) the LAR was untimely because it was filed 12 years after the issuance of the Decommissioning Trust Rule and Entergy had not satisfied the timeliness requirements for petitions for reconsideration and motions for filing new or amended contentions after the deadline at 10 C.F.R. §§ 2.345 or 2.309, respectively,[83] (3) the LAR must be considered with the Exemption Request because the exemption, if granted, would not

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[79] Petition for Review (Aug. 13, 2015), The State of Vermont, et. al v. NRC, D.C. Circuit No. 15-1279.

[80] Respondents' Motion to Dismiss (Nov. 16, 2015), The State of Vermont, et. al v. NRC, D.C. Circuit No. 15-1279.

[81] State of Vermont's Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) (Hearing Request) (available as a package at ADAMS Accession No. ML15110A484 along with: Declaration of Anthony R. Leshinskie (Apr. 20, 2015) (Leshinskie Declaration); Anthony R. Leshinskie curriculum vitae (Leshinskie CV); Declaration of William Irwin, Sc.D, CHP (Apr. 20, 2015) (Irwin Declaration); William E. Irwin, Sc.D., CHP curriculum vitae (Irwin CV); Exhibit 1, Comments of the State of Vermont [on the Vermont Yankee Post-Shutdown Decommissioning Activities Report (PSDAR)] (Mar. 6, 2015) (Vermont's PSDAR Comments); Exhibit 2, Entergy Nuclear Vermont Yankee, LLC Master Decommissioning Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002) (MTA)).

[82] *See* Hearing Request at 3-17.

[83] *See id*. at 17-20.

provide reasonable assurance of adequate protection of public health and safety,[84] and (4) the LAR should be denied because Entergy did not submit an environmental report in accordance with 10 C.F.R. §§ 51.53(d) and 51.61 and because the Staff's environmental review was not complete or categorically excluded under 10 C.F.R. § 51.22(c).[85]

On July 6, 2015, Vermont proffered a fifth contention asserting that the LAR should be denied because the grant of the Exemption Request, rendered the LAR "no longer accurate within the meaning of 10 C.F.R. §§ 50.9 and 50.90" and its approval would "violate the requirement of 10 C.F.R. [§] 50.75(h)(5)".[86]

The Staff and Entergy opposed the admission of all five contentions.[87]

After hearing oral argument, the Atomic Safety and Licensing Board (Board) issued LBP-15-24, in which it admitted the first and fifth contentions and granted Vermont's Hearing Request.[88]

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[84] *See id.* at 20-26.

[85] *See id.* at 26-31.

[86] Motion at 4-5.

[87] *See* NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request (May 15, 2015) (ADAMS Accession No. ML15135A523) (Staff Answer); Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request (May 15, 2015) (ADAMS Accession No. ML15135A498) (Entergy Answer). *See also* The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (May 22, 2015) (ADAMS Accession No. ML15142A902) (Vermont Reply); s*ee* NRC Staff's Answer to the State of Vermont's Motion for Leave to File New and Amended Contentions (July 31, 2015) (ADAMS Accession No. ML15212A281) (Staff Answer to New Contention); Entergy's Answer Opposing State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV (July 31, 2015) (ADAMS Accession No. ML15212A825) (Entergy Answer to New Contention). *See also* State of Vermont's Reply in Support of Motion for Leave to File a New Contention and Add Bases and Support to Existing Contentions (Aug. 7, 2015) (ADAMS Accession No. ML15219A712) (Vermont Reply to New Contention).

[88] *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC __ (Aug. 31, 2015) (slip op.).

Subsequently, on September 22, 2015, Entergy filed a motion with the Board to withdraw the LAR, without conditions, and to dismiss the proceeding without prejudice.[89] The Board granted Entergy's motion to withdraw the LAR without prejudice and terminated the proceeding.[90] The Board imposed the following conditions on the withdrawal: that (1) Entergy provide written notice to Vermont of any new license amendment application relating to the VY DTF at the time such application is submitted to the NRC and (2) specify in its 30-day notices to the NRC if any proposed disbursements is for any of the expenses to which Vermont had objected in its admitted contention. 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. In addition, the Board required Entergy to report the disbursement of DTF money to pay "legal costs that were the factual basis of Contention 1."[91]

On October 6, 2015, the NRC Staff moved to vacate LBP-15-24, the Board decision on contention admissibility, on the grounds of mootness.[92] Vermont opposed the motion,[93] which is currently pending before the Commission.

To sum up, as a result of the grant of the Exemption Request and the withdrawal of the LAR, the DTF license conditions and regulatory requirements currently applicable to the VY are as follows: VY License Condition 3.J.a. governs the VY DTF; the DTF regulations of 10 C.F.R.

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[89] Entergy's Motion to Withdraw its September 4, 2014 License Amendment Request (Sept. 22, 2015) (ADAMS Accession No. ML15265A583).

[90] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-28, 82 NRC __ (Oct. 15, 2015) (slip op.).

[91] *Id.* at 2, 11-12.

[92] NRC Staff Motion to Vacate LBP-15-24 (October 26, 2015) (ADAMS Accession No. ML15299A260).

[93] State of Vermont's Response to NRC Staff's Motion to Vacate LBP-15-24 (November 5, 2015) (ADAMS Accession No. ML15309A759).

§ 50.75(h)(1)-(3) do not apply to VY; and pursuant to the Staff's grant of Entergy's Exemption Request, 10 C.F.R. § 50.82(a)(8)(i) (A) does not apply to VY with respect to withdrawals from the VY DTF for spent fuel management expenses. Consequently, Entergy can make withdrawals from the VY DTF for certain spent fuel management expenses but, consistent with VY License Condition 3.J.a.(iii), must first give the NRC 30-days' prior written notice of these withdrawals. In addition, the conditions imposed by the Board in connection with the withdrawal of the LAR, and specified in LBP-15-28, apply.

## DISCUSSION

### I. Commission Supervisory Review

The Commission has inherent supervisory authority over proceedings and may exercise that authority to take *sua sponte* review.[94] The Commission has undertaken *sua sponte* review to consider "novel" issues with broad ramifications for the proceeding at hand and others.[95] The Commission has used its *sua sponte* authority to address unappealed issues or orders, to address issues of wide implication, and to provide guidance to a licensing board.[96] The Commission has done so even in moot cases where necessary to clarify important issues for the future.[97] However, the Commission has indicated that it disfavors requests to invoke its

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[94] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 4 (2007) (This provides "an avenue for [the Commission] to take various kinds of adjudicatory action").

[95] *North Atlantic Energy Service Corp*. (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998).

[96] *Vermont Yankee*, CLI-07-1, 65 NRC at 4 (internal citations omitted); *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992) ("Even in the absence of a petition for review, the Commission retains its supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself"); s*ee also* 10 C.F.R. § 2.341 ("Within 120 days after the date of a decision or action by a presiding officer… the Commission may review the decision or action on its own motion").

[97] *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-05-14, 61 NRC 359, 362 (2005) (finding authority to address moot questions because the "Commission is not subject to the constitutional 'case or controversy' requirement that prevents federal courts from deciding moot

inherent supervisory authority over adjudications.[98] The Commission has stated that simply because the Commission may exercise its authority "in no way implies that parties have a right to seek [ ] review on that same ground."[99] Indeed, such requests are improper.[100]

The Commission has also used its supervisory authority to institute a discretionary hearing, where none is required by law.[101] However, the Commission has held that the institution of a proceeding where one is not required is appropriate only where substantial health and safety issues have been identified.[102] Where a petitioner raises broad questions about health and safety, but makes no allegations that activities being conducted pose any unusual and significant unexamined issues, the Commission has found that a discretionary hearing is not warranted.[103] Moreover, the Commission has denied several recent requests for discretionary hearings,[104] concluding in each instance that there was no reason to bypass the Commission's normal regulatory process and referring compliance and enforcement matters to Executive Director for Operations to consider the matter as a 10 C.F.R. § 2.206 petition.

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questions"); *Cf. North Atlantic Energy Serv. Corp.* (Seabrook Station Unit No. 1), CLI-98-24, 48 NRC 267, 269 (1998) ("A moot adjudicatory proceeding is clearly not the forum to decide a novel issue").

[98] *U.S. Department of Energy* (High-Level Waste Repository), CLI-11-13, 74 NRC 635, 637 n.11 (citing *U.S. Department of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC 387, 388 n.6 (2010) (citing *Entergy Nuclear Operations, Inc*. (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009))).

[99] *Carolina Power & Light Co*. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000).

[100] *Indian Point*, CLI-09-6, 69 NRC at 138 (citing *Shearon Harris*, CLI-00-11, 51 NRC at 299).

[101] *Yankee Atomic Elec. Co*. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 103 (1994) (42 U.S.C. § 2201(c), which authorizes the Commission to make studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder.).

[102] *Id.*

[103] *Id.*

[104] *Florida Power & Light Co*. (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167, 173 (2014); *Omaha Pub. Power Dist.* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 338-39 (2015); *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-15-14, 81 NRC 729, 737-38 (2015).

II. Supervisory Review Is Not Warranted.

Vermont argues in its petition that the Commission should exercise its supervisory authority and take *sua sponte* review of the issues it raised in its petition.[105] In support, Vermont asserts that the question of what constitutes legitimate decommissioning expenses is a novel one that will have broad impacts on future decommissioning licensees[106] and Vermont requests a hearing on that question.[107]

Although the Commission may exercise its supervisory authority, a petitioner does not have the right to request such action. The Commission has made it clear that it will not entertain appeals of Director's decisions on § 2.206 petitions or Staff decisions regarding no significant hazard consideration decisions although it may take those issues up sua sponte.[108] The Commission exercises its supervisory authority on its own impetus, not upon the request of a party in a proceeding. The Commission explained that it "may exercise its discretion to review a licensing board's interlocutory order if the *Commission* wants to address a novel or important issue."[109] The Commission went on to say that its "decision to do so in any particular proceeding stems from its inherent supervisory authority over adjudications and in no way implies that *parties* have a right to seek interlocutory review on that same ground."[110] However,

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[105] Petition at 10.

[106] *Id.* at 10-11.

[107] *Id.*

[108] *See* 10 C.F.R. §§ 2.206 and 50.58(b); *See also Yankee Atomic Elec. Co*. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 127 (1996) ("our regulations specifically provide that the Commission will not entertain appeals from the Director's decision"); *Carolina Power & Light Co*. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 117 (2001) (denying petition for review of Staff's no significant hazards consideration decision because such review is subject only to the Commission's discretion).

[109] *Shearon Harris*, CLI-00-11, 51 NRC at 299 (emphasis in original).

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

Vermont is doing just that; it is seeking review based on the Commission's inherent supervisory authority and its request is, therefore, improper.[111]

Moreover, Vermont has not demonstrated that its claims are novel or that the broad reach of the issue justifies the Commission's exercise of supervisory authority. First, these issues are not novel. Decommissioning and DTF issues were considered by the Commission in 1996 and 2002, and there is a current rulemaking underway that proposes to address such issues.[112] Moreover, how a licensee decommissions, and specifically, how it funds decommissioning, has been addressed in a number of prior proceedings.[113] Furthermore, the Staff has considered similar issues at other plants, including exemptions related to DTF expenditures.[114] Thus, the issues are not novel, but rather, have been examined by the Commission, Staff, and Boards numerous times in the past.

Also, Vermont's concerns regarding what expenses the DTF can be used to fund, are of broad applicability, and as such they are being addressed in the rulemaking that is currently underway.[115] These issues, because of their broad applicability are more appropriately addressed in a rulemaking, not in an adjudication.[116] Thus, it is unnecessary for the

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[111] *Indian Point*, CLI-09-6, 69 NRC at 138.

[112] Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,278-80 (July 29, 1996) (Final rule); Decommissioning Trust Provisions, 67 Fed. Reg. 78332 (Dec. 24, 2002);

[113] *See generally Yankee Atomic Elec. Co*. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235 (1996); *PPL Susquehanna, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-15-08 81 NRC 500 (2015); *Honeywell Int'l, Inc*. (Metropolis Works Uranium Conversion Facility) CLI-13-1, 77 NRC 1 (2013); *Safety Light Corp*. (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 NRC 53 (2005).

[114] *See* License Exemption Request for Dominion Energy Kewaunee, Inc., 79 Fed. Reg. 30,900 (May 29, 2014); Southern California Edison Company; San Onofre Nuclear Generating Station, Units, 2 and 3, 79 Fed. Reg. 55,019 (Sept. 15, 2014); Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 5,795 (Feb. 3, 2015).

[115] 80 Fed. Reg. 72,358, 72,368-69.

[116] *See e.g., Yankee Atomic*, CLI-96-7, 43 NRC 235, 252 (1996) ("An adjudication of a single case is not the place to consider [a] Petitioners' across-the-board challenge" to a Commission decision to generically approve something); *Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999) ("It has long been agency policy that Licensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general

Commission to use this proceeding to clarify these issues for future proceedings. Because a rulemaking is underway, this is not an appropriate situation for the exercise of the Commission's inherent supervisory authority.[117] Moreover, as the Commission has observed, a moot proceeding such as this is not the best forum to decide broadly applicable issues like those Vermont raises.[118] The rulemaking process should be allowed to proceed, with public notice and comment and Staff consideration of them on these and other decommissioning issues, and ultimately for Commission approval based on the Staff's recommendation.[119]

Vermont's request is more akin to a request that the Commission exercise its supervisory authority and order a discretionary hearing outside of the traditional hearing process.[120] However, Vermont has not demonstrated a substantial risk to public health and safety and the issues Vermont raises with respect to the decommissioning process do not, in and of themselves, raise a substantial public health or safety risk. The risk of an offsite radiological release is significantly lower and the types of possible accidents are significantly fewer at permanently shut down and defueled facilities than at operating facilities.[121] This is

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rulemaking by the Commission") (internal quotations omitted); *Duke Power Co., et al*. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59 (1985) (finding Licensing Board was correct in rejecting contentions because they were the subject of an ongoing rulemaking).

[117] *See e.g., Yankee Atomic*, CLI-96-7, 43 NRC at 252 ("An adjudication of a single case is not the place to consider [a] Petitioners' across-the-board challenge" to a Commission decision to generically approve something); *Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999) ("It has long been agency policy that Licensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission") (internal quotations omitted); *Duke Power Co., et al*. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC59 (1985) (finding Licensing Board was correct in rejecting contentions because they were the subject of an ongoing rulemaking).

[118] *Seabrook*, CLI-98-24, 48 NRC at 269.

[119] Vermont, itself, could petition for rulemaking pursuant to 10 C.F.R. § 2.802, but it has not done so.

[120] *See e.g., St. Lucie*, CLI-14-11, 79 NRC at 173; *Fort Calhoun*, CLI-15-5, 81 NRC 329, 338-39 (2015); *Diablo Canyon*, CLI-15-14, 81 NRC 729 (2015).

[121] *See* NUREG-1738, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants*, at 3-1 (Feb. 2001) (ADAMS Accession No. ML010430066) (NUREG-1738). The purpose of NUREG-1738 was to "support development of a risk-informed technical basis for reviewing

because, for operating facilities, a large number of different event sequences make significant contributions to risk, but, for permanently shut down and defueled facilities, the most severe accident is a loss of spent fuel pool (SFP) water inventory and the subsequent heat-up of the spent fuel stored therein to the point of rapid oxidation (*i.e.,* a zirconium fire).[122] The event sequences important to this risk are limited to large earthquakes and cask drop events.[123] Essentially, the risks for permanently shut down and defueled facilities with spent fuel in their SFPs are limited to the risks for SFPs,[124] which technical studies spanning from 1975 to 2014 have demonstrated to be very low.[125] As a result, the Staff has concluded that it can grant exemptions from certain of the Commission's EP requirements with an acceptably small change in risk for permanently shut down and defueled facilities so long as those facilities meet specific design and operational characteristics.[126] In fact, the NRC has exempted permanently shut

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[EP] exemption requests [at decommissioning nuclear power plants] and a regulatory framework for integrated rulemaking." *Id*. at ix. *See also* SECY-00-0145, *Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning* (June 28, 2000) (ADAMS Accession No. ML003721626). This proposed rulemaking was later deferred in light of higher priority work after the terrorist attacks of September 11, 2001.

[122] NUREG-1738 at ix.

[123] *Id.* at x.

[124] *See id*. at 1-1. *See also* SECY-99-168, *Improving Decommissioning Regulations for Nuclear Power Plants*, at 2 (June 30, 1999) (ADAMS Accession No. ML992800087); NEI 99-01, Rev. 6, at C-1.

[125] *See* NUREG-75/014, *Reactor Safety Study, an Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants* (Oct. 1975) (ADAMS Accession No. ML070610293); NUREG-1353, *Regulatory Analysis for the Resolution of Generic Issue 82, "Beyond Design Basis Accidents in Spent Fuel Pools"* (Apr. 1989) (ADAMS Accession No. ML082330232); NUREG-1738; Sandia Report, MELCOR 1.8.5 Separate Effect Analyses of Spent Fuel Pool Assembly Accident Response (Jun. 2003) (Sandia Report) (ADAMS Accession No. ML062290362) (redacted); NUREG-2161, *Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor* (Sept. 2014) (ADAMS Accession No. ML14255A365); NUREG-2157, Vol. 1, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel* (Sept. 2014) (ADAMS Accession No. ML14196A105) (demonstrating that "the probability-weighted impacts, or risk, from a spent fuel pool fire for the short-term storage timeframe are SMALL because, while the consequences from a spent fuel pool fire could be significant and destabilizing, the probability of such an event is extremely remote.").

[126] NUREG-1738 at ix-x, 3-5 – 3-6, 4-12; NSIR/DPR-ISG-02, *Interim Staff Guidance; Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants* at 9-10, Table 1 (May 11, 2015) (ADAMS Accession No. ML14106A057).

down and defueled facilities with spent fuel stored in their SFPs from certain EP regulations, allowing them to stop maintaining formal offsite radiological emergency plans and to reduce the scope of their onsite EP activities.[127] Therefore, as a permanently shut down facility, VY poses less of a safety concern than an operating facility and, as such, cannot pose the kind of safety risk that would warrant the Commission ordering a discretionary hearing on Vermont's Petition.[128]

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[127] *See* Exemption, 58 Fed. Reg. 52,333, 52,333-34 (Oct. 7, 1993) (granting EP exemptions for the permanently shut down and defueled Trojan Nuclear Power Plant); Connecticut Yankee Atomic Power Company and Haddam Neck Plant; Exemption, 63 Fed. Reg. 47,331, 47,332 (Sept. 4, 1998) (granting EP exemptions for the permanently shut down and defueled Connecticut Yankee Nuclear Power Plant); Maine Yankee Atomic Power Company, Maine Yankee Atomic Power Station; Exemption, 63 Fed. Reg. 48,768, 48,770 (Sept. 11, 1998) (granting EP exemptions for the permanently shut down and defueled Maine Yankee Nuclear Power Plant); Consumers Energy Company; Big Rock Point Nuclear Plant; Exemption, 63 Fed. Reg. 53,940, 53,942-43. (Oct. 7, 1998) (granting EP exemptions for the permanently shut down and defueled Big Rock Point Nuclear Power Plant); Commonwealth Edison Company; (Zion Nuclear Power Station, Units 1 and 2); Exemption, 64 Fed. Reg. 48,856, 48,856-57 (Sept. 8, 1999) (granting EP exemptions for the permanently shut down and defueled Zion Nuclear Power Station); Dominion Energy Kewaunee, Inc.; Kewaunee Power Station, 79 Fed. Reg. 65,715 (Nov. 5, 2014) (granting EP exemptions for the permanently shut down and defueled Kewaunee Power Station); Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Station, 80 Fed. Reg. 19,358 (Apr. 10, 2015) (granting EP exemptions for the permanently shut down and defueled Crystal River Unit 3 Nuclear Generating Plant); Southern California Edison Company; San Onofre Nuclear Generating Station, Units 1, 2, and 3, and Independent Spent Fuel Storage Installation, 80 Fed. Reg. 33,558 (June 12, 2015) (granting EP exemptions for the permanently shut down and defueled San Onofre Nuclear Generating Station, Units 1, 2, and 3); SRM-SECY-14-0125, *Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements* (Mar. 2, 2015) (ADAMS Accession No. ML15061A516) (granting EP exemptions for the permanently shut down and defueled Vermont Yankee Nuclear Power Station). On December 2, 2015, the Staff notified the Commission that the Staff proposes to make a final no significant hazards consideration determination and issue a related license amendment that will revise the VY site emergency plan and emergency action level scheme and reduce the scope of offsite and onsite emergency planning. Commission Notification of Significant Licensing Action in Docket No. 50-271-LA-2 (ADAMS Accession No. ML15336A712).

[128] In further support of its request for review, Vermont cites the Staff's cancellation of Entergy's parent company guarantee. Petition at 17. Its discussion of the parent company guarantee is incorrect, however. Because of a market downturn, several decommissioning trust funds failed to meet the minimum formula amount for financial assurance in 10 C.F.R. § 50.75(c). VY's DTF was one of those and in order to certify financial assurance, Entergy augmented the VY DTF with a parent company guarantee. Letter from J. Kim, NRC, to Entergy Nuclear Operations, Inc. re Decommissioning Funding status, Report for Vermont Yankee Nuclear Power Station, Dec. 8, 2009 (ADAMS Accession No. ML093410582). In 2015, the Staff found that the VY DTF no longer required the parent company guarantee in order to meet the financial assurance requirements for decommissioning and, on that basis, cancelled that parent company guarantee. Letter from M. Khanna to Site Vice President, Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station, April 21, 2015 (ADAMS Accession No. ML15107A074). Separately, and not as a replacement for the 2009 parent company guarantee, Entergy submitted a parent company guarantee, as required by 10 C.F.R. § 50.82(a)(8)(iv), to provide secondary

For the foregoing reasons, the Commission should decline to undertake supervisory or discretionary *sua sponte* review.

III. Vermont's Petition Should Be Denied Because It Is Procedurally Improper

In its Petition, Vermont requests that the NRC conduct a "robust, comprehensive, and participatory review" of Entergy's use the Vermont Yankee DTF.[129] Vermont explains that the purpose of its Petition "is to have one authority—the Commissioners or a designated Atomic Safety and Licensing Board (ASLB)" address Entergy's interrelated requests in a coordinated matter to ensure adequate protection of public health and safety during the decommissioning of Vermont Yankee.[130] Specifically, Vermont asks the Commission to grant a hearing to address the need to: (1) reverse the Staff's grant of Entergy's Exemption Request; (2) review all of Entergy's withdrawal requests from the VY DTF and prohibit Entergy from making future withdrawals for expenses not meeting the NRC's definition of decommissioning; (3) require Entergy to provide detail in its 30-day notices; (4) find Entergy's post-shutdown decommissioning activities report (PSDAR) and associated filings deficient; (5) undertake a NEPA review with respect to Entergy's withdrawals from the VY DTF; and (6) take any other actions necessary to protect the DTF until decommissioning is complete.[131]

Vermont's filing, however, is not authorized by the Atomic Energy Act of 1954, as amended (AEA)[132] or Commission regulations, and attempts to circumvent the Commission's well-established Rules of Practice and Procedure in 10 C.F.R. Part 2. As explained in detail below, Vermont's Petition should be denied as procedurally improper because: (1) there is no

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coverage above and beyond the DTF and thus to provide added financial assurance to address the period of SAFSTOR. PSDAR at 21 and List of Regulatory Commitments, Attachment 1 at 1.

[129] Petition at 1.

[130] Petition at 1.

[131] Petition at 8-9.

[132] Atomic Energy Act of 1954, as amended, § 189.a.(1)(A), 42 U.S.C. § 2239(a)(1)(A) (listing NRC licensing action that give rise to hearing rights).

proceeding triggering hearing rights under AEA 189a; (2) the Staff's grant of the Exemption Request is not subject to a hearing; (3) the matters Vermont raises in its Petition for Review do not trigger hearing rights under Atomic Energy Act (AEA); and (4) Vermont's Petition does not meet the contention admissibility standards in 10 C.F.R. § 2.309. Instead, Vermont raises numerous issues that could be raised in petitions for enforcement action or rulemaking under 10 C.F.R. § 2.206 or § 2.802, respectfully. The matters it seeks to raise are not appropriate for an adjudicatory proceeding before either the Commission or an ASLB.

A. The Legal Standards that Govern Requests for Hearings

To obtain a hearing, a petitioner must request a hearing on a matter that triggers a hearing opportunity under section 189a of AEA.[133] Specifically, section 189a states, in part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a.[134] Moreover, neither licensee activities nor NRC inspection of those activities provides the opportunity for a hearing under the AEA because those activities only concern compliance with the terms of an existing license.[135] Indeed, oversight activities normally conducted for the purpose of ensuring that licensees comply with existing NRC requirements

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[133] *Fort Calhoun*, CLI-15-5, 81 NRC at 333.

[134] *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 292 (1993) (citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI–92–12, 36 NRC 62, 67 (1992)).

[135] *St. Lucie*, CLI-14-11, 80 NRC at 174 (2014).

and license conditions do not typically trigger the opportunity for a hearing under the AEA.[136] Instead, the appropriate means of challenging licensee actions is through a petition under 10 C.F.R. § 2.206.[137]

Further, neither the AEA nor the Commission's Rules of Practice provide third parties with a right to an adjudicatory hearing on an exemption request.[138] For example, in *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), the Commission denied hearing requests challenging exemptions related to physical security at decommissioning reactors.[139] The Commission held that the exemption request did not amend the Zion license and that "there is no right to request a hearing" to challenge "an exemption from NRC regulations."[140] Hearing rights to exemptions only attach when the exemption is requested during an ongoing licensing proceeding, and the exemption is essential to the applicant's licensability.[141]

The purpose of AEA § 189a hearings is to allow for meaningful public participation and prompt resolution of issues in controversy in a licensing proceeding.[142] However, it is well-established that section 189a does not provide an unqualified right to a hearing. Rather, the Commission is authorized to establish reasonable regulations on procedural matters such as

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[136] *Fort Calhoun*, CLI-15-5, 81 NRC at 333.

[137] *See, e.g., Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 NRC __, __ (Nov. 9, 2015) (slip op. at 17 n.69) ("[C]ontrary to [the petitioner's] view . . . the [10 C.F.R. §] 2.206 process is designed for bringing just such a challenge regarding a licensee's current operation under its existing license."); *St. Lucie Plant*, CLI-14-11, 80 NRC at 176.

[138] AEA § 189.a.(1)(A); *Brodsky v. NRC*, 578 F.3d 175, 180 (2d Cir. 2009) (citing 42 U.S.C. § 2239(a)(1)(A)) (holding that exemption requests do not give rise to hearing rights).

[139] *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 96–97 (2000).

[140] *Id.*

[141] *Private Fuel Storage, L.L.C.* (Independent Irradiated Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001).

[142] *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998).

the filing of petitions to intervene and on the proffering of contentions.[143] Thus, the Commission promulgated the regulations in 10 C.F.R. Part 2, "Agency Rules of Practice and Procedure," which govern the conduct of all proceedings under the AEA for licensing actions,[144] and establish certain requirements which must be met before an AEA § 189a hearing will be granted. Specifically, to obtain a hearing under the Commission's regulations in 10 C.F.R. Part 2, a petitioner must show that its hearing request is timely, that it has standing to obtain a hearing, and that it has proposed at least one admissible contention.[145]

Section 2.309(a) specifies that "Any person whose interest may be affected by a proceeding and who desires to participate as a party *must file a written request for hearing and a specification of the contentions* which the person seeks to have litigated in the hearing."[146] The Commission's contention admissibility requirements are set forth in 10 C.F.R. § 2.309(f)(1). In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must provide a specific statement of the issue raised, provide a basis for the contention, demonstrate that the contention is within the scope of the proceeding and material to the findings the NRC must make, provide a concise statement of the alleged facts and expert opinions upon which the petitioner intends to rely, and show that the contention raises a genuine dispute on a material issue. In addition, a proposed contention must be rejected if it challenges the Commission's regulations without a waiver of the regulation prohibiting such challenges, because such a challenge is necessarily beyond the scope of the proceeding.[147]

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[143] *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983) (citing *BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974); *Easton Utilities Commission v. AEC*, 424 F.2d 847 (D.C. Cir. 1970)).

[144] 10 C.F.R. § 2.1.

[145] 10 C.F.R. § 2.309.

[146] 10 C.F.R. § 2.309(a) (emphasis added).

[147] 10 C.F.R. § 2.335(a). *See also Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974) ("[A] licensing proceeding before this agency is plainly

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[148] Indeed, by focusing litigation efforts on specific and well defined issues, all parties will be relieved of the burden of having to develop evidence and prepare a case to address possibly wide-ranging, vague, undefined issues.[149] Further, the Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing" as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.[150] Challenges to the Commission's regulations may be addressed through 10 C.F.R. § 2.802 petitions for rulemaking.[151]

B. Vermont's Petition Should Be Denied Because There Is No Licensing Action or Proceeding to Trigger AEA § 189 Hearing Rights.

To obtain a hearing under the AEA, a petitioner must address its hearing request to a matter that triggers a hearing opportunity under section 189a of the AEA–i.e., the granting, suspending, revoking, or amending of a license.[152] However, there is no licensing action regarding the VY DTF currently before the Staff and thus no vehicle for the intervention that Vermont seeks. Entergy previously filed an LAR to delete from the VY operating license all of its conditions related to the VY DTF[153] and replace them with the provisions in the regulations at

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not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process.").

[148] Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (final rule).

[149] *Id.* at 2,188.

[150] *Id.* at 2,202.

[151] 10 C.F.R. § 2.802.

[152] AEA § 189a.

[153] *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

10 C.F.R. § 50.75(h)(1)-(3).[154] This was the subject of a separate proceeding where the Board granted Vermont intervention.[155] However, the Board has since granted Entergy's request to withdraw its license amendment without prejudice and terminated the proceeding.[156]

Moreover, as Vermont concedes, Entergy has not submitted any other license amendment requests associated with the VY decommissioning trust fund,[157] nor has the Staff instituted any proceeding to modify, suspend, or revoke Entergy's license with respect to the VY DTF. Therefore, there is no proceeding regarding any licensing action related to the VY decommissioning trust fund that would trigger a hearing right under section 189a.[158] Accordingly, Vermont's Petition should be dismissed.

C. The Staff's Grant of the VY Exemption Is Not Subject to Hearing

Vermont stresses that the Commission's regulations prohibit the use of decommissioning funds for any purpose other than legitimate decommissioning expenses.[159] However, the Commission has the authority, pursuant to 10 C.F.R. § 50.12, to exempt licensees from any of its regulatory requirements in 10 C.F.R. Part 50, including the regulatory requirements identified by Vermont as limiting withdrawals from DTFs to legitimate decommissioning expenses.[160] In that event, NRC case law is clear: the grant of an exemption

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Operating License No. DPR-28, at 7-8 (Mar. 21, 2011) (ADAMS Accession No. ML052720265) (providing "Decommissioning Trust" license conditions at 3.J).

[154] LAR at 1.

[155] *Vermont Yankee*, LBP-15-24, 82 NRC at __ (slip op. at 1).

[156] *Vermont Yankee*, LBP-15-28, 82 NRC at __ (slip op. at 1).

[157] Petition at 13.

[158] *New Jersey,* CLI-93-25, 38 NRC at 292.

[159] Petition for Review at 18-23.

[160] *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516 (1st Cir. 1989); *Zion*, CLI-00-5, 51 NRC at 97 (explaining that, consistent with 10 C.F.R. § 50.12, the Commission may grant exemptions from any of its regulations in 10 C.F.R. Part 50, either temporarily or permanently, and that such exemptions do not amend a license or modify the regulations because they do no change a licensee's

is not subject to challenge by an intervenor in an adjudicatory hearing. As the Commission explained, "Congress intentionally limited the opportunity for a hearing to certain designated agency actions" and these agency actions "do *not* include exemptions."[161]

Although the granting of an exemption, on its own, does not give rise to a hearing opportunity, the Commission found in *PFS* that there are limited instances in which an exemption request is related to a license application or an amendment request in such a way that the hearing opportunity on the license application or amendment request encompasses the exemption request.[162] *PFS* involved an "Exemption Request Related to Initial Licensing"[163] where the exemption request sought an exemption "in the midst of a licensing proceeding" from "required elements of the license application process" that must be met "before the NRC can find the facility safe and license it."[164] The Commission ruled that, in such a situation, "[b]ecause resolution of the exemption request directly affects the *licensability* of the proposed [underlying license application], the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties."[165] Therefore, the test for whether an exemption request gives rise to an opportunity for a hearing is whether the exemption request directly affects the licensability of an existing LAR.

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duty to follow the regulations, but on which regulations apply to the licensee consistent with the regulations themselves).

[161] *Zion*, CLI-00-5, 51 NRC at 96 (emphasis in original). *See also Brodsky v. NRC*, 578 F.3d 175, 180-81 (2d Cir. 2009) (deferring to the NRC interpretation that AEA § 189a. does not provide an opportunity for a hearing on exemptions); *Honeywell*, CLI-13-1, 77 NRC at 10 ("An exemption standing alone does not give rise to an opportunity for hearing under our rules.").

[162] *PFS*, CLI-01-12, 53 NRC at 465-67.

[163] *Id.* at 465.

[164] *Id*. at 467 (emphasis omitted).

[165] *Id*. (emphasis added). *See also id*. at 470 ("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 thus is 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 a right to a hearing under the AEA.").

Based on this test, the Commission should deny Vermont's request for an adjudicatory hearing on Entergy's Exemption Request because, first, there is no existing LAR proceeding whose hearing opportunity might encompass the Exemption Request. Although Vermont seeks to tie its challenge to Entergy's Exemption Request with the opportunity for a hearing that was available on Entergy's LAR,[166] there is no longer an opportunity for a hearing on that LAR. The LAR was withdrawn and the hearing that had been granted with respect to the LAR was terminated.[167] Therefore, there is no licensing action on which Vermont's challenge to the Exemption Request can lie.

The Commission should also deny Vermont's request for an adjudicatory hearing on Entergy's Exemption Request because the Exemption Request does not directly affect the "licensability" of the applicant. This is demonstrated by the fact that the LAR could have been granted regardless of whether the Exemption Request had been granted.[168] If the LAR had been granted and the Exemption Request denied, Entergy would be relieved from the obligation to provide 30-day notice, although still be prohibited by the regulation from spending DTF money on spent fuel management. Thus, the circumstances at hand do not satisfy the Commission's "licensability" test for allowing a hearing on an exemption request based on an existing LAR.[169]

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[166] Petition for Review at 13.

[167] *Vermont Yankee*, LBP-15-28, 82 NRC at __ (slip op. at 14).

[168] *See* Tr. at 72-73.

[169] In LBP-15-24, the Board ruled that because "two of the granted exemptions are completely dependent on the LAR[,]" they are like the *PFS* exemptions and, therefore, both the license amendment and the exemption were within the scope of the proceeding. *Vermont Yankee*, LBP-15-24, 82 NRC at __ (slip op. at 15-16). The Staff maintains that the test for whether an exemption should be adjudicated with a related license amendment is whether the license amendment can go forward or be implemented without the exemption, not the whether the exemption requires the license amendment. The first proposition correctly states the *PFS* "licensability" test, the second does not.

Vermont argues, however, that the appropriate test is whether the Exemption Request is "directly related" to the LAR instead of whether the Exemption Request affects the "licensability" of the applicant.[170] Vermont cites to the Commission decision in *Honeywell* for this proposition.[171] However, *Honeywell* relies on the "licensability" language of *PFS*.[172] Additionally, the facts of *Honeywell* are easily distinguishable from this case. Here, Vermont submitted a license amendment request and, subsequently, an exemption request. In *Honeywell*, the exemption was submitted as a license amendment and thus, hearing rights would attached.[173] Thus, *Honeywell* does not support a hearing on the exemption here.

Vermont asserts that Entergy's use of the decommissioning fund, particularly in light of the grant of the exemption, will result in a diminished DTF that has insufficient funds to accomplish decommissioning.[174] However, the Commission's regulations are specifically structured so as to prevent the exhaustion of a DTF before the completion of radiological decommissioning. During decommissioning, licensees are required to annually recalculate and report to the NRC their estimated costs for completing decommissioning and for spent fuel storage and then compare these costs to the sum of the balance of the DTF, plus a 2% real rate of return.[175] If the costs are greater than the funds, then the licensee must provide additional financial assurance to cover the estimated cost of completion.[176] Further, the NRC has the authority to rescind an exemption, including the exemption allowing Entergy to make

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[170] Petition for Review at 13.

[171] *Id*.

[172] *Honeywell*, CLI-13-1, 77 NRC at 10 n.37.

[173] Honeywell Metropolis Works (Docket No. 40-3392) – Request for Extension of Exemption from Decommissioning Financial Assurance Requirements Contained in License Condition 27 in SUB-526 on May 11, 2007 (Apr. 1, 2009 (ADAMS Accession No. ML090920087).

[174] Petition at 15.

[175] 10 C.F.R. § 50.82(a)(8)(v)-(vii).

[176] *Id*.

withdrawals from the VY DTF for certain spent fuel management expenses, at any time.[177] Because the Commission's regulations require an annual showing of a DTF's sufficiency during decommissioning and because the Commission has the ability to act to prevent any projected shortfall in a DTF, there is no need for a hearing to address Vermont's concern that Entergy will exhaust the VY DTF before radiological decommissioning is complete.

D. Vermont's Proffered Issues Do Not Trigger AEA § 189 Hearing Rights

Vermont asserts that the matters raised in its Petition are "license-related matters" that should be considered adjudications within the meaning of 5 U.S.C. § 551(7) of the Administrative Procedure Act (APA)[178] and trigger hearing rights under the APA and the AEA.[179] However, as discussed below, Vermont's Petition should be dismissed because none of these matters trigger hearing rights under AEA section 189a.

In its Petition for Review, Vermont requests a hearing for the Commission to review Entergy's withdrawals from the VY DTF and prohibit Entergy from making future withdrawals for expenses not meeting the NRC's definition of decommissioning.[180] However, neither licensee activities such as making withdrawals from the DTF nor NRC oversight and inspection of those activities conducted for the purpose of ensuring licensee compliance with existing requirements

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[177] *Florida Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 n.2 (1989).

[178] Vermont does not explain why these matters should qualify for a hearing under the APA and merely references APA § 551(7) which contains the definition of "adjudication." Specifically, § 551(7) states that "'adjudication' means agency process for the formulation of an order." Notably, Vermont does not cite to APA § 551(8) which contains the definition of "licensing" or to APA § 554 which contains the APA's provisions on adjudications. In any event, AEA § 189a provides the NRC's statutory authority regarding hearing requests related to licensing actions.

[179] Petition at 9, 11-12. Vermont uses the term "license-related" matter to assert that it is entitled to a hearing under the AEA. However, neither the AEA nor the Commission's regulations use this term. Moreover, none of Vermont's purported "license related" matters are related to the granting, suspending, revoking, or amending of a license which would trigger a hearing under § 189a.

[180] Petition at 8-9.

provides the opportunity for a hearing under the AEA.[181] Instead, the appropriate means of seeking enforcement action against a licensee is through a petition under 10 C.F.R. § 2.206.[182]

Vermont also requests a hearing to require Entergy to provide detail in its 30-day notices.[183] To the extent that Vermont argues that Entergy's current notices do not satisfy the requirement for these notices, which is provided for by license condition 3.J.a.(iii) of the VY operating license,[184] this is a challenge to the current operations of VY that is more appropriate under 10 C.F.R. § 2.206. Similarly, to the extent that this is a request that the Commission make license condition 3.J.a.(iii) more stringent, this too is more appropriate under § 2.206. Accordingly, the sufficiency of Entergy's 30-day notices do not trigger a hearing opportunity under the AEA § 189a.

Additionally, Vermont asks the Commission to hold a hearing to find Entergy's PSDAR and associated filings deficient.[185] However, the Commission's regulations provide that there is no opportunity for a hearing on PSDARs.[186] Instead, the Commission's regulations only provide an opportunity for the submission of public comments on PSDARs,[187] an opportunity of which

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[181] *St.Lucie*, CLI-14-11, 80 NRC at 174; *Fort Calhoun*, CLI-15-5, 81 NRC at 333.

[182] *Diablo Canyon*, CLI-15-21, 82 NRC at __ (slip op. at 17 n.69); *St. Lucie Plant*, CLI-14-11, 80 NRC at 176.

[183] Petition at 8-9. Upon granting Entergy's request to withdraw its LAR, the Board imposed a condition requiring Entergy to specify additional detail in its 30-day notices regarding whether the proposed disbursements include expenses for the following: (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. In addition, the Board required Entergy to report the disbursement of DTF money to pay "legal costs that were the factual basis of Contention 1." *Vermont Yankee,* LBP-15-28, 82 NRC at __ (slip op. at 2, 11-12).

[184] *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 7-8 (Mar. 21, 2011) (ADAMS Accession No. ML052720265) (providing "Decommissioning Trust" license conditions at 3.J).

[185] Petition for Review at 8-9, 35-47.

[186] 10 C.F.R. § 50.82(a)(4).

[187] 10 C.F.R. § 50.82(a)(4)(ii).

Vermont has already availed itself.[188] Therefore, Vermont is not entitled to a hearing under AEA § 189a with respect to the sufficiency of Entergy's PSDAR.

Vermont also asks the Commission to hold a hearing to undertake a NEPA review with respect to Entergy's withdrawals from the VY DTF.[189] However, as explained in further detail below,[190] Vermont's argument that the NRC should conduct a NEPA analysis of the entire decommissioning process at VY from permanent shut down to termination of the VY license, is directly contrary to the Commission's decommissioning regulations. Indeed, these regulations were specifically amended in 1996, in part, so as not to require a licensing action and to eliminate the need for a licensee to submit a supplemental environmental report at this stage of the decommissioning process.[191] Because there is no licensing action required at this stage of decommissioning, there is no action requiring a NEPA review. An environmental analysis and safety evaluation will be performed at the LTP stage of decommissioning.[192] If Vermont believes that the NRC's current decommissioning regulations should be changed, Vermont may file a 10 C.F.R. § 2.802 petition for rulemaking.[193]

Moreover, the right of interested persons to intervene as a party in a licensing proceeding stems from AEA § 189a, not from NEPA.[194] Therefore, Vermont's NEPA arguments are not subject to an adjudicatory hearing before the Commission because there is no proceeding regarding any licensing action that would trigger a hearing right under AEA § 189a.

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[188] *See* Petition for Review at Exhibit 2.

[189] Petition for Review at 9, 50-56.

[190] *See infra*, section V. A.

[191] 10 C.F.R. § 50.82(a)(4)(i); 61 Fed. Reg. at 39,281, 39,283-84.

[192] 10 C.F.R. § 50.82(a)(9)-(10).

[193] 80 Fed. Reg. 72,358, 72,368-69.

[194] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 6 (2001) (citing AEA § 189).

Likewise, to the extent Vermont challenges the NEPA analysis that supported the grant of the Exemption Request, Vermont's arguments are not subject to an adjudicatory hearing because Vermont does not have a right to a hearing on the Exemption Request under section 189a. of the AEA.

Vermont also argues that the Commission has interlocutory authority "to address matters pending before an ASLB, and appellate authority over decisions of the Board."[195] However, there are no matters currently pending before the ASLB. As explained above, the Board granted Vermont's hearing request on Entergy's LAR regarding the VY DTF, but subsequently terminated the proceeding after granting Entergy's request to withdraw its LAR.[196] Vermont's Petition states that the parties are still within the appeal period to ask for review of the Board's decision granting Entergy's withdrawal.[197] However, the time to appeal both decisions issued by the Board has passed and no appeals were filed.[198] The only filing pending before the Commission is a Motion to Vacate filed by the NRC Staff asking that LBP-15-24 be vacated as moot.[199] Vermont asserts that the Motion to Vacate, any appeal of LBP-15-28, as well as the new issues it raises in its Petition should be reviewed together in a comprehensive proceeding.[200] However, as explained above, Vermont raises no issues that trigger hearing

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[195] Petition at 9.

[196] *Vermont Yankee*, LBP-15-28, 82 NRC at __ (slip op. at 1).

[197] Petition at 9, 14.

[198] Appeals for LBP-15-24 were due on October 26, 2015. *See* unpublished Order of the Secretary (Granting Request for Extension) (Sept. 24, 2015) (ADAMS Accession No. ML15267A839) (providing that any party may appeal LBP-15-24 within ten days after the Board's ruling on Entergy's Motion to Withdraw). None of the parties filed an appeal of LBP-15-24. Instead, the Staff filed a Motion to Vacate LBP-15-24 because there is no outstanding controversy, rendering any proposed appellate challenge to LBP-15-24 moot. *See generally* NRC Staff Motion to Vacate. Appeals for LBP-15-28 were due on November 9, 2015; however, none of the parties appealed that decision.

[199] *See generally* NRC Staff Motion to Vacate.

[200] Petition at 14, 48.

rights under the AEA, and its Petition is procedurally improper. Thus, its Petition should be dismissed and the Motion to Vacate should be decided separately.

For the reasons discussed above, Vermont's Petition should be dismissed in its entirety because there are no license-related matters to trigger hearing rights under AEA § 189a. Instead, the Commission should direct Vermont to those avenues specifically provided for in the Commission's regulations to address the concerns raised in the Petition for Review, such as the 10 C.F.R. § 2.206 request for agency action and the 10 C.F.R. § 2.802 petition for rulemaking processes.

E. Vermont's Petition Should Be Denied Because It Does Not Meet the Commission's Contention Admissibility Standards in 10 C.F.R. § 2.309

Even if the issues raised in Vermont's Petition for Review were subject to an opportunity for a hearing, Vermont's Petition for Review, a filing not contemplated by NRC regulations, fails to address the NRC's contention admissibility standards in § 2.309(f) or specify any contentions for litigation in a hearing.[201] This is contrary to § 2.309(a) which requires all hearing requests to specify "the contentions which the person seeks to have litigated in the hearing.[202]

Pursuant to 10 C.F.R. § 2.309(f)(1)(v), a proposed contention must be rejected if it does not provide a concise statement of the facts or expert opinions that support the proposed contention together with references to specific sources and documents. Mere speculation and

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[201] The only reference to 10 C.F.R. Part 2 in Vermont's Petition for Review is a citation to 10 C.F.R. § 2.104, "Notice of hearing," but Vermont provides no explanation as to why it is referencing § 2.104 or how it is applicable. Petition at 10-11. Vermont's attachment at Exhibit 2, which contains its March 6, 2015 comments on Entergy's PSDAR, argues that under § 2.104 the NRC should "find[] that a hearing is required in the public interest" and provide a full adjudicatory hearing. However, Vermont does not make this argument in its Petition for Review and the Commission discourages incorporating pleadings or arguments by reference and expects briefs to be "comprehensive, concise, and self-contained. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 139 n.41 (2012) (citations omitted). In any event, this argument should not be considered because section 2.104 simply pertains to a notices for hearing and, as explained above, Vermont has not met the criteria for a discretionary hearing.

[202] 10 C.F.R. § 2.309(a).

bare or conclusory assertions, even by an expert, will not suffice to allow the admission of a proposed contention.[203] As the Commission has explained, the contention admissibility standards are intended to "focus litigation on concrete issues" so that all parties will be relieved of the burden of having to develop evidence and prepare a case to address possibly wide-ranging, vague, undefined issues.[204]

Vermont's Petition, however, raises a number of issues that are unsupported and vague regarding the sufficiency of the DTF, the extent and cost of radiological decontamination, the economic impact of Entergy's use of the DTF, and the ramifications of spent fuel pool storage.[205] These issues would not support contention admissibility even if a hearing opportunity were in order.

Vermont asserts that the DTF will not be sufficient to pay for decommissioning because of the withdrawals Entergy has made and proposes to make. It asserts "[i]n all likelihood, spent fuel management expenses will greatly exceed Entergy's estimate of $225.5 million, since that estimate is predicated on the assumption that all spent fuel will be removed from the site by 2052";[206] but proffers no calculation of the spent fuel management expenses that it asserts Entergy will incur. It states that Entergy has no basis for its assumptions regarding the amount of its tax obligations at the state and local level;[207] and does not itself provide any basis for its suggestion that those obligations will be greater than Entergy's projections. It asserts that

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[203] *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[204] 69 Fed. Reg. at 2,188, 2,202.

[205] While the Commission has made it clear that it disfavors the incorporation of pleadings and arguments by reference, Vermont appended several documents to its Petition as exhibits and raises numerous and disparate issues in those documents, some of which it has repeated in its Petition. Given the number and scope of the issues raised in the exhibits, the Staff has confined its analysis to the issues raised in the Petition.

[206] Petition at 43.

[207] *Id.* at 41.

Entergy has not accounted for how it will pay for employee pension fund liabilities.[208] However, Vermont has not established the necessary predicate – that Entergy plans to use the DTF to address those liabilities or that Entergy and its subsidiaries and parent company will be financially incapable of meeting those obligations without using DTF money.

Vermont asserts that Entergy has failed to account for increased costs associated with strontium 90 contamination,[209] but does not explain how the low level of that contamination will require increased remediation and does not provide its own calculation of the increased costs associated with remediation. Citing radiological contamination at Maine Yankee, Connecticut Yankee, Yankee Rowe, and possible contamination at San Onofre facilities, Vermont states that decontamination costs will probably exceed Entergy's current projections.[210] However, these arguments are speculative vis-à-vis VY and insufficient to support Vermont's assertion of increased decontamination costs.[211]

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[208] *Id.* at 40.

[209] *Id.* at 23, 36-37. While Vermont submits the Declaration of William Irwin, the Vermont Radiological and Toxicological Sciences Program Chief, in support of its argument, that declaration itself contains speculation and unsupported conclusory statements.

[210] Petition at 38-40.

[211] Vermont states that, in August 2014, strontium-90 was detected at below EPA limits in samples from monitoring wells on the VY site and concludes that more soil will have to be excavated at VY than the amount currently accounted for in the VY PSDAR and that this will increase the cost of decommissioning VY to the point such that the VY DTF may no longer provide adequate financial assurance. Petition at 36-38. Vermont, however, does not explain how it reached the conclusion that more soil will have to be excavated. In fact, without further explanation, it would appear that the detection of strontium-90 cited by Vermont would have no such effect. This is because the amount of strontium-90 detected was already below EPA limits and Vermont provides no reason to believe that the concentration of strontium-90 will increase above EPA limits. Vermont Department of Health Communications Office, *Strontium-90 Detected in Ground Water Monitoring Wells at Vermont Yankee* (Feb. 9, 2015), *available at* http://healthvermont.gov/news/2015/020915_vy_strontium90.aspx. On the contrary, strontium-90 is produced by nuclear fission, but nuclear fission is no longer occurring at VY and, thus, there are no additional sources of strontium-90 at VY. U.S. Spent Nuclear Fuel Storage, Congressional Research Service, J.D. Werner, May 24, 2012, p. 10 n.60 (ADAMS Accession No. ML14142A043). Further, since strontium-90 has a half-life of 29 years, its concentration will decrease even further below EPA limits by the time soil remediation is scheduled to occur –i.e., by 2072, or 58 years after the detection of strontium-90 that is cited by Vermont. *Id.* Thus, Vermont has not sufficiently supported its conclusion and, as the Commission has noted, such unsupported arguments, even when made by an expert, are not sufficient.

Vermont argues that Entergy's use of the DTF may result in a shortfall and suggests that the NRC will not pursue Entergy on the shortfall and that, as a result, the economic effect on Vermont taxpayers will be substantial.[212] On its face, Vermont argument is speculative; it is also unsupported. While it notes that the NRC has stated, emphatically, that it will pursue Entergy if there is a shortfall, Vermont points to the NRC's cancellation of an Entergy parent company guarantee as a "mixed signal" on the part of the agency as to its willingness to pursue Entergy. As explained, *supra*, n.128, the Staff's cancellation of the parent company guarantee was proper. It does not constitute a mixed signal regarding the NRC's commitment to pursue violations of its regulations.

In its Petition, Vermont also argues that the exemption provides "a dangerous incentive for owners of nuclear power plants to defer [spent fuel management expenses] until after plant closure."[213] Vermont fails to explain how the exemption creates this incentive and its argument is vague.

As these examples demonstrate, Vermont's Petition, in essence, is precisely the type of filing the Commission's contention admissibility standards were designed to avoid. Vermont's Petition circumvents the Commission's well-established Part 2 requirements for clear, well-supported, specific contentions, and, therefore, these issues would not support contention admissibility even if a hearing were appropriate here.

## IV. The Petition Raises Issues That Should Be Addressed in Accordance with 10 C.F.R. § 2.206 and 10 C.F.R. § 2.802.

### A. Master Trust Agreement

Vermont argues that Entergy has in the past or will in the future violate the Commission's regulations, the VY operating license, and the Master Decommissioning Trust

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[212] Petition at 16-17.

[213] Petition at 42.

Agreement (MTA) between Entergy and Mellon Bank, N.A., by making withdrawals from the VY DTF for non-decommissioning activities.[214] In essence, Vermont is requesting that the NRC take enforcement action against Entergy for operating VY in violation of its licensing basis. However, as the Commission has repeatedly, and recently, explained, the proper avenue for such a request is the 10 C.F.R. § 2.206 request for agency action process.[215]

Vermont's concerns related to the Master Trust Agreement consist of assertions that the decommissioning trust funds are being used in contravention of NRC regulations, Federal Energy Regulatory Commission (FERC) regulations, rulings of the Vermont Public Service Board, and the provisions of the Master Trust Agreement, itself. Because Vermont is alleging regulatory violations, Vermont's proper course of action is to file a petition under 10 C.F.R. § 2.206.[216] As the 7th Circuit recognized in *dicta* in *Pennington*, the NRC is "the designated policeman of decommissioners" and "[a]nyone can complain to the commission about such fraud or waste[.]"[217] When the NRC functions as that "policeman", it does so through its enforcement process, not through the adjudicatory hearing that Vermont seeks in the instant Petition.

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[214] Petition at 18-29.

[215] *See, e.g., Diablo Canyon*, CLI-15-21, 82 NRC __ (slip op. at 17 n.69) ("[C]ontrary to [the petitioner's] view . . . the [10 C.F.R. §] 2.206 process is designed for bringing just such a challenge regarding a licensee's current operation under its existing license.").

[216] *Florida Power and Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167, 174 (stating that "neither licensee activities nor NRC inspection of (or inquiry about) those activities provides the opportunity for a hearing under the AEA because those activities only concern compliance with the terms of an existing license" and that the appropriate means to request enforcement action is through a petition under 10 C.F.R. § 2.206). The Commission may, of course, refer a matter for action under § 2.206. *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012) (referring asserted violation of 10 C.F.R. § 50.59 to the Executive Director for Operations for enforcement action pursuant to 10 C.F.R. § 2.206).

[217] *Pennington v. ZionSolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014), *rehearing and rehearing en banc denied* (February 28, 2014). The Circuit Court held that electricity customers who had an interest in the remainder of the decommissioning trust fund were not beneficiaries of the trust and could not sue for misuse of trust funds.

Vermont's raises three concerns regarding Entergy's use of the Decommissioning Trust, all of which stem from some claim of violation or impropriety. In addition, some of Vermont's arguments are misplaced or mis-state the law. They are addressed individually as follows.

First, Vermont asserts that the Master Trust Agreement prohibits use of the Decommissioning Trust Fund for non-decommissioning expenses[218] and that NRC regulations at 10 C.F.R. § 50.75(f)(1) and (2) require Entergy to comply with the Master Trust Agreement,[219] and that Entergy is violating the provisions of its license.[220] Vermont argues that the NRC conditioned its approval of Entergy's purchase of VY on Entergy's establishment of, and compliance with, the Master Trust Agreement.[221] Assertions of regulatory violation and non-compliance with license provisions are, by their nature, appropriate for resolution through the 2.206 petition process.

The regulations at 10 C.F.R. § 50.75(f)(1) and (2) that Vermont cites do not, however, require compliance with the Master Trust Agreement; they simply require licensees to report on the status of decommissioning funding.[222] Furthermore, the NRC did not condition its approval of the VY purchase as Vermont asserts. While it is true that the NRC required that certain provisions regarding the operation of the decommissioning trust fund be included in the Master Trust Agreement,[223] those provisions are not the provisions that Vermont asserts Entergy is violating.

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[218] Petition at 25-29

[219] *Id.* at 24.

[220] *Id*. at 25.

[221] *Id*. at 23-24. Vermont also asserts that the Vermont Public Service Board similarly conditioned its approval of the sale. *Id*. Whether or not this assertion is correct is not cognizable in this forum.

[222] 10 C.F.R. § 50.75(f)(1) and (2).

[223] The provisions that VY License Condition 3.J requires in the Master Trust agreement are as follows: (1) a requirement that the agreement be in a form acceptable to the NRC; (2) that it prohibit the investment of trust funds in the nuclear industry; (3) that it provide that no disbursement other than for administrative expenses of the trust can be made until the trustee has given 30 days written notice to the NRC and not received a written notice of objection; (4) that material amendment of agreement requires

Vermont asserts, instead, that Entergy is violating two other provisions in the Master Trust Agreement. The first provision requires that radiological decontamination and decommissioning be complete before trust funds can be used for spent fuel management costs and site restoration.[224] The second provision, Vermont asserts, restricts Entergy from using decommissioning trust funds to pay for spent fuel management expenses that it has or will recover from the Department of Energy.[225] Vermont's complaint that Entergy is violating provisions of the Master Trust Agreement should be pursued in accordance with the provisions of 10 C.F.R. § 2.206 process.[226]

The second concern that Vermont raises relates to FERC regulations. Vermont asserts that use of the trust funds to pay for non-decommissioning expenses is contrary to FERC regulations.[227] It also argues that FERC regulations provide that only after decommissioning is complete may a licensee use trust funds to pay for any other purpose.[228] Finally, it asserts that Entergy's use of the trust funds is at variance with FERC's approval of Entergy's purchase of VY.[229] To the extent that Vermont is asking the NRC to enforce FERC regulations, its request is misplaced. Vermont cites no legal authority to support an NRC action to enforce the regulatory

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30 days prior written notification to the Director of the Office of Nuclear Reactor Regulation; and (5) that the trustee to adhere to the "prudent investor" standard. These are not the provisions of the Master Trust Agreement that Vermont asserts Entergy is violating.

[224] Petition at 27-28.

[225] *Id*. at 28-29, 34-35, 41.

[226] In any event, Vermont can pursue its claims on both of these issues in State court. The provisions in the Master Trust Agreement regarding the sequence of payments and reimbursement from DOE are also reflected in Paragraphs 7-9 and 11(a) of the December 2013 Settlement Agreement between Entergy and the Vermont Public Service Department, the Vermont Agency of Natural Resources, and the Vermont Department of Health (ADAMS Accession No. ML14357A110). Paragraph 26 of the Settlement Agreement provides that "the courts of the State of Vermont shall be an available venue for enforcement of any disputes arising under this Agreement." Thus, Vermont has the option of suing on these issues in state court.

[227] Petition at 25.

[228] *Id*. at 30.

[229] *Id*. at 30-31.

provisions of another federal agency and FERC itself has statutory authority to enforce its own regulations.[230]

Finally, Vermont asserts that Entergy cannot pay spent fuel management expenses from the decommissioning trust fund unless it amends the Master Trust Agreement and that as it has not amended the agreement, it is in violation of NRC regulations and its own license provisions.[231] To the extent that Vermont takes the position that Entergy is in violation of the regulations or its license, then it is raising classic enforcement issues which should be pursued under 10 C.F.R. § 2.206.

Thus, Vermont's concerns would not be appropriate for an adjudicatory hearing even if they were not subject to the errors identified above.

B. There is No Hearing Opportunity on the PSDAR.

Vermont also requests a hearing on the VY PSDAR.[232] The Commission's decommissioning regulations, however, provide that there is no opportunity for a hearing on a licensee's PSDAR.[233] Therefore, Vermont's request for a hearing on the VY PSDAR is a challenge to the Commission's rules that prohibit exactly such a hearing. Consequently, the Commission should not entertain Vermont's challenge to the PSDAR rule. Instead, the

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[230] Federal Power Act, §§ 314 through 316A, 16 U.S.C. §§ 825M through 325O-1.

[231] Petition at 25-26.

[232] Petition for Review at 8-9.

[233] *See* 61 Fed. Reg. at 39,278-79 ("[I]nitial decommissioning activities (dismantlement) are not significantly different from routine operational activities such as replacement or refurbishment. Because of the framework of regulatory provisions embodied in the licensing basis for the facility, these activities do not present significant safety issues for which an NRC decision would be warranted. Therefore, it is appropriate that the licensee be permitted to conduct these activities without the need for a license amendment. However, the information meetings will be beneficial in keeping the public informed of the licensee's decommissioning activities. Although the primary purpose of these meetings is to inform the public of the licensee's planned activities, the NRC will consider public health and safety comments raised by the public during the 90-day period before the licensee undertakes decommissioning activities.").

Commission should direct Vermont to submit its concerns with the PSDAR process as a 10 C.F.R. § 2.802 petition for rulemaking.[234]

The Commission's current decommissioning regulations were developed through the rulemaking process specifically to streamline the decommissioning process.[235] Before the rule change, a licensee was required to submit a detailed decommissioning plan to the NRC for approval, along with a supplemental environmental report.[236] This process gave rise to an opportunity for a hearing.[237]

In its 1996 rulemaking, however, the Commission determined that this process of requiring an amendment to the licensee's operating license before the licensee could perform major decommissioning activities was unnecessarily complex and rigid because "the activities performed by the licensee during decommissioning do not have a significant potential to impact public health and safety and . . . require considerably less oversight by the NRC than during power operations."[238] Thus, instead of requiring an affirmative change to an operating license before the licensee could conduct major decommissioning activities such as dismantlement, the Commission determined that these activities could be done under the licensee's existing operating license as part of the 10 C.F.R. § 50.59 change process and, thus, no change to the license was required.[239] The Commission required the submission of a PSDAR before the

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[234] Vermont could, of course, submit its concerns as comments on the effort currently being undertaken by the Staff to revise the Commission's decommissioning regulations. *See* 80 Fed. Reg. at 72,358.

[235] 61 Fed. Reg. at 39,281.

[236] *Id*. at 39,278.

[237] *Id*. at 39,278.

[238] *Id*. at 39,278-79.

[239] *Id*. at 39,279 ("Based on NRC experience with licensee decommissioning activities, the Commission recognized that the [10 C.F.R.] § 50.59 process used by the licensee during reactor operations encompassed routine activities that are similar to those undertaken during the decommissioning process.").

performance of these activities, not so that it could affirmatively approve of these activities, which would presumably be permitted under 10 C.F.R. § 50.59 without prior Commission approval, but so that the NRC and the public would be aware of the licensee's plans to use the 10 C.F.R. § 50.59 process and, thus, could properly oversee the licensee's adherence to 10 C.F.R. § 50.59 and the Commission's decommissioning regulations.[240] Since the PSDAR is an informational submission that does not require NRC licensing approval, it does not give rise to an opportunity for a hearing like the previously-required submission of a decommissioning plan did.[241]

Now, almost twenty years after the rulemaking that established that the PSDAR is not subject to a hearing, Vermont is requesting a hearing on the particulars of the VY PSDAR. Pursuant to 10 C.F.R. § 2.335, such a direct challenge to the Commission's regulations is not permitted. Vermont's assertion of a right to a hearing on the VY PSDAR constitutes a challenge to the decommissioning regulations and, as such, should be pursued in rulemaking in accordance with 10 C.F.R. § 2.802.

Vermont also faults the VY PSDAR for not taking into consideration the possibility of the indefinite storage of spent fuel at VY.[242] This is also an impermissible challenge to the Commission's decommissioning regulations, which require that decommissioning be completed

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[240] *Id*. at 39,279-80 ("A PSDAR would be submitted to the NRC that would contain a schedule of planned decommissioning activities and provide a mechanism for timely NRC oversight."); *id*. at 39,281 ("The purpose of the PSDAR is to provide a general overview for the public and the NRC of the licensee's proposed decommissioning activities . . . . [It] is part of the mechanism for informing and being responsive to the public prior to any significant decommissioning activities taking place. It also serves to inform and alert the NRC staff to the schedule of licensee activities for inspection planning purposes and for decisions regarding NRC oversight activities."); *id*. at 39,283 (one of the primary goals of the PSDAR process . . . is to promote public knowledge and provide an opportunity to hear public views on decommissioning activities before licensees commence decommissioning.").

[241] *Id*. at 39,279-80.

[242] Petition for Review at 42-47.

within 60 years.[243] Consistent with these regulations, any estimate of decommissioning costs must project the completion of decommissioning within 60 years. Vermont cannot advocate in an adjudicatory hearing for a requirement that Entergy consider costs beyond this 60-year time period.[244] This argument may only be proffered as a 10 C.F.R. § 2.802 petition for rulemaking.[245]

Finally, Vermont argues that, because Entergy has been granted an exemption to withdraw funds from the VY DTF for certain spent fuel management expenses, its access to the DTF for this purpose will be effectively "unlimited" such that, if Entergy's projections of spent fuel pickup by the Department of Energy are not realized, the DTF will be exhausted by spent fuel management expenses before radiological decommissioning can be completed.[246] However, the Commission's regulations are specifically structured so as to prevent this scenario. During decommissioning, licensees are required to annually recalculate and report to the NRC their estimated costs for completing decommissioning and for spent fuel storage and then compare these costs to the sum of the balance of the DTF, plus a 2% real rate of return.[247] If the costs are greater than the funds, then the licensee must provide additional financial assurance to cover the estimated cost of completion.[248] Further, the NRC has the authority to rescind an

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[243] 10 C.F.R. § 50.82(a)(3) ("Decommissioning will be completed within 60 years of permanent cessation of operations.").

[244] *See, e.g., Vermont Yankee*, LBP-15-4, 81 NRC at __ (slip op. at 12-13) (stating that a contention that seeks to impose a requirement more stringent than that required by the regulations is an impermissible collateral attack on the regulations in derogation of 10 C.F.R. § 2.335(a) and must be rejected as inadmissible) (citing *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC __, __ n.27 (slip op. at 9 n.27) (Aug. 26, 2014); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995)).

[245] *See, e.g., Diablo Canyon,* CLI-15-21, 82 NRC at __ (slip op. at 17 n.69).

[246] Petition for Review at 42-47.

[247] 10 C.F.R. § 50.82(a)(8)(v)-(vii).

[248] *Id*.

exemption, including the exemption allowing Entergy to make withdrawals from the VY DTF for certain spent fuel management expenses, at any time.[249] Therefore, because of the Commission's regulations requiring an annual showing of a DTF's sufficiency during decommissioning and because of the Commission's ability to act to prevent any projected shortfall in a DTF, Vermont's concern that Entergy will exhaust the VY DTF through spent fuel management costs is without merit.

## V. Vermont's NEPA Arguments Are Both Procedurally and Substantively Flawed.

### A. Vermont's NEPA Arguments Are Impermissible Challenges to the Commission's Decommissioning Rule.

Vermont requests that the NRC conduct a NEPA analysis of the entire decommissioning process at VY now that it has permanently ceased operations.[250] However, the Commission's decommissioning regulations specifically provide that no such NEPA analysis is required upon a facility's permanent cessation of operations because decommissioning is conducted according to the licensee's operating license and does not involve a license amendment or other affirmative NRC action that would warrant a NEPA analysis beyond those that had already been performed in support of the issuance of the operating license and the decommissioning rules themselves. Therefore, Vermont's NEPA arguments amount to impermissible challenges to the Commission's decommissioning rules and, consistent with 10 C.F.R. § 2.335, may not be entertained in an adjudicatory hearing before the Commission.

By arguing that a "comprehensive" environmental analysis is required at the PSDAR-stage of decommissioning,[251] Vermont is essentially arguing against the Commission's current decommissioning regulation at 10 C.F.R. § 50.82, which was promulgated by a 1996

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[249] *St. Lucie*, CLI-89-21, 30 NRC at 330 n.2.

[250] Petition for Review at 50-56.

[251] Petition for Review at 54.

rulemaking.[252] As already discussed above, in 1996, the Commission determined that decommissioning could be conducted under a licensee's existing operating license pursuant to the 10 C.F.R. § 50.59 change process and the Commission's regulations at 10 C.F.R. § 50.82. As a result of this rulemaking, since a licensee's performance of major decommissioning activities is done under its existing license and the Commission's existing regulations at 10 C.F.R. § 50.59 and 10 C.F.R. § 50.82, these major decommissioning activities no longer require the licensee to obtain additional authority from the NRC and, thus, no longer require an NRC licensing action and NEPA analysis.

During the 1996 rulemaking, the NRC received comments regarding its creation of a PSDAR with "no mandatory [environmental report] or subsequent [environmental assessment] requirements."[253] Some commenters "believed that the NRC should define decommissioning as a major Federal action requiring an EA or EIS."[254] The Commission, though, responded that, no environmental analysis was required at the PSDAR stage because "the final rule prohibits major decommissioning activities that could result in significant environmental impacts not previously reviewed."[255] Further, the NRC conducted an environmental assessment of the rulemaking itself and determined that, "insofar as the rule would allow major decommissioning activities (dismantlement) to proceed without an environmental assessment, application of the rule will not have a significant impact on the environment."[256] Therefore, although the rule requires licensees to indicate in their PSDARs the reasons for concluding that the planned activities are bounded by previous EISs, the Commission concluded that this is not required by NEPA and is,

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[252] *Id.* at 28-29. *See* 61 Fed. Reg. 39,278.

[253] 61 Fed. Reg. at 39, 283.

[254] *Id*.

[255] *Id*.

[256] *Id*.

instead, intended to "promote public knowledge and provide an opportunity to hear public views on decommissioning activities before licensees commence decommissioning."[257] The Commission concluded that a NEPA analysis was only required as part of its review of the LTP.[258]

Through its request for a comprehensive NEPA analysis at the PSDAR-stage of decommissioning, Vermont is essentially, challenging the Commission's existing decommissioning regulations. However, the Commission determined that there was no need for an environmental review at this stage of the decommission process and that the appropriate time to perform an environmental analysis and safety evaluation was at the LTP stage of decommissioning.[259] The Commission determined that this was appropriate because "the final disposition of the site is determined at that time."[260] If Vermont would like to change the existing rule, Vermont can file a petition for rulemaking under 10 C.F.R. § 2.802.[261]

B. No Further NEPA Analysis Is Required for Entergy's Planned Withdrawals From its Decommissioning Trust Fund.

1. NEPA Requirements for Major Federal Actions

Section 102 of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 *et seq.,* requires, in pertinent part, that Federal agencies are to include in every recommendation or report on major Federal actions that significantly affect the quality of the human environment, a detailed statement on (a) "the environmental impact of the proposed

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[257] *Id*.

[258] *Id*. at 39,284.

[259] 10 C.F.R. § 50.82(a)(9)-(10).

[260] 61 Fed. Reg. at 39,284.

[261] The Leshinskie Declaration also faults the PSDAR for its reliance on the Commission's Continued Storage Rule. Leshinskie Declaration at 2-3. This comment on the PSDAR is both beyond the scope of this proceeding, which concerns a distinct LAR and not the PSDAR, and an inadmissible challenge to a commission rule.

action," (b) "any adverse environmental effects which cannot be avoided should the proposal be implemented," (c) "alternatives to the proposed action," (d) "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and (e) "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." It is well-established that NEPA requires federal agencies to take a "hard look" at the environmental impacts of major federal actions.[262] Inherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an environmental impact statement (EIS) based on the usefulness of any new potential information to the decisionmaking process.[263]

NEPA seeks to ensure that the agency will "consider every significant aspect of the environmental impact of a proposed action," and will "inform the public that it has considered environmental concerns in its decisionmaking process."[264] The Commission's regulations in 10 C.F.R. Part 51 establish the procedures by which the agency implements and satisfies the requirements of NEPA, for a broad range of NRC regulatory and licensing activities.[265] Section 51.20 identifies the criteria for and identification of licensing and regulatory actions that the NRC has identified as requiring EISs. Specifically, 10 C.F.R. § 51.20(a) states that licensing and regulatory actions requiring an EIS shall meet at least one of the following criteria:

> (1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

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[262] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *accord, Commonwealth of Massachusetts v. NRC,* 708 F.3d 63, 67 (1st Cir. 2013).

[263] *See, e.g.*, *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 754 (2004).

[264] *Commonwealth of Massachusetts v. NRC,* 708 F.3d at 67, *quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, *Inc.,* 462 U.S. 87, 97 (1983) (internal quotation marks and citations omitted); *accord, N.J. Dep't of Environmental Protection v. NRC,* 561 F.3d 132, 134 (3d Cir. 2009).

[265] *See* 10 C.F.R. § 51.2.

> (2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

Section 51.20(b) specifies several actions which the Commission has determined constitute a major Federal action or otherwise require an EIS such as issuance of a limited work authorization or a permit to construct a nuclear power plant, issuance of a renewed license to operate a nuclear power plant. Further, 10 C.F.R. § 51.20(b)(14) includes as requiring an EIS "Any other action which the Commission determines is a major Commission action significantly affecting the quality of the human environment."

The NRC has evaluated the environmental impacts of power reactor decommissioning on a generic basis in NUREG-0586, Supplement 1, "Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities," dated November 2002 (Decommissioning GEIS).[266] The PSDAR must include a discussion of reasons supporting the conclusion "that site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements."[267] NRC regulations do not require a licensee to submit an environmental

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[266] GEIS, Supplement 1, is available at ADAMS Accession Nos. ML023470304, ML023470323, ML023500187, ML023500211, ML023500223. Supplement 1 updates the August 1988 NUREG-0586 to reflect technological advances in decommissioning operations, experience gained by licensees, and changes made to NRC regulations. The Supplement is intended to be used to evaluate environmental impacts during the decommissioning of nuclear power reactors as residual radioactivity at the site is reduced to levels that allow for termination of the NRC license and is considered a stand-alone document. GEIS at iii.

Vermont asserts that the NRC has failed to "take into account the negative economic impacts to the surrounding area resulting from Entergy's decision to use the maximum SAFSTOR period[.]" Petition at 55-56. On the contrary, the GEIS, specifically addresses the socio-economic impacts of decommissioning and its analysis includes an analysis of SAFSTOR as compared to the other decommissioning options (DECON and ENTOMB). NUREG-5086, Supp. 1, Socioeconomics, § 4.3.12 (ADAMS Accession No. ML023470323).

[267] 10 C.F.R. § 50.82(a)(9)(ii)(G).

report and do not require the NRC to issue an environmental evaluation of the site-specific environmental impacts discussed in the PSDAR.[268]

Applicants for license amendments that seek approval of decommissioning activities that do not fall under 10 C.F.R. § 50.59 or the approval of an LTP under 10 C.F.R. § 50.82 that would authorize unrestricted use of the site or continued restricted use of the site must submit a "Supplement to Applicant's Environmental Report—Post Operating License Stage," with updates to its operating license environmental report to reflect any new information or significant environmental change associated with decommissioning or irradiated fuel storage.[269] Similarly, 10 C.F.R. § 51.95(d) requires the Staff to prepare a supplemental EIS only for licensing actions that authorize unrestricted release (or continued restricted use of the facility site) or actions that authorize irradiated fuel storage at a nuclear power reactor after expiration of the operating license.

2. Entergy's DTF Withdrawals Do Not Constitute a Major Federal Action.

Vermont argues that the sum total of the NRC's actions and inactions regarding the VY decommissioning trust fund constitute a "major federal action" requiring review under NEPA.[270] Specifically, Vermont argues that these actions and inactions include the "NRC's grant of Entergy's exemption requests, and other similar approvals, standing alone and in

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[268] *See* 10 C.F.R. §§ 50.82(a)(4)(i) , 51.53(d), 51.95(d).

[269] 10 C.F.R. § 51.53(d).

[270] Petition at 9, 14.

combination;"[271] the Staff's review of Entergy's PSDAR;[272] and the "NRC's responsibility to police Entergy's 30-day notifications for anticipated withdrawals."[273]

Contrary to Vermont's assertions, the Staff's treatment of the PSDAR and the Staff's failure to object to Entergy's withdrawal notifications do not rise to the level of a "major federal action." The Council on Environmental Quality (CEQ) regulations implementing NEPA state that major federal action includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility" and "the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action."[274]

The NRC's supposed failure to act with respect to the PSDAR is not reviewable as an agency action under the AEA because, as explained above, the submission of a PSDAR does not trigger a hearing opportunity. Likewise, the sufficiency of Entergy's 30-day notices do not trigger a hearing opportunity under the AEA § 189a, and concerns based on those notices can only be raised by means of a petition that requests NRC action pursuant to 10 C.F.R. § 2.206. Therefore, these actions do not qualify as major federal actions under 40 C.F.R. § 1508.18.[275]

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[271] Petition at 52 (citing *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 293 (1st Cir. 1995)). Vermont does not explain what it means by other similar approvals. It is unclear whether Vermont is referring to other exemptions that have been granted to Entergy on matters unrelated to the VY DTF or to something else.

[272] Petition at 52-53 (citing 59 F.3d at 293).

[273] Petition at 52.

[274] 40 C.F.R. § 1508.18. Section 1508.18(b) provides that major federal actions tend to fall into one of the four following categories: 1) adoption of official policy; 2) adoption of formal plans; 3) adoptions of programs; and 4) approval of specific projects.

[275] Moreover, the VY PSDAR was submitted in accordance with and processed by the Staff in accordance with NRC regulations at 10 C.F.R. §§ 50.59 and 50.82. These regulations were amended in 1996 and that regulatory amendment was accompanied by a NEPA review that determined that the regulations, "if adopted, would not be a major Federal action significantly affecting the quality of the human environment and therefore, an environmental impact statement is not required." 61 Fed. Reg. at 39,296. The NRC prepared an environmental assessment and made a finding of no significant environmental impact. *Id.*

Vermont does not explain how the effects of the NRC's purported actions or inactions regarding these items would be a "major" effect warranting a NEPA review[276] and the cases it cites are readily distinguishable. In *Ramsey v. Kantor*, 96 F.3d 434, 445 (9th Cir. 1996), the Court of Appeals held that the Secretary of Commerce's failure to disapprove the plans governing fishing off the coast of Alaska enabled those plans to go into effect and constituted major federal action. However, *Ramsey* is distinguishable because in that case the agency's failure to disapprove plans prepared by the fish management council resulted in the plans attaining the force of law.[277] Moreover, the court found that it was clear that the actions regarding the fish management plans "may have major effect."[278] Here, the NRC's failure to disapprove the PSDAR does not result in the decommissioning plans attaining the force of law.[279] As discussed above, the PSDAR does not permit the licensee to perform any task it could not already perform pursuant to 10 C.F.R. § 50.59, otherwise a license amendment associated NEPA review would be required.

Vermont also cites to C*itizens Awareness Network, Inc. v. NRC*, 59 F.3d 284 (1st Cir. 1995) as support for its argument that the agency's approvals constitute "major federal actions."[280] However, Vermont's Petition fails to acknowledge that the Commission explicitly addressed this court decision in the 1996 decommissioning rule.[281] Indeed, in that rulemaking,

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[276] *See* 40 C.F.R. § 1508.18 (noting that "Major reinforces but does not have a meaning independent of significantly (§ 1508.27).") 40 C.F.R. § 1508.27 which defines "significantly" contains numerous criteria for determining whether an action is significant and notes that "[s]ignificantly as used in NEPA requires considerations of both context and intensity."

[277] *Ramsey*, 96 F.3d at 445.

[278] *Id.*

[279] *See Anglers Conservation Network,v. Penny Pritzker*, 70 F.Supp.3d 427, 442 (DC Cir. 2014) (distinguishing *Ramsey* because the Secretary's inaction resulted in the plans attaining the force of law). In addition, the PSDAR was submitted pursuant to regulatory provisions and in the rulemaking for those provisions, NEPA was considered and applied. 61 Fed. Reg. 39,296.

[280] Petition at 53.

[281] *See* 61 Fed. Reg. at 39,285-86 ("In publishing this final rule, the Commission has explained the rationale for the new decommissioning process, and has concluded that nothing in the court decision

the Commission specifically recognizes that the First Circuit "perceived that the agency 'approval' of the expenditure of funds from the decommissioning funds may be a basis for triggering both NEPA reviews and hearing rights,"[282] and explains that the revised rule addresses this issue.[283]

As explained above, the revised rule no longer requires licensees to have an approved decommissioning plan before being permitted to perform major decommissioning activities.[284] This is in contrast to the regulation in place at the time the court rendered its decision.[285] Thus, the NRC is not required to issue an evaluation approving site-specific environmental impacts discussed in the PSDAR.[286] Moreover, the revised rule does not require the NRC's affirmative approval of decommissioning until the licensee's submission of a LTP at least two years before the termination of the license.[287] In publishing the final rule, the Commission "concluded that nothing in the court decision dictates that the Commission take a specific approach to this issue or otherwise raises questions concerning the validity of the approach adopted in this rulemaking."[288] Vermont's arguments are essentially a challenge to the Commission's existing decommissioning regulations and should instead be raised through a petition for a rulemaking

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dictates that the Commission take a specific approach to this issue or otherwise raises questions concerning the validity of the approach adopted in this rulemaking.").

[282] 61 Fed. Reg. at 39,286 (citing 59 F.3d at 292-95).

[283] *Id.* (noting that the revised regulations do not require prior NRC approval of site-specific expenditures meeting the generic criteria).

[284] 61 Fed. Reg. at 39,279.

[285] *Citizens Awareness*, 59 F.3d at 291 (noting that the regulation in place specifically required NRC approval of a decommissioning plan before a licensee undertook any major structural changes to a facility).

[286] *See* 10 C.F.R. §§ 50.82(a)(4)(i) , 51.53(d), 51.95(d). Additionally, the NRC has evaluated the environmental impacts of power reactor decommissioning on a generic basis in the Decommissioning GEIS. Under the revised rule, the PSDAR must include a discussion of reasons supporting the conclusion "that site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements." 10 C.F.R. § 50.82(a)(9)(ii)(G).

[287] 10 C.F.R. § 50.82(a)(9).

[288] *Id.*

under 10 C.F.R. § 2.802. Accordingly, Vermont's arguments should be dismissed because it has not demonstrated that there is a major federal action here warranting the NRC to conduct a NEPA review.

Finally, to the extent Vermont asserts that the Exemption Request is a major federal action requiring a NEPA review, Vermont appears to suggest that a NEPA review has not been undertaken with respect to the Exemption Request.[289] However, as explained in further detail below, the Staff conducted a NEPA review of the Exemption Request and applied a categorical exclusion. To the extent Vermont is arguing that a categorical exclusion is an insufficient environmental review under NEPA, Vermont's arguments amount an impermissible challenge the Commission's categorical exclusions rule.[290]

C. The Staff's Application of a Categorical Exclusion to Entergy's Exemption Request Was Not Arbitrary or Capricious Under NEPA.

The Staff correctly classified Entergy's exemption request as a categorical exclusion under 10 C.F.R. § 51.22(c)(25) and explained why the grant of the exemption will not have a significant effect on the environment. Because the application of the categorical exemption was proper, the Staff was not required to prepare an EA or an EIS. A cumulative impacts analysis is not required because such an analysis is only required in an EIS or EA. Accordingly, the Commission should reject Vermont's argument that the Staff application of the categorical

[289] Petition for Review at 52.

[290] *See* Categorical Exclusions From Environmental Review, 75 Fed. Reg. 20,248 (Apr. 19, 2010) (final rule).

exclusion was incorrect and that its environmental review is deficient for failure to analyze cumulative impacts.

1. The Categorical Exclusion Regulation and Process

Under NEPA, agencies are permitted to exclude certain categories of actions by rule from EIS and EA analyses where the agency has determined that such actions do not individually or cumulatively have a significant effect on the environment.[291] Consequently, "a categorical exclusion is by definition not a major federal action."[292] Accordingly the Commission's regulations provide that a "categorical exclusion" is applicable to:

> actions which do not individually or cumulatively have a significant effect on the human environment and which the Commission has found to have no such effect in accordance with procedures set out in [10 C.F.R. ] § 51.22, and for which, therefore neither an environmental assessment nor an environmental impact statement is required.[293]

The Commission has by rule identified a number of actions that the Commission may take that do not individually or cumulatively have a significant effect on the environment, which include, *inter alia*, the issuance of exemptions.[294]

The Commission's categorical exclusions do "not indicate the absence of an environmental review, but rather, that the agency has established a sufficient administrative record to show that the subject actions do not, either individually or cumulatively, have a

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[291] *See* 40 C.F.R. §§ 1507.3(b)(2) & 1508.4; *Brodsky v. NRC*, 704 F.3d 113, 120 (2d Cir. 2013); *see also* 10 C.F.R. § 51.10 (noting that it is the NRC's policy to take into account CEQ regulations, subject to certain conditions).

[292] *Sierra Club v. Bosworth*, 510 F.3d 1016, 1025 (9th Cir. 2007).

[293] 10 C.F.R. § 51.14.

[294] *See* 10 C.F.R. § 51.22; Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9,352 (Mar. 12, 1984); Categorical Exclusions From Environmental Review, 75 Fed. Reg. 20,248 (Apr. 19, 2010).

significant effect on the human environment."[295] In the Statement of Consideration (SOC) for the 2010 amendments to § 51.22, the Commission established "a sufficient administrative record, consisting of professional staff opinions and past NEPA records, which shows that these actions [enumerated in § 51.22], either individually or cumulatively, do not result in a significant effect on the human environment."[296] Furthermore, the Commission stated that the purpose of the categorical exclusion regulations is to "reduce inefficiencies and inconsistencies in the implementation of NRC's regulatory program" and "eliminate the need to prepare unnecessary EAs for NRC regulatory actions that have no significant effect on the human environment."[297]

In 2010, the Commission added subsection (25) to 10 C.F.R. § 51.22(c), thereby creating a specific categorical exclusion for the grant of exemptions from certain regulatory requirements.[298] The Commission found that the "majority of the exemptions it grants are administrative or otherwise minor in nature," and that the granting of exemptions for these types of requirements "normally do not result in any significant effect, either individually or cumulatively, on the human environment."[299] The categorical exclusion in § 51.22(c)(25) only applies to exemption requests that meet all of the criteria listed in 10 C.F.R. 51.22(c)(25)(i)-(vi). Thus, in order for the categorical exclusion to be applicable to a specific exemption request, the

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[295] *Id.* at 20,250 (citing CEQ, "The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation," at 59 (2003) (Task Force Report)).

[296] 75 Fed. Reg. at 20,251 ("The statements of consideration for this final rule summarize the NRC's administrative record for each categorical exclusion").

[297] *Id.* The Commission amended its categorical exclusion regulations in 2010 partly in response to the CEQ Task Force Report. *Id.* at 20,249. The Commission conducted an in-depth review of the EA/FONSIs issued during the period 2003-2007. That review identified "several recurring categories of regulatory actions that are not addressed in 10 CFR 51.22, and have no significant effect on the human environment, either individually or cumulatively." *Id.* Those categories of actions were considered in the amendments adopted in that final rule. *Id.*

[298] 75 Fed. Reg. at 20,255.

[299] *Id.*

Staff must first make the findings described in 10 C.F.R. 51.22(c)(25)(i)-(v) and then determine that the exempted requirement is of a type listed in 10 C.F.R. 51.22(c)(25)(vi).[300]

Once a categorical exclusion has been established, the Staff need not prepare an EA or an EIS, unless there are "special circumstances" that compel an EA or EIS.[301] The NRC retains discretion in determining whether special circumstances are present.[302] A determination that special circumstances are not present does not require the preparation of additional documentation beyond that normally prepared to indicate that the categorical exclusion is being invoked for the proposed action.[303]

2. The Staff's Application of the Categorical Exclusion Was Proper.

Vermont argues that the Staff's decision to apply a categorical exclusion to the granting of Entergy's exemption request was incorrect and that the exemption will have a significant

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[300] *Id.* The safety findings Staff must make are that: (i) There is no significant hazards consideration; (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (iii) There is no significant increase in individual or cumulative public or occupational radiation exposure; (iv) There is no significant construction impact; and (v) There is no significant increase in the potential for or consequences from radiological accidents. 10 C.F.R. § 51.22(c)(25)(i)-(v).

The eight exemption types categorically excluded by § 51.22 are those for: (A) Recordkeeping requirements; (B) Reporting requirements; (C) Inspection or surveillance requirements; (D) Equipment servicing or maintenance scheduling requirements; (E) Education, training, experience, qualification, requalification or other employment suitability requirements; (F) Safeguard plans, and materials control and accounting inventory scheduling requirements; (G) Scheduling requirements; (H) Surety, insurance or indemnity requirements; or (I) Other requirements of an administrative, managerial, or organizational nature. *Id.* at (vi).

[301] 10 C.F.R. § 51.22(b). The Commission may find special circumstances upon its own initiative, or upon the request of an interested person. *Id.* In the regulation, the Commission stated that special circumstances include situations where the proposed action involves unresolved conflicts concerning alternative uses of available resources within the meaning of section 102(2)(E) of NEPA. *Id. See also Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 76 (2010). Vermont has not, however, asserted or demonstrated that there are special circumstances associated with the exemption that would render the categorical exclusion inappropriate.

[302] 75 Fed. Reg. at 20,250. "Special circumstances" are synonymous with the "extraordinary circumstances" exception required for procedures under the CEQ's regulations. *See* 40 C.F.R. § 1508.4 ("Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect"). 20,250.

[303] *Id.*

environmental effect.[304] Vermont further argues that the Staff did not adequately explain its decision to apply the categorical exclusion to the exemption and thus failed to meet its responsibilities under NEPA.[305] Vermont's arguments are unavailing.

First, in the 2010 Rulemaking, the Commission reviewed the environmental effects of certain exemption requests and determined via "a sufficient administrative record, consisting of professional staff opinions and past NEPA records" that such administrative exemptions, as enumerated in § 51.22(c)(25), do not have a significant effect on the environment.[306] Accordingly, the Staff appropriately reviewed the exemption to determine if it met the criteria for the categorical exclusion in § 51.22(c)(25), and found that each of these criteria were met. Once the Staff established that the categorical exclusion applied, the necessary environmental review was complete because the Commission already determined by rule that such exemptions do not have individual or cumulative effects on the environment, and therefore, do not warrant further review in an EA or EIS.[307] Indeed, requiring an EIS or an EA for Entergy's exemption would be the type of "unnecessary EA [or EIS]" for an administrative exemption that the Commission sought to avoid in promulgating § 51.22(c)(25).[308] As such, the Staff conducted the appropriate environmental review for the exemption and correctly determined that the categorical exclusion applied.

Second, the Staff did not merely recite the criteria of § 51.22(c)(25), as Vermont asserts, but rather, explained how each criteria was met in this instance because the exemption is from

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[304] Petition at 56 (citing *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999) ("Categorical exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment").

[305] *Id.*

[306] 75 Fed. Reg. at 20,251 and 20,255.

[307] *Pa'ina*, CLI-10-18, 72 NRC at 76.

[308] 75 Fed. Reg. at 20,251.

an administrative requirement that does not affect the environment.[309] The Staff explained that allowing withdrawals from the DTF in accordance with the PSDAR, without thirty days prior notification, is a reporting and record keeping requirement unrelated to safety that does not require a significant hazard consideration.[310] Similarly, the Staff explained that, the exemption is unrelated to operating restrictions and does not reduce the margin of safety, since the reactor is defueled, and that the exemption does not include construction.[311] Therefore, the Staff sufficiently explained why this administrative exemption fits squarely within the categorical exclusion, as envisioned by the Commission's 2010 Rulemaking.[312]

The cases that Vermont cites are unavailing. *Alaska Center for the Environment* merely holds that a categorical exclusion cannot be used where the action at issue has a significant effect on the environment.[313] In such a situation, a categorical exclusion would be inappropriate. The Court of Appeals in Alaska wrote: "as long as there is a rational connection between the facts and the conclusions made," the agency has not acted arbitrarily or capriciously.[314] In *Jones*, the Court of Appeals rejected the National Marine Fisheries Service's conclusory determination of no significant impact.[315] As explained above, in this case, the Staff provided a rational connection between the facts of the exemption and its conclusion that exemption met the criteria of 10 C.F.R. § 51.22(c)(25). Its determination was not conclusory, but fully explained and justified.

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[309] 80 Fed. Reg. at 35,994.

[310] *Id.*

[311] *Id.*

[312] 75 Fed. Reg. at 20,255.

[313] *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d at 857-59.

[314] *Id.* at 859.

[315] *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986).

3. A Cumulative Impacts Analysis Was Not Required.

Vermont argues in its petition that the Staff was required to conduct a cumulative impacts analysis for the Staff's application of the categorical exclusion to the exemption.[316] Vermont points to no regulation requiring the Staff to perform a cumulative impacts analysis for a categorical exclusion. The Commission only requires a cumulative impact analysis in an EIS.[317] As discussed *supra*, section V.C.2., the Staff performed an appropriate environmental review of the exemption in analyzing the application of the categorical exclusion and properly concluded that its review was complete after establishing that the categorical exclusion applied. Indeed, the very purpose of the categorical exclusion at § 51.22(c)(25) is to lessen agency inefficiencies by not conducting "unnecessary EAs [or EISs]" for administrative exemptions, such as this, which have already been determined to "not individually or cumulatively have a significant effect on the human environment."[318] Accordingly, because Staff completed the requisite review in establishing that the categorical exclusion applied, further review in an EA or EIS, and the accompanying cumulative impacts analysis, was unwarranted.

The cases Vermont cites to support its challenge, *Sierra Club v. Bosworth* and *Brady Campaign to prevent Gun Violence v. Salazar*,[319] are distinguishable from the instant case. Both of those cases concerned regulations and policies of a national scope.[320] *Sierra Club* involved the establishment of a new nationally applicable categorical exclusion obviating certain

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[316] Petition at 57.

[317] *See* 10 C.F.R. § 51.71(d).

[318] 75 Fed. Reg. at 20,251 & 20,255.

[319] Petition at 57-58 (citing *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2009) case dismissed, No. 09-5093, 2009 WL 2915013 (D.C. Cir. Sept. 8, 2009); *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007). Vermont also cites *Northern States Power Co*. (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503 (Dec. 20, 2012), but that decision did not involve the application of a categorical exclusion; it addressed the need for a cumulative impacts analysis in an applicant's environmental review.

[320] *Brady*, 612 F. Supp. 2d at 9 (D.D.C. 2009); *Sierra Club*, 510 F.3d at 1,019 (9th Cir. 2007).

firefighting practices in national forests from the need for an EA or EIS,[321] and *Brady* involved the use of a categorical exclusion to forego an EA or EIS for a new regulation allowing the carrying of loaded firearms in national parks.[322] In *Brady*, the court found the agency's use of a categorical exclusion to be arbitrary and capricious because it ignored numerous findings of environmental effects in the record, including the agency's own prior view that there were significant effects from the same activity.[323] And, in *Sierra Club*, the agency promulgated a categorical exclusion without explaining why the actions that fall within the categorical exclusion would not cumulatively, on a regional to national scale, have significant environmental effects.[324]

Neither of these cases is similar to the situation here. The VY DTF exemption does not have nationwide applicability; it is a specific administrative exemption for one aspect of a single plant's decommissioning. Moreover, the Staff did explain why the exemption met the criteria for categorical exclusion. Plus, the Commission has provided a detailed administrative record as to why administrative exemptions categorically excluded in § 51.22(c)(25) do not have a significant effect on the environment.[325] Accordingly, the cases Vermont cites are inapplicable and Vermont's assertion that the environmental review for the DTF exemption is deficient should be rejected.

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[321] *Sierra Club*, 510 F.3d at 1,019-20.

[322] *Brady*, 612 F. Supp. 2d at 6.

[323] *Brady*, 612 F. Supp. 2d at 9-10 (D.D.C. 2009) (enjoining agency's decision to categorically exclude a rule permitting concealed weapons in national parks from NEPA requirements because agency's rationale that the rule did not authorize the discharge of such weapons, and therefore would not cause any actual environmental impacts, was insufficient to examine possible environmental effects).

[324] *Sierra Club*, 510 F.3d at 1,025-1,032(9th Cir. 2007) ("The Forest Service concedes that no cumulative impacts analysis was performed for the Fuels [categorical exclusion] as a whole. The Forest Service must perform this impacts analysis *prior to promulgation of the [categorical exclusion]*") (emphasis added).

[325] 75 Fed. Reg. at 20,251-55.

## CONCLUSION

For the reasons stated above, the Commission should deny Vermont's Petition for Review. While Vermont is not entitled to an adjudicatory hearing, there are other options available to it: it may petition for agency action pursuant to 10 C.F.R. § 2.206 and it may petition for rulemaking pursuant to 10 C.F.R. § 2.802.

Respectfully submitted,

***/Signed (electronically) by/***

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Dated at Rockville, Maryland
this 7th day of December, 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 ANSWER TO THE VERMONT PETITION FOR REVIEW OF ENTERGY NUCLEAR OPERATION INC.'S PLANNED USE OF THE VERMONT YANKEE NUCLEAR DECOMMISSIONING TRUST FUND," dated December 7, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 7th day of December, 2015.

***/Signed (electronically) by/***

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Dated at Rockville, Maryland
this 7th day of December, 2015.

EXHIBIT 7

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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

# ENTERGY'S ANSWER OPPOSING NOVEMBER 4, 2015 PETITION FILED BY THE STATE OF VERMONT, VERMONT YANKEE NUCLEAR POWER CORPORATION, AND GREEN MOUNTAIN POWER CORPORATION

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**UNITED STATES OF AMERICA**
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**BEFORE THE COMMISSION**

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| | ) | December 7, 2015 |
| (Vermont Yankee Nuclear Power Station) | ) | |

**ENTERGY'S ANSWER OPPOSING NOVEMBER 4, 2015 PETITION FILED BY THE STATE OF VERMONT, VERMONT YANKEE NUCLEAR POWER CORPORATION, AND GREEN MOUNTAIN POWER CORPORATION**

## I. INTRODUCTION

Pursuant to the November 10, 2015 Order of the Secretary, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy") submit this Answer opposing the Petition of the State of Vermont ("State"), the Vermont Yankee Nuclear Power Corporation ("VYNPC"), and the Green Mountain Power Corporation ("GMPC") (collectively, "Petitioners") for Review of Entergy Nuclear Operation, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund ("Petition") filed on November 4, 2015.[1] As explained below, the Commission should deny the Petition because it is procedurally and substantively deficient on numerous grounds.

Petitioners demand a hearing on issues related to the Vermont Yankee nuclear decommissioning trust ("NDT") to:

> (1) reverse NRC Staff's June 17, 2015 grant of Entergy's exemption requests to use the Decommissioning Fund for spent

[1] The State attached three documents, labeled as "exhibits," to the Petition: Exhibit 1, Master Decommissioning Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002); Exhibit 2, State of Vermont's PSDAR Comments (Mar. 6, 2015); and Exhibit 3, Declaration of William Irwin, Sc.D, CHP (Apr. 20, 2015).

> fuel management expenses before radiological decommissioning is complete;
>
> (2) review all of Entergy's requests for withdrawals from the Decommissioning Fund, and prohibit Entergy from making future withdrawals for expenses that do not meet the NRC's definition of decommissioning;
>
> (3) require Entergy to provide detail in its 30-day notices;
>
> (4) find Entergy's December 19, 2014, filings ([Post-Shutdown Decommissioning Activities Report ("PSDAR")], Decommissioning Cost Estimate [("DCE")], and Updated Irradiated Fuel Management) deficient insofar as those filings contemplate using the Decommissioning Fund for spent fuel management and other non-decommissioning expenses before radiological decommissioning is complete;
>
> (5) undertake the environmental review required by [the National Environmental Policy Act ("NEPA")] before deciding whether Entergy may proceed with non-compliant uses of the Decommissioning Fund; and
>
> (6) take any other actions necessary to protect the Decommissioning Fund until radiological decommissioning is complete.[2]

In support of such demands, the Petition presents and references—without any coherent procedural basis—a hodge-podge of generalized grievances, duplicative pleadings, untimely appeals, impermissible challenges to NRC regulations, and conjecture about what NRC regulations *should* require. This extra-procedural Petition should be rejected for failure to satisfy *any* criteria set forth in the Commission's Rules of Practice and Procedure in 10 C.F.R. Part 2.

On one hand, the Petition fails to identify a "proceeding" for which it demands a hearing. On the other hand, the Petition references multiple completed or ongoing proceedings in which Petitioners (individually or collectively) are currently participating in, have previously participated in, or could have but chose not to participate in. Ostensibly, Petitioners now demand

[2] Petition at 8-9 (internal citations omitted).

that the Commission ignore these prior efforts (or lack thereof) and instead conjure up a new proceeding from whole cloth—presumably to create yet another forum for their various purported grievances. This demand, which ignores the requirements and procedures in 10 C.F.R. Part 2 in their entirety, is an impermissible challenge to the NRC's regulations and regulatory process, contrary to 10 C.F.R. § 2.335.

Further, as Petitioners make no attempt to identify what, if any, 10 C.F.R. Part 2 procedures apply to, or even permit the filing of, their Petition, Entergy is left to speculate as to the possible regulatory requirements that could arguably apply to the Petition. Nonetheless, for each possible construction of the Petition, it must be summarily rejected:

- To the extent it can be viewed as a hearing request under 10 C.F.R. § 2.309, it cites no opportunity to request a hearing; it cites no basis under Section 189(a) of the Atomic Energy Act of 1954, as amended ("AEA") for entitlement to a hearing; the time to request a hearing for any previous opportunities has long since passed; and it fails to address the late filing criteria in 10 C.F.R. § 2.309(c) or to submit any contention under 10 C.F.R. § 2.309(f).

- To the extent it can be viewed as a petition for reconsideration of a previously-granted exemption under 10 C.F.R. § 2.345, it is untimely, fails to demonstrate a "clear and material error," and is duplicative of an appeal Petitioners already have filed with the U.S. Court of Appeals for the District of Columbia Circuit.

- To the extent it challenges the outcome of LBP-15-28,[3] which granted Entergy's withdrawal of a license amendment request ("LAR"), Petitioners should have submitted a petition for review under 10 C.F.R. § 2.341; and to the extent the instant Petition can be viewed as that petition for review, it fails to demonstrate why the decision was "erroneous," fails to demonstrate a "substantial question," and lacks a substantive basis.

- To the extent it suggests what Commission decommissioning and environmental policy "should be," Petitioners should have filed a petition for rulemaking under 10 C.F.R. § 2.802.

- To the extent it claims that Entergy is not complying with its license conditions or NRC regulations, Petitioners should have filed a petition under 10 C.F.R. § 2.206.

[3] *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-28, 82 NRC __ (Oct. 15, 2015) (slip op.) ("LBP-15-28").

Notwithstanding the multitude of procedural deficiencies, the Petition also is devoid of a substantive basis. As explained further in the discussion below and contrary to Petitioners' various vague and unsupported claims, Entergy's decommissioning-related activities are fully consistent with NRC regulations, guidance, and precedent.

For these many reasons, the Petition should be summarily rejected.

## II. REGULATORY AND PROCEDURAL BACKGROUND

### A. Brief Overview of Decommissioning Requirements

Under NRC regulations, decommissioning a nuclear reactor means to safely remove the facility from service, reduce residual radioactivity to a level that allows releasing the property for unrestricted use (or restricted use subject to conditions), and terminate the license.[4] During the operating life of a plant, NRC regulations require that a licensee maintain financial assurance for decommissioning.[5] Licensees report on the status of decommissioning funding at least once every two years during operation.[6]

Once a licensee decides to cease operations permanently, NRC regulations impose additional requirements that govern three sequential phases for decommissioning activities: (1) initial activities; (2) major decommissioning and storage activities; and (3) license termination activities. The following are the key activities and filings that a licensee must undertake:

1. Certification of Permanent Cessation of Operations (within 30 days of public announcement of decision regarding permanent cessation)[7]

2. Certification of Permanent Removal of Fuel (once fuel has been permanently removed from the reactor vessel)[8]

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4 10 C.F.R. § 50.2.

5 10 C.F.R. § 50.75(c).

6 10 C.F.R. § 50.75(f).

7 10 C.F.R. § 50.82(a)(1)(i).

8 10 C.F.R. § 50.82(a)(1)(ii).

3. PSDAR, including a description of planned decommissioning activities (within two years of permanently ceasing operations)[9]

4. Irradiated Fuel Management Program ("IFMP") (within two years of permanently ceasing operations)[10]

5. Site-Specific DCE (within two years of permanently ceasing operations)[11]

6. Status Reports on Decommissioning Funding Assurance, Expenditures, and Remaining Costs (annually following the DCE)[12]

7. License Termination Plan (at least two years prior to license termination)[13]

**B. Entergy's Purchase of Vermont Yankee and License Condition 3.J**

On May 17, 2002, the NRC issued an Order approving the transfer of the Vermont Yankee Operating License, DPR-28 ("Vermont Yankee License"), from VYNPC to Entergy ("Transfer Order").[14] The Transfer Order required the NDT to be "subject to or consistent with" certain requirements, including the following:

> (i) The decommissioning trust agreement must be in a form acceptable to the NRC. . . .
>
> (iii) The decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of payment. The decommissioning trust agreement shall further contain a provision that no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director of the Office of Nuclear Reactor Regulation.

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9 10 C.F.R. § 50.82(a)(4)(i).

10 10 C.F.R. § 50.54(bb).

11 10 C.F.R. §§ 50.82(a)(4)(i), (a)(8)(iii).

12 10 C.F.R. §§ 50.75(f)(2), 50.82(a)(8)(v).

13 10 C.F.R. § 50.82(a)(9).

14 Letter from R. Pulsifer to R. Barkhurst and M. Kansler, Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (May 17, 2002) ("Transfer Order"), *available at* ADAMS Accession No. ML020390198; *see also* Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station); Order Approving Transfer of License and Conforming Amendment, 67 Fed. Reg. 36,269 (May 23, 2002) ("Transfer Order Notice").

> (iv) The decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without 30 days prior written notification to the Director of the Office of Nuclear Reactor Regulation. . . .
>
> (3) Entergy Nuclear VY shall take all necessary steps to ensure that the decommissioning trust is maintained in accordance with the application and the requirements of this Order, and consistent with the safety evaluation supporting this Order. . . .[15]

On July 31, 2002, the NRC issued a conforming amendment to the Vermont Yankee License incorporating each of these requirements as part of a condition on the license ("Condition 3.J.").[16]

## C. Vermont Yankee Initial Decommissioning Activities

By letter dated September 23, 2013, Entergy informed the NRC that Vermont Yankee would permanently cease operations at the end of the operating cycle.[17] Entergy ceased power operations at Vermont Yankee on December 29, 2014, and subsequently submitted its certifications of permanent cessation of power operations and permanent removal of fuel from the reactor vessel to the NRC on January 12, 2015.[18]

Entergy submitted, in December 2014: (1) an update to the Vermont Yankee IFMP,[19] and (2) the Vermont Yankee PSDAR with the site-specific DCE.[20] Among other things, the PSDAR

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15 Transfer Order Notice, 67 Fed. Reg. at 36,270.

16 Letter from R. Pulsifer to M. Balduzzi, Vermont Yankee Nuclear Power Station - Issuance of Amendment re: Transfer of Ownership and Operating Authority Under Facility Operating License from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Enclosure 1, Amendment No. 208 to License No. DPR-28 at 8 (July 31, 2002), *available at* ADAMS Accession No. ML022100395.

17 BVY 13-079, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Sept. 23, 2013), *available at* ADAMS Accession No. ML13273A204.

18 BVY 15-001, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel (Jan. 12, 2015), *available at* ADAMS Accession No. ML15013A426.

19 BVY 14-085, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Update to Irradiated Fuel Management Program Pursuant to 10 CFR 50.54(bb) (Dec. 19, 2014), *available at* ADAMS Accession No. ML14358A251.

explained that Entergy will utilize the NRC-authorized "SAFSTOR" decommissioning approach under which the facility is placed in a safe and stable condition and maintained in that state to allow levels of radioactivity to decrease through radioactive decay, followed by decontamination and dismantlement.[21]

**D. Nuclear Decommissioning Trust LAR**

Following the 2002 amendment incorporating Condition 3.J. into the Vermont Yankee License, the NRC amended its regulations to add a new provision at 10 C.F.R. § 50.75(h) governing NDT agreements ("NDT Rulemaking").[22] The new regulations specify requirements very similar to those in Condition 3.J. with one exception. Unlike Condition 3.J., the regulations do not require "30 days prior written notice" for all disbursements from the NDT. In the NDT Rulemaking, the Commission generically determined that, for "licensees who have complied with 10 CFR 50.82(a)(4)," *i.e.*, have submitted a PSDAR, the requirement for a "30-day disbursement notice" "would not add *any* assurances that funding is available and would duplicate notification requirements at § 50.82."[23] Accordingly, the regulations at 10 C.F.R. §§ 50.75(h)(1) and (2) except withdrawals being made under 10 C.F.R. § 50.82(a)(8) from the 30-day disbursement notice requirement, and specify that "[a]fter decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8), no further notifications need be made to the NRC."[24]

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20 BVY 14-078, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Post Shutdown Decommissioning Activities Report (Dec. 19, 2014) ("Vermont Yankee PSDAR"), *available at* ADAMS Accession No. ML14357A110.

21 *Id.*, Attachment at 4.

22 Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002).

23 *Id*. at 78,336 (emphasis added).

24 10 C.F.R. § 50.75(h)(1)(iv).

The Commission also explicitly stated in the NDT Rulemaking that "licensees will have the option of maintaining their existing license conditions or submitting to the new requirements,"[25] and "will be able to decide for themselves whether they prefer to keep or eliminate their specific license conditions."[26] Accordingly, on September 4, 2014, Entergy submitted an LAR seeking NRC approval to exercise its option to eliminate portions of Condition 3.J. from the Vermont Yankee License in favor of complying with the regulatory requirements in 10 C.F.R. § 50.75(h).[27]

In accordance with 10 C.F.R. § 50.91(b)(1), Entergy provided a copy of the LAR to the State.[28] On April 20, 2015, the State filed a petition to intervene and hearing request proposing four contentions.[29] The Atomic Safety and Licensing Board ("ASLB") granted the petition and admitted two contentions on August 31, 2015.[30] On September 22, 2015, Entergy moved to withdraw its LAR, rather than litigate those contentions, noting that it had determined that maintaining the existing license conditions represented a manageable administrative burden and was permitted by the NRC regulations.[31] The ASLB granted the motion on October 15, 2015, imposing two conditions on withdrawal; one (duplicating the requirement in 10 C.F.R. § 50.91(b)(1)) requiring Entergy to notify the State of any new LAR related to the NDT, and the

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25 Decommissioning Trust Provisions, 67 Fed. Reg. at 78,335.

26 *Id*. at 78,339.

27 *See* BVY 14-062, Letter from C. Wamser to NRC Document Control Desk, Proposed Change No. 310 – Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions (Sept. 4, 2014), *available at* ADAMS Accession No. ML14254A405.

28 *See id.* at 2.

29 *See* State of Vermont's Petition for Leave to Intervene and Hearing Request at 10 (Apr. 20, 2015), *available at* ADAMS Accession No. ML15111A087.

30 *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC __ (Aug. 31, 2015) ("LBP-15-24").

31 Entergy's Motion to Withdraw Its September 4, 2014 License Amendment Request (Sept. 22, 2015), *available at* ADAMS Accession No. ML15265A583.

other requiring Entergy to "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."[32] On October 27, 2015, Entergy submitted a pre-disbursement notification letter to the NRC indicating that it expected to seek reimbursement from the NDT for decommissioning-related costs, including property taxes, emergency planning contractor costs, and insurance, incurred during the month of October 2015.[33] Entergy did not receive any objection from the NRC regarding its planned reimbursement of these or any other decommissioning-related costs.

**E. Commingled Funds Exemption**

To support its decommissioning plans for Vermont Yankee, Entergy applied for and received exemptions from: (1)10 C.F.R. § 50.82(a)(8)(i)(A), permitting Entergy to use a portion of the funds from the Vermont Yankee NDT for certain irradiated fuel management activities, consistent with the plans described in the updated IFMP and the PSDAR; and (2) 10 C.F.R. § 50.75(h)(1)(iv), allowing trust fund disbursements for irradiated fuel management activities to be made without prior notice (together, the "Commingled Funds Exemption").[34] Such exemptions are consistent with those approved by the NRC for other recently shutdown plants, including Crystal River Unit 3,[35] Kewaunee,[36] and San Onofre Units 2 and 3.[37]

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[32] LBP-15-28 (slip op. at 14); *see also* Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 71,846 (Nov. 17, 2015).

[33] *See* BVY 15-053, Letter from C. Wamser to W. Dean, NRC, Pre-Notice of Disbursement from Decommissioning Trust, Vermont Yankee Nuclear Power Station (Oct. 27, 2015), *available at* ADAMS Accession No. ML15307A008. This notice was fully consistent with the second condition imposed by the Board in LBP-15-28.

[34] BVY 15-002, Letter from C. Wamser to NRC Document Control Desk, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) at 1 (Jan. 6, 2015) ("Exemption Request"), *available at* ADAMS Accession No. ML15013A171; Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992, 35,992-993 (June 23, 2015) ("Exemption Approval").

[35] Letter from M. Orenak to T. Hobbs, Crystal River Unit 3 Nuclear Generating Plant - Exemptions from the Requirements of 10 CFR Part 50, Sections 50.82(a)(8)(i)(A) and 50.75(h)(2) (TAC No. MF3875) (Jan. 26, 2015), *available at* ADAMS Accession No. ML14247A545.

## III. LEGAL STANDARDS

### A. Hearing Requests

The AEA requires a hearing opportunity in any proceeding for:

- "the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control;"
- "the issuance or modification of rules and regulations dealing with the activities of licensees;" or
- "the payment of compensation, an award, or royalties" under certain sections of the AEA.[38]

Hearings are not required for any other proceeding, or where there is no proceeding at all, because, "as should be obvious, there is no general right to a hearing for a hearing's sake."[39] And petitioners cannot "create a hearing opportunity merely by claiming that a facility is improperly operating outside its licensing basis," because "[s]uch claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206, rather than by a request for a hearing under AEA section 189a."[40]

In those instances for which a hearing is authorized, under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC

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36 Letter from C. Gratton to D. Heacock, Kewaunee Power Station - Exemptions from the Requirements of 10 CFR Part 50, Section 50.82(a)(8)(i)(A) and Section 50.75(h)(1)(iv) (TAC No. MF1438) (May 21, 2014), *available at* ADAMS Accession No. ML13337A287.

37 Letter from T. Wengert to T. Palmisano, San Onofre Nuclear Generating Station, Units 2 and 3 - Exemptions from the Requirements of 10 CFR Part 50, Sections [sic] 50.82(a)(8)(i)(A) and Section 50.75(h)(2) (TAC Nos. MF3544 and MF3545) (Sept. 5, 2014), *available at* ADAMS Accession No. ML14101A132.

38 AEA § 189(a)(1)(A).

39 *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 282 (2001), *aff'd*, 54 NRC 349 (2001), *reconsid. denied*, 55 NRC 1 (2002).

40 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-15-27, 82 NRC __ (slip op. at 9) (Sept. 28, 2015).

hearing."[41] Hearing requests must be submitted within 60 days of publication of a notice of agency action, or otherwise demonstrate "good cause" by addressing the late filing criteria in NRC regulations.[42]

Of particular relevance here is the longstanding principle that NRC rules and the basic structure of the Commission's regulatory process are not subject to attack in any NRC adjudicatory proceeding.[43] This includes challenges "that advocate stricter requirements than agency rules impose, or that otherwise seek to litigate a generic determination established by a Commission rulemaking."[44] Additionally, the adjudicatory process is not the proper venue for challenges "that merely addresses petitioner's own view regarding the direction regulatory policy should take."[45]

**B. Commission Appeals**

Within 25 days after service of certain decisions by the ASLB, a party may file a petition for review with the Commission.[46] The Commission also may review ASLB decisions *sua sponte*.[47] But, *sua sponte* review is rarely exercised, and is only undertaken in extraordinary circumstances.[48] Moreover, the Commission recently held that it is "improper" for a party to

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

42 *See* 10 C.F.R. § 2.309(b)-(c).

43 *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974); *see also* 10 C.F.R. § 2.335(a) (absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding").

44 *Crow Butte Res., Inc.* (Marsland Expansion Area), LBP-13-6, 77 NRC 253, 284 (2013), *aff'd*, CLI-14-2, 79 NRC 11 (2014) (citing several previous decisions holding the same).

45 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008) (citing *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33).

46 10 C.F.R. § 2.341(b)(1).

47 10 C.F.R. § 2.341(a)(2).

48 *See, e.g.*, *Ohio Edison Co., et al.* (Perry Nuclear Power Plant, Unit 1, and Davis-Besse Nuclear Power Station, Unit 1), CLI-91-15, 34 NRC 269 (1991).

request that the Commission exercise its inherent supervisory authority to consider an issue *sua sponte*.[49]

**C. NEPA**

NEPA requires agencies to take a "hard look" at environmental consequences of major federal actions. By its terms, NEPA imposes procedural rather than substantive constraints upon an agency's decisionmaking process. The statute requires only that an agency undertake an appropriate assessment of the environmental impacts of its action without mandating that the agency reach any particular result concerning that action.[50] Furthermore, the U.S. Supreme Court has held that generic analysis is "clearly an appropriate method" of meeting the NRC's statutory obligations under NEPA.[51] As particularly relevant here, "[t]he Commission has analyzed the major environmental impacts associated with decommissioning in the Generic Environmental Impact Statement (GEIS), NUREG-0586, August 1988, published in conjunction with the Commission's final decommissioning rule (53 FR 24018; June 27, 1988)."[52]

Additionally, NRC regulations at 10 C.F.R. § 51.22 provide for categorical exclusion of certain licensing and regulatory actions from the requirement of an environmental review under NEPA. Notably, subject to the satisfaction of certain criteria, regulatory exemptions are among the enumerated categorical exclusions.[53]

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49 *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-09-6, 69 NRC 128, 138 (2009).

50 *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

51 *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100-01 (1983).

52 Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,296 (July 29, 1996).

53 *See* 10 C.F.R. § 51.22(c)(25).

## IV. THE PETITION IS PROCEDURALLY DEFICIENT AND SHOULD BE REJECTED

As demonstrated below, the Petition—either considered as a whole or as individual arguments—is procedurally deficient and should be summarily rejected.

### A. There Is No Authorized Procedural Basis to Request a Hearing

Section 189(a) of the AEA "does not confer the automatic right of intervention upon anyone."[54] The AEA specifies the limited subset of proceedings that allow for a hearing opportunity.[55] As relevant here, Petitioners do not base their Petition on any active "proceeding." Petitioners instead request that the Commission convene an entirely *new* proceeding in order to hold a hearing on the various issues cited in the Petition.[56] But such requests are contrary to law. The Commission has explicitly held that "[i]ntervention is not available when there is no pending 'proceeding' of the sort specified in AEA Section 189(a)."[57] Because Petitioners have not identified a "pending 'proceeding' of the sort specified in AEA Section 189(a)," the Petition must be summarily rejected.

Even assuming a new proceeding is convened, the actions requested by Petitioners would not, either individually or collectively, constitute a proceeding for "the granting, suspending, revoking, or amending of any license."[58] Notably, none of Petitioners' demands—retracting an exemption, reviewing or prohibiting withdrawal requests, imposing additional requirements on pre-disbursement notices, finding post-shutdown submissions "deficient," conducting additional NEPA reviews, or taking other (unspecified but, presumably, enforcement) "actions"—constitute

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54 *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1448 (D.C. Cir. 1984) (citing *Business and Professional People for the Public Interest v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974)).

55 AEA § 189(a)(1)(A).

56 Petition at 8-9, 59-60.

57 *See State of N.J.* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 292 (1993).

58 AEA § 189(a)(1)(A).

a grant, suspension, revocation, or amendment of a license. Petitioners merely claim that these demands raise "license-related" matters.[59] But this very generalized claim is far too attenuated to invoke hearing rights under Section 189(a) of the AEA.[60] Despite all of this, even if the Petition had identified a pending "proceeding," or even if the new global proceeding requested by Petitioners did constitute a proceeding for "the granting, suspending, revoking, or amending of any license," it would still be untimely by any measure.[61] Accordingly, the Petition should be summarily dismissed.

**B. Petitioners' Request for *Sua Sponte* Review Is Improper and Unsupported**

Likely recognizing the lack of any established legal authority or precedent for their Petition, Petitioners also argue that the Commission has general supervisory authority to review adjudicatory issues *sua sponte*.[62] As noted above, *sua sponte* review is rarely exercised, and is only undertaken in extraordinary circumstances.[63] The Commission also has explained that it is "improper" for a party to affirmatively request *sua sponte* review.[64] Moreover, Petitioners neglect to explain why they have not, themselves, pursued available procedural remedies afforded in 10 C.F.R. Part 2. For example, Petitioners note that ASLB order LBP-15-28 "remain[ed] open to appeal" as of the date the Petition was filed.[65] Petitioners are correct that

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59 Petition at 11.

60 *See Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677-78 (2008).

61 Entergy submitted the PSDAR and DCE in December 2014; the NDT Exemption Request in January 2015; and the 30-day notice LAR in September 2014. By any calculation in 10 C.F.R. Part 2 (*e.g.*, 60 days per 10 C.F.R. § 2.309) a petition challenging these activities is too late.

62 Petition at 9-11.

63 *See, e.g.*, *Perry & Davis-Besse*, CLI-91-15, 34 NRC 269.

64 *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-09-6, 69 NRC 128, 138 (2009) (concluding that requests for the Commission to use its *sua sponte* authority are "improper" and if it were to accept such requests, "there would be no limit to the arguments parties could present via interlocutory appeal — a result fundamentally at odds with the Commission's expressed intent to limit such appeals").

65 Petition at 9.

NRC regulations permit parties to file petitions for review of ASLB decisions under 10 C.F.R. § 2.341(b)(1), but Petitioners chose not to file such a petition.[66] Petitioners cannot simply substitute an improper request for *sua sponte* review as an end-run around the requirements of 10 C.F.R. § 2.341.

Furthermore, Petitioners have not identified a legitimate basis for such *sua sponte* review. On one page, Petitioners argue that they raise "novel" issues;[67] on the next, they contradict themselves arguing that such matters, including exemptions, are "routine."[68] In reality, issues regarding the use of funds from NDTs are well known to the Commission and are not novel.[69] As discussed in further detail below, Entergy's actions are fully consistent with industry and Commission precedent and NRC guidance and regulations. Furthermore, 10 C.F.R. Part 2 provides appropriate regulatory processes for each of the issues identified by Petitioners—most of which Petitioners already have availed themselves. Petitioners' attempt to discredit those processes as somehow inadequate—through redundant arguments currently under review or previously rejected in other established processes—constitutes an inappropriate challenge to NRC regulations,[70] and certainly not an extraordinary circumstance requiring *sua sponte* review.[71]

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66 To the extent the instant Petition may be considered a petition for review of LBP-15-24, it must be rejected for failure to address any of the considerations in 10 C.F.R. § 2.341(b)(4).

67 Petition at 10.

68 *Id*. at 11.

69 *See, e.g.*, Regulatory Improvements for Decommissioning Power Reactors, 80 Fed. Reg. 72,358, 72,368 (Nov. 19, 2015) ("ANOPR") (discussing exemptions from NRC regulations on NDT issues).

70 10 C.F.R. § 2.335.

71 *Cf., e.g.*, *Perry & Davis-Besse*, CLI-91-15, 34 NRC 269.

Additionally, Petitioners claim that certain decommissioning policy matters that have broader industry impacts warrant resolution through adjudication or rulemaking.[72] But, the Petition neglects to mention that the NRC Staff, as directed by the Commission in December 2014,[73] already is engaged in a "high priority" rulemaking on the topic of decommissioning.[74] In fact, the Commission recently published its "advance notice of proposed rulemaking" on this topic inviting public comment.[75] Accordingly, Petitioners' claim—that these complex policy matters are "ripe"[76] for Commission *sua sponte* review in an adjudicatory-style hearing specific to Vermont Yankee—is entirely baseless. The Petition cites no basis for its demand that the Commission cut short the normal deliberative rulemaking process (including the development of a regulatory basis and the public review and comment process). Petitioners' established remedy is, therefore, to participate in the rulemaking process.

In summary, *sua sponte* review is rarely exercised, and is only undertaken in extraordinary circumstances. Petitioners point to no such circumstances here, and their Petition, which apparently relies on this general argument as its sole ground for demanding a hearing, should be summarily rejected.

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72 Petition at 11.

73 SRM-SECY-14-0118, Request by Duke Energy Florida, Inc., for Exemptions from Certain Emergency Planning Requirements at 1 (Dec. 30, 2014), *available at* ADAMS Accession No. ML14364A111 ("The staff should proceed with rulemaking on decommissioning").

74 *See Common Prioritization of Rulemaking Report for Fiscal Year 2016/2017*, NRC, http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/common-prioritization-rulemaking-rpt-fy2016-2017.html (last visited Nov. 18, 2015) (listing "Regulatory Improvements for Power Reactors Transitioning to Decommissioning" as a "High" priority rulemaking in the NRC agenda); *see also* SECY-15-0014, Anticipated Schedule and Estimated Resources for a Power Reactor Decommissioning Rulemaking (Jan. 30, 2015), *available at* ADAMS Accession No. ML15082A089.

75 ANOPR, 80 Fed. Reg. at 72,368 (discussing exemptions from NRC regulations on NDT issues).

76 Petition at 10.

### C. The Petition Improperly Challenges the NRC's Well-Established Regulatory Regime on Decommissioning and Commission Procedural Regulations

Petitioners repeatedly allude to the allegedly "disjointed and siloed approach adopted by Entergy in seeking separate approvals,"[77] and suggest that "Entergy has chosen to present its related requests in a piecemeal fashion."[78] However, Petitioners have not identified any request or other process utilized by Entergy that is contrary to NRC regulations. Nor do Petitioners acknowledge that the NRC's regulatory scheme permits Entergy to seek—and indeed, contemplates that licensees will seek—separate approvals for separate regulatory actions. The PSDAR/DCE, IFMP, Exemption Request, and NDT LAR are each subject to separate NRC regulations, and each was submitted consistent with the respective NRC regulations.[79] To the extent Petitioners challenge these processes, such challenges constitute impermissible collateral attacks on the NRC's regulatory authority and process.[80]

Commission regulations at 10 C.F.R. § 2.335 specify that, absent a waiver, "no rule or regulation of the Commission, or any provision thereof . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part." Furthermore, a waiver will only be granted upon a demonstration, through submission of an affidavit, that "application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted."[81]

Petitioners make no such waiver request here, nor have they submitted an affidavit in this regard. If Petitioners seek to change the decommissioning process to prohibit what they view as

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77 *Id*. at 11.

78 *Id.* at 14. To the extent Petitioners are asserting that Entergy somehow intended to manipulate the regulatory process, such assertions are unsupported.

79 *See, e.g.*, 10 C.F.R. §§ 50.82(a)(4)(i), 50.54(bb), 50.12, 50.90, 50.4.

80 *See* 10 C.F.R. § 2.335.

81 *Id*.

the "disjointed and siloed approach" prescribed in NRC regulations, then their remedy is to submit a rulemaking petition under 10 C.F.R. § 2.802—but they have not done so. Alternatively, they can participate in the ongoing rulemaking process.

On the whole, Petitioners' amorphous, extra-procedural Petition—submitted outside the bounds of any available path provided in the Commission's Rules of Practice and Procedure—which requests a hearing (without addressing, much less satisfying, any of the requirements for such a request in 10 C.F.R. § 2.309) constitutes an impermissible attack on 10 C.F.R. Part 2, contrary to 10 C.F.R. § 2.335. Accordingly, the Petition should be summarily dismissed.

## V. THE SPECIFIC CHALLENGES RAISED IN THE PETITION ARE PROCEDURALLY AND SUBSTANTIVELY DEFICIENT AND SHOULD BE REJECTED

### A. Petitioners' Challenges Regarding the PSDAR and Use of NDT Funds Fail to Justify *Sua Sponte* Review of an Ongoing Proceeding, Improperly Attack Commission Regulations, and Lack Substantive Basis

Entergy's plans for the use of NDT funds are explained in detail in the PSDAR and the DCE, submitted to the NRC on December 19, 2014, pursuant to 10 C.F.R. § 50.82(a)(4). Insofar as the Petition challenges Entergy's use of NDT funds as specified in the PSDAR and DCE,[82] 10 C.F.R. § 50.82(a)(4)(ii) explains that the appropriate place to address these matters is in comments on the PSDAR/DCE. The NRC published a request for comment and notice of a public meeting on the Vermont Yankee PSDAR on January 14, 2015.[83] And, the State did

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[82] Petition at 8-9, 18-23, 59-60 (challenging use of NDT funds for: a. The $5 million payment that Entergy is making to the State as part of a Settlement Agreement; b. Emergency preparedness costs; c. Shipments of non-radiological asbestos waste; d. Insurance; e. Property taxes; and f. Replacement of structures during SAFSTOR). With regard to the $5 million payment mentioned above, pursuant to the terms of a December 2013 Settlement Agreement negotiated by Entergy and the State, Entergy made a one-time $5 million payment to the Vermont Department of Taxes on April 24, 2015. Entergy did not seek reimbursement from the NDT for this payment.

[83] Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station Post-Shutdown Decommissioning Activities Report, 80 Fed. Reg. 1975 (Jan. 14, 2015).

submit comments on March 6, 2015, in response to that request.[84] The NRC has explained that it "will consider public health and safety comments raised by the public" regarding a PSDAR to guide its exercise of ongoing oversight.[85] The NRC Staff's review of the Vermont Yankee PSDAR and DCE is ongoing. Petitioners cite no valid reason to dislodge the PSDAR and DCE from the Staff's pending review process in favor of an adjudicatory hearing. In fact, this suggestion is a direct attack on NRC regulations at 10 C.F.R. § 50.82, contrary to 10 C.F.R. § 2.335, and should be summarily dismissed.

Furthermore, the arguments in the Petition about use of the NDT funds are simply repeated (in some cases, verbatim) from the State's March 6, 2015 comments. They raise no issues that are new or "novel," or of which the Commission is presently unaware. Petitioners' desire to republish these comments in yet another forum is not the type of extraordinary circumstance that would necessitate the exercise of *sua sponte* review.[86]

Moreover, in the 1996 rulemaking that expanded opportunities for public participation in the decommissioning process, the Commission explicitly rejected the idea of a hearing and intervention opportunity at the PSDAR review stage because "initial decommissioning activities (dismantlement) are not significantly different from routine operational activities . . . [and] do not present significant safety issues for which an NRC decision would be warranted."[87] The Commission explained that "[a] more formal public participation process is appropriate at the

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84 Public Submission for Docket NRC-2015-0004, Comments of the State of Vermont (Mar. 6, 2015) ("Original PSDAR Comments"), *available at* ADAMS Accession No. ML15082A234.

85 Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,284.

86 These comments have now been submitted to the NRC three times: March 6, 2015 (Original PSDAR Comments); April 20, 2015 (State of Vermont's Petition for Leave to Intervene and Hearing Request, Exhibit 1 (Apr. 20, 2015), *available at* ADAMS Accession No. ML15111A085); and November 4, 2015 (Petition, Exhibit 2).

87 Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,284.

termination stage of decommissioning."[88] And, as discussed previously, Petitioners have not obtained, or even requested, a waiver permitting them to challenge these regulations. Accordingly, challenges in this regard should be summarily dismissed.

In any event, Petitioners' substantive claims are baseless. Entergy's use of NDT funds has been entirely consistent with NRC regulations, available guidance, and industry practice. 10 C.F.R. § 50.2 states that:

> Decommission means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits-
>
> (1) Release of the property for unrestricted use and termination of the license; or
>
> (2) Release of the property under restricted conditions and termination of the license.

NRC regulations at 10 C.F.R. § 50.82(a)(8)(i)(A) identify permissible uses of the decommissioning trust funds as withdrawals for "expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2." No other regulations specify a more precise definition of activities that constitute "legitimate decommissioning activities."

NRC guidance documents, however, provide additional clarification on the types of costs that the Staff considers legitimate decommissioning costs.[89] For example, NUREG/CR-5884 was prepared by the Pacific Northwest Laboratory for the purpose of providing the NRC Staff

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88 *Id.*

89 Although guidance documents "are not legally binding regulations," the Commission has stated that "[w]here the NRC develops a guidance document to assist in compliance with applicable regulations, it is entitled to special weight." *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001). *See also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 375 n.26 (2005) ("guidance is at least implicitly endorsed by the Commission and therefore is entitled to correspondingly special weight") (citations and internal quotation marks omitted); *Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3), CLI-15-6, 81 NRC __ (slip op. at 21 & n.86) (Mar. 9, 2015) (declining to "lightly set[] guidance aside" absent "unusual circumstances," *e.g.*, the guidance is "not directly applicable to the issue at hand").

with a technical basis for assessing the reasonableness of licensees' decommissioning cost estimates as well as the minimum decommissioning funding formula amounts in 10 C.F.R. § 50.75(c).[90] NUREG/CR-5884 includes examples of the types of costs that licensees would be expected to incur during the decommissioning period and should therefore be included in decommissioning cost estimates. These include certain costs that Petitioners challenge here,[91] such as property taxes, insurance, and asbestos removal and disposal.[92] Appendix M of NUREG/CR-5884 includes the Staff's responses to public comments on the draft report, in which the Staff explicitly notes the inclusion of these costs as appropriate decommissioning expenses.[93] Property taxes and insurance are also specifically identified in numerous NRC regulatory guides and Commission documents as cost items that licensees should consider in the preparation of their decommissioning cost estimates.[94] Even the NRC's "Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors," NUREG-1713, lists property taxes and insurance as appropriate decommissioning expenses.[95] In the absence of any specific

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90 *See* NUREG/CR-5884, Revised Analyses of Decommissioning for the Reference Pressurized Water Reactor Power Station at xiii (Nov. 1995), *available at* ADAMS Accession No. ML14008A187.

91 *E.g.*, Petition at 20.

92 *See, e.g.*, NUREG/CR-5884 at 2.4; 3.12; 3.3, tbl.3.1, n.(f); 3.12; 4.8; App. B, B.2 §§ B.9, B.10; B.34.

93 *See, e.g.*, *id*., App. M. at M.21-22, M.45, M.49 (noting that "cascading costs for asbestos removal and disposal" were added to the modeled decommissioning cost estimate), M.54 (acknowledging that asbestos removal is an attendant and essential part of decommissioning and noting that such costs "have been incorporated into the total decommissioning cost estimate"), M.61, M.105 ("[property taxes] are also costs to the owner throughout decommissioning period(s), and should be included in the cost").

94 *See, e.g.*, Regulatory Guide 1.202, "Standard Format and Content of Decommissioning Cost Estimates for Nuclear Power Reactors" at 9 (Feb. 2005), *available at* ADAMS Accession No. ML050230008; Regulatory Guide 1.159, Rev. 2, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" at 11 (Oct. 2011), *available at* ADAMS Accession No. ML112160012. Additionally, a 2013 SECY paper concluded that property taxes must be included in decommissioning cost estimates and are recognizable as decommissioning expenses. SECY-13-0066, "Staff Findings on the Table of Minimum Amounts Required to Demonstrate Decommissioning Funding Assurance" at 7 (June 20, 2013), *available at* ADAMS Accession No. ML13127A234.

95 NUREG-1713, Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors at 6 tbl.1, 29 tbl.13, 30 tbl.14 (Dec. 2004), *available at* ADAMS Accession No. ML043510113.

language in the regulations or regulatory guidance to the contrary, Entergy's reliance on this directly relevant Staff guidance is fully justified.

Indeed, Petitioners themselves acknowledge that NRC guidance "lists property taxes and 'nuclear liability insurance' as part of a decommissioning cost estimate."[96] But, Petitioners then imply that these costs are listed in only one NRC guidance document, and make the unsupported claim that they are "erroneous[]" and a "mistake."[97] As demonstrated by the numerous repeated references to these items throughout multiple NRC guidance documents, Petitioners' characterization is clearly contrary to the record. Moreover, Entergy's intended uses of the NDT funds for expenses such as property taxes, insurance, and asbestos remediation were included in its 2008 preliminary DCE, submitted under 10 C.F.R. § 50.75(f)(3),[98] approved by the NRC in 2009,[99] and are entirely consistent with industry practice.[100]

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96 Petition at 21.

97 *Id*. Alternatively, to the extent Petitioners are demanding a public proceeding to revise NRC guidance documents, neither the NRC's Rules of Practice and Procedure nor the Administrative Procedure Act contemplate such a proceeding. *See* 5 U.S.C. § 553(b)(A); 10 C.F.R. Part 2.

98 BVY-08-010, Letter from T. Sullivan to NRC Document Control Desk, Report Pursuant to 10 CFR 50.75(f)(3), Attach. 1, App. C-D tbls. C-1 & D-1 (Feb. 6, 2008), *available at* ADAMS Accession No. ML080430658 (listing property taxes, insurance, and/or asbestos remediation on nearly every page of the estimates).

99 Letter from J. Kim to Site Vice President, Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station, Vermont Yankee Nuclear Power Station - Safety Evaluation re: Spent Fuel Management Program and Preliminary Decommissioning Cost Estimate (TAC Nos. MD8035 and MD8051) (Feb. 3, 2009), *available at* ADAMS Accession No. ML083390193.

100 Other licensees also have submitted preliminary DCEs which include property taxes, insurance, asbestos remediation, bituminous roof replacement, and emergency planning fees, and these have been approved by the NRC. *See, e.g.*, Letter from J. Benjamin, AmerGen Energy Co. LLC to NRC Document Control Desk, Oyster Creek Generating Station, Submittal of Preliminary Decommissioning Cost Estimate (Apr. 14, 2004), *available at* ADAMS Accession No. ML041130434; Letter from P. Tam, NRC to C. Crane, AmerGen Energy Co. LLC, Oyster Creek Nuclear Generating Station (OCNGS) Safety Evaluation re: Preliminary Decommissioning Cost Estimate and Spent Fuel Management Program (TAC Nos. MC2996 and MC4994) (Mar. 25, 2005), *available at* ADAMS Accession No. ML050550242; Letter from J.A. Price, Dominion Energy Kewaunee, Inc. to NRC Document Control Desk, Kewaunee Power Station, Report Pursuant to 10 CFR 50.75(f)(3) (Dec. 18, 2008), *available at* ADAMS Accession No. ML090300120; Decommissioning Cost Estimate Study of the Kewaunee Nuclear Power Plant (Nov. 25, 2008), *available at* ADAMS Accession No. ML090300484; Letter from K. Feintuch, NRC to D. Heacock, Dominion Energy Kewaunee, Inc., Kewaunee Power Station - Irradiated Fuel Management Program and Preliminary Decommissioning Cost Estimate (TAC Nos. ME0253 and ME0275) (Sept. 28, 2009), *available at* ADAMS Accession No. ML092321079.

Further, Petitioners' assertions about the inappropriateness of Entergy's use of NDT funds for property taxes, insurance, emergency planning, spent fuel management, and "cascading costs" such as asbestos disposal, ring especially hollow, given that petitioner VYNPC collected funds from its sponsors' ratepayers to fund the Vermont Yankee NDT with the full expectation that these costs would eventually be reimbursed from the NDT. Indeed, these costs that Petitioners now challenge were included in the decommissioning cost estimate that provided the basis for VYNPC's decommissioning cost collections and funding of the NDT.[101]

In summary, Petitioners' arguments regarding Entergy's use of the NDT directly attack Commission regulations without a waiver to do so; fail to demonstrate that Entergy's actions are inconsistent with industry practice or available NRC guidance; fail to demonstrate the type of extraordinary circumstance that would necessitate the exercise of *sua sponte* review; and otherwise identify no good cause to dislodge the ongoing PSDAR review from its current process. Accordingly, the Petition should be summarily rejected.

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[101] In June 1994, petitioner VYNPC filed a wholesale rate application with the Federal Energy Regulatory Commission ("FERC") seeking to, among other things, increase its authorized schedule of decommissioning charges based on an updated decommissioning cost estimate. FERC Docket No. ER94-1370-000, Vermont Yankee Nuclear Power Corporation, Amendment to FPC Rate Schedule No. 1 (June 15, 1994), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10515775 (* page numbers refer to page numbers in the electronic file). The application was supported by a Stipulation and Agreement among a number of parties, including GMPC and the Vermont Department of Public Service (*i.e.*, the State). *Id*. at *19-*35. The decommissioning funds that VYNPC collected from ratepayers from 1995 to 2002 were collected and deposited into the NDT for the express purpose of funding the decommissioning costs identified in the updated cost estimate, which specifically identified and included the very items which Petitioners now challenge, including property taxes (*id*. at *173, *190, *194, *196), insurance (*id*. at *173, *190, *194, *196), emergency planning fees (*id*. at *191, *195, *196), spent fuel management costs (*id*. at *191, *192; *see also id*. at *119 ("The estimate considers that spent fuel will be transferred to a dry storage facility built on site.")), and non-radiological decontamination costs (*id*. at *158 ("It should be noted, however, that this accounting of costs includes not only those costs directly attributable to 'decommissioning' as defined by the NRC, but those clean 'cascading' costs necessary to be expended in order to execute the decontamination processes.")). FERC approved the requested rate schedule on September 2, 1994. Letter from Secretary, Federal Energy Regulatory Commission, to K. Jaffe, Docket No. ER94-1370-000 (Sept. 2, 1994), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10530816.

**B. Petitioners' Challenges Regarding the Master Trust Agreement Are Procedurally and Jurisdictionally Improper, Improperly Attack Commission Regulations, Fail to Justify *Sua Sponte* Review, and Lack Substantive Basis**

The Master Trust Agreement ("MTA") is a contract between Entergy and Mellon Bank for the purposes of accumulating and holding funds for decommissioning in trust.[102] Petitioners argue that the MTA "places important limitations on disbursements from the [NDT]."[103] More specifically, Petitioners contend that the MTA: (1) "establishes a specific sequence that requires *completion* of all radiological decontamination and decommissioning activities before any other disbursements from the [NDT]," and (2) dictates that the NDT "can be used only for expenses for which DOE is not responsible" (collectively, "Alleged Contractual Restrictions").[104] Petitioners argue that "Entergy's planned uses" of the NDT would allegedly violate certain terms of the MTA and are thus "prohibited by Entergy's operating license and by NRC regulations," and would "violate rulings and regulations of the Public Service Board and FERC."[105] However, as explained below, Petitioners' challenges are factually unsupported, procedurally improper, jurisdictionally improper, improperly challenge Commission regulations, and fail to demonstrate any extraordinary circumstance appropriate for Commission *sua sponte* review, and therefore should be summarily dismissed.

As an initial matter, Entergy remains committed to full compliance with its legal obligations under the MTA, relevant PSB Orders, and all other state and Federal laws. Indeed, Entergy already has detailed its compliance with the substantive terms of the MTA in its

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102 MTA at 1,5.

103 Petition at 26.

104 *Id*. at 27, 28 (emphasis in original).

105 *Id*. at 25.

February 9, 2015 letter to the State.[106] Petitioners' claims are procedurally improper because, to the extent they allege violations of NRC regulatory requirements, the appropriate procedure is to file a petition under 10 C.F.R. § 2.206.[107] Nonetheless, Petitioners' arguments must be rejected for multiple additional reasons.

First, Petitioners' general arguments regarding the MTA and Entergy's planned use of NDT funds for what it alleges are "non-decommissioning expenses"[108] are simply repeated from numerous other forums[109] and elsewhere in the Petition.[110] As discussed throughout this Answer, Entergy's planned expenditures are consistent with NRC regulations, precedent, practice, and guidance,[111] and the NRC has found that there will be *no adverse impact* on Entergy's ability to decommission Vermont Yankee in accordance with NRC's regulations.[112] Moreover, Petitioners' arguments are unsupported and contradictory. For example:

- On one page, Petitioners claim the MTA categorically "prohibits use of the [NDT] for non-decommissioning expenses" and that amendment of the MTA is the "sole" means of avoiding the prohibition; on another page, Petitioners acknowledge that the MTA "allows use of the [NDT] for two non-decommissioning expenses";[113]
- Petitioners argue that the "exclusive purpose" section of the MTA, stating funds are to be used for expenses "related to" decommissioning, prohibits the use of funds for

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106 Letter from T.M. Twomey to K. Landis-Marinello and C. Recchia, Pre-Notice of Disbursement from Entergy Nuclear Vermont Yankee Decommissioning Trust (Feb. 9, 2015) ("Feb. 9 Letter"), *available at* ADAMS Accession No. ML15058A801.

107 To the extent Petitioners complain of future uses of the NDT, their challenge is premature. *See, e.g.*, Petition at 25-26 (citing the regulations and license condition permitting Entergy, if necessary, to amend the MTA).

108 *E.g.*, *id*. at 25.

109 *E.g.*, *id.*, Attach. 2 at 27-39 (the State's arguments on this topic were submitted in its March 6, 2015 comments on the PSDAR, which the NRC Staff is currently reviewing).

110 *E.g.*, *id.* at 18-23, 31-36.

111 *See, e.g.*, *supra* Part V.A; *infra* Part V.C.

112 *See, e.g.*, Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Exemption; Issuance, 80 Fed. Reg. 35,992, 35,993 (June 23, 2015) (noting the NRC conclusion that the Commingled Funds Exemption "will not adversely impact [Entergy's] ability to complete radiological decommissioning within 60 years and terminate the [Vermont Yankee] license.").

113 Petition at 3, 25.

non-decommissioning activities; however, Petitioners admit the MTA, "allows use of the [NDT] for two non-decommissioning expenses" and "includes 'non-DOE spent fuel storage' expenses incurred during 'pre-shutdown activities'";[114] and

- Petitioners claim PSB orders read the MTA to prohibit use of NDT funds for "non-decommissioning expenses"; however, the PSB Docket 7082 order partially based its "certificate of public good" finding on the basis that Entergy would "obtain access to decommissioning funds" to cover long-term spent fuel storage costs.[115]

For these and other reasons, including those discussed in Entergy's February 9, 2015 letter to the State,[116] Petitioners' repetitive arguments regarding use of the Vermont Yankee NDT for alleged "non-decommissioning expenses" are unsupported and contradictory, and fail to identify any extraordinary circumstance that would necessitate the exercise of *sua sponte* review.

Second, Petitioners assert that postulated breaches of the Alleged Contractual Restrictions "are prohibited by Entergy's operating license and by NRC regulations."[117] Petitioners appear to offer three bases for this assertion:

- 10 C.F.R. §§ 50.75(f)(1) and (2) "require Entergy to comply with the [MTA]";[118]
- License Condition 3.J and 10 C.F.R. § 50.75(h)(1)(iii) require written notification to the NRC for material amendments of the MTA;[119] and
- The 2002 License Transfer Order required that the MTA "be in a form acceptable to the NRC."[120]

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114 *Id*., Attach. 1 § 2.01; *id*. at 3, 26-27, 27 n.14.

115 *Id*. at 25; Order, Docket No. 7082, at 37 (Vt. Pub. Svc. Bd. Apr. 26, 2006), *available at* http://www.state.vt.us/psb/orders/2006/files/7082fnl.pdf.

116 *See generally* Feb. 9 Letter (further explaining why the State's interpretation of the MTA is flawed). In particular, as discussed in that letter, Section 4.06 of the MTA expressly confirms that disbursements from the NDT are permitted during the period of "Decommissioning," as that term is defined in Section 1.01(j) of the MTA for "Decommissioning costs *including* costs for decommissioning, *spent fuel storage* and site restoration." *Id*. at 3 (quoting MTA § 4.06 (emphasis added)).

117 Petition at 25.

118 *Id*. at 24.

119 *Id*. at 26.

120 *Id*. at 23-24.

However, Petitioners misconstrue these regulatory requirements, none of which transforms the Alleged Contractual Restrictions into regulatory requirements subject to Commission authority. Accordingly, Petitioners' assertion is baseless and unsupported.

Commission regulations at 10 C.F.R. § 50.75(h)(1)(iii) and License Condition 3.J. require Entergy to provide the NRC with 30 days advance notice of any material amendment to the MTA, and 10 C.F.R. §§ 50.75(f)(1) and (2) merely require power reactor licensees to submit periodic decommissioning funding status reports to the NRC. The Alleged Contractual Restrictions are not imposed or even contemplated by these or any other NRC regulations or license conditions. Petitioners' claims regarding the 2002 License Transfer Order (requiring that the MTA "be in a form acceptable to the NRC") are likewise unsupported; they also constitute an impermissible attack on Commission regulations. In its 2002 NDT Rulemaking, the Commission codified the "form acceptable to the NRC" into 10 C.F.R. §§ 50.75(e) and 50.75(h). As the Commission explained:

> The changes in § 50.75(e) specify that the trust should be an external trust fund in the United States, established under a written agreement and with an entity that is a State or Federal government agency or an entity whose operations are regulated by a State or Federal agency. Paragraph 50.75(h) discusses the terms and conditions that the NRC believes are necessary to ensure that funds in the trusts will be available for their intended purpose.[121]

The Alleged Contractual Restrictions are not among the terms and conditions codified at 10 C.F.R. §§ 50.75(e) or (h). Accordingly, Petitioners' argument that the MTA is only in a "form acceptable to the NRC" if the Alleged Contractual Restrictions are read as regulatory requirements is both unsupported and an impermissible attack on Commission regulations at 10 C.F.R. §§ 50.75(e) and (h), contrary to 10 C.F.R. § 2.335.

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[121] Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,333 (Dec. 24, 2002).

In sum, Petitioners' assertions regarding the operation of License Condition 3.J., the 2002 License Transfer Order, and 10 C.F.R. §§ 50.75(f)(1), (f)(2), and (h)(1)(iii) are unsupported, impermissibly attack Commission regulations, or both, and fail to demonstrate that postulated breaches of the Alleged Contractual Restrictions "are prohibited by Entergy's operating license and by NRC regulations," and therefore lack substantive basis.

Third, Petitioners assert that postulated breaches of the Alleged Contractual Restrictions would "violate rulings and regulations of the [PSB] and FERC," absent approval from those agencies,[122] including an obligation regarding the disposition of "any potential future excess decommissioning funds."[123] Petitioners appear to argue that the NRC should adjudicate these claims.[124] Petitioners cite to the "primary jurisdiction" theory in *Pennington*, a case from the Seventh Circuit."[125] However, the Commission has long held that it "will not be drawn into" contractual disputes, "absent a concern for the public health and safety or the common defense and security, except to carry out its responsibilities to act to enforce its licenses, orders and regulations."[126] Accordingly, to the extent Petitioners demand the NRC adjudicate FERC and PSB legal requirements, they misconstrue *Pennington* and their challenges are jurisdictionally improper.

As noted by the *Pennington* court, the "primary jurisdiction" theory requires that the issue "have been placed within the special competence" of the agency pursuant to a regulatory

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122 *E.g.*, Petition at 25, 30.

123 *Id*. at 24-25.

124 *Id*. at 25 (arguing that NRC "should require Entergy to provide proof that obligations imposed on it by State and other federal agencies will not be violated").

125 *Id*. at 7 (citing *Pennington v. ZionSolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014)).

126 *CBS Corporation* (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 234 (2007).

scheme.[127] Conversely, Petitioners demand NRC adjudication of purported requirements from the FERC and PSB regulatory schemes, for which the NRC has no "special competence." Additionally, long-standing NRC precedent explains that the NRC will not "stay its hand" based on a claim that a party cannot conduct the NRC-authorized activity because a provision in a private contract allegedly requires approval from a separate regulatory agency.[128] Moreover, to the extent Petitioners ask the NRC to opine on the "return of excess funds to ratepayers,"[129] the Commission has explicitly held that:

> The question of who receives [any money remaining in the Trust Fund after completion of decommissioning] . . . is a rate question well outside the Commission's jurisdiction. (The proper forum for such an argument is the Federal Energy Regulatory Commission and/or [the state] Board of Public Utilities.)[130]

In summary, Petitioners' challenges are factually unsupported, procedurally improper, jurisdictionally improper, improperly challenge Commission regulations, fail to justify *sua sponte* review, and should be summarily dismissed.

### C. Petitioners' Challenges Regarding the Commingled Funds Exemption Are Procedurally Impermissible, Untimely, Fail to Demonstrate a "Clear and Material Error," Fail to Identify a Hearing Opportunity Under the AEA, Fail to Justify *Sua Sponte* Review of an Ongoing Proceeding, and Lack Substantive Basis

As noted above, Entergy applied for and received, among other things, an exemption from 10 C.F.R. § 50.82(a)(8)(i)(A), permitting use of a portion of the funds from the Vermont Yankee NDT for the management of irradiated fuel. The Staff, acting on behalf of the Commission, determined that Entergy's Commingled Funds Exemption requests, submitted to

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127 *Pennington*, 742 F.3d at 719-20.

128 *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977) (quoting *So. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974)) (declining to suspend a construction permit based on petitioners' claim that a private contract required state regulatory approval prior to construction).

129 Petition at 24.

130 *GPU Nuclear, Inc., et al.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210-11 (2000).

the NRC on January 6, 2015, were "authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security," and satisfy all criteria under 10 C.F.R. § 50.12(a).[131] More specifically, the NRC concluded that, "[b]ased on the site-specific cost estimate and the cash flow analysis, use of a portion of the Trust for irradiated fuel management will not adversely impact [Entergy's] ability to complete radiological decommissioning within 60 years and terminate the [Vermont Yankee] license."[132]

Notably, there is nothing unusual about the Commingled Funds Exemption requested by Entergy. Such exemptions are consistent with those requested by other recently shutdown plants, such as Crystal River,[133] Kewaunee,[134] and San Onofre.[135] Petitioners concede as much in their Petition,[136] and go as far as to describe such exemptions as "routine."[137] Despite this precedent, the Petition asks the Commission to "reverse" the issuance of this (supposedly, "routine") exemption.[138] Such a request to the Commission is procedurally impermissible as 10 C.F.R. Part 2 does not provide any opportunity for this request. Nonetheless, even if, for the sake of argument, this request were assumed to be a "Petition for Reconsideration" under 10 C.F.R. § 2.345, it is defective. Section 2.345(a)(1) requires such petitions to be filed "within ten

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131 Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Exemption; Issuance, 80 Fed. Reg. 35,992, 35,994-995 (June 23, 2015).

132 *Id*. at 35,993.

133 Letter from M. Orenak to T. Hobbs, Crystal River Unit 3 Nuclear Generating Plant - Exemptions from the Requirements of 10 CFR Part 50, Sections 50.82(a)(8)(i)(A) and 50.75(h)(2) (TAC No. MF3875) (Jan. 26, 2015), *available at* ADAMS Accession No. ML14247A545.

134 Letter from C. Gratton to D. Heacock, Kewaunee Power Station - Exemptions from the Requirements of 10 CFR Part 50, Section 50.82(a)(8)(i)(A) and Section 50.75(h)(1)(iv) (TAC No. MF1438) (May 21, 2014), *available at* ADAMS Accession No. ML13337A287.

135 Letter from T. Wengert to T. Palmisano, San Onofre Nuclear Generating Station, Units 2 and 3 – Exemptions from the Requirements of 10 CFR Part 50, Sections [sic] 50.82(a)(8)(i)(A) and Section 50.75(h)(2) (TAC Nos. MF3544 and MF3545) (Sept. 5, 2014), *available at* ADAMS Accession No. ML14101A132.

136 Petition at 32.

137 *Id*. at 11.

138 *Id*. at 8, 59.

(10) days after the date of the decision." Accordingly, any petition for reconsideration of the Commingled Funds Exemption was due no later than ten days after its issuance—June 29, 2015 (accounting for the weekend). Thus, Petitioners' November 4, 2015 Petition, to the extent it is requesting reconsideration of the exemption issuance, is untimely by over four months, and should be rejected.

Additionally, 10 C.F.R. § 2.345(b) requires petitioners to "demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid." Petitioners, here, make no mention of the required demonstration. Thus, even if the Petition was timely, Petitioners have not satisfied their burden to demonstrate "clear and material error," and the request to reconsider the exemption issuance should be denied.

Also, on August 13, 2015, the same Petitioners filed a petition for review related to the Commingled Funds Exemption issuance with the D.C. Circuit.[139] Petitioners' appeal remains pending before the D.C. Circuit. Accordingly, the Petition is duplicative of the appellate review proceeding, initiated by Petitioners, on the very same exemption. Such repetitive filings are legally improper, waste limited Commission resources and weigh heavily against any *sua sponte* review in this matter.

Again, neither the original Exemption Request, nor Petitioners' untimely, unsubstantiated, and duplicative petition for reconsideration of the exemption issuance, affords a right to a hearing under the AEA. Petitioners previously requested a hearing on the exemption by arguing it was part of the LAR proceeding,[140] but the ASLB appropriately rejected that

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[139] *See Vermont v. NRC*, No. 15-1279 (D.C. Cir.).

[140] State of Vermont's Petition for Leave to Intervene and Hearing Request at 20-26 (Apr. 20, 2015).

attempt.[141] In any event, that LAR has since been withdrawn,[142] and the proceeding terminated.[143] Thus, Petitioners' third[144] demand for a hearing on the exemption, once again, fails to identify an existing proceeding for the "granting, suspending, revoking, or amending of any license," contrary to the requirements of the AEA, and should be summarily rejected.

Nonetheless, Petitioners substantively argue that this "routine" exemption should not have been granted because, allegedly, Entergy has not appropriately accounted for potential costs related to the discovery of low levels of strontium-90,[145] and the costs of spent fuel management.[146] However, Petitioners' assertions that Entergy significantly has underestimated the cost of decommissioning are highly speculative, lack a basis in fact, and fail to satisfy the stringent "clear and material error" standard—a required demonstration for a petition for reconsideration—under 10 C.F.R. § 2.345.

Petitioners assert that the DCE fails to consider low levels of strontium-90 recently discovered via groundwater monitoring, which they claim could lead to "enormous escalations in decommissioning costs."[147] However, the level of strontium-90 is well below the drinking water

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141 LBP-15-24 (slip op. at 45).

142 Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 71,846 (Nov. 17, 2015).

143 LBP-15-28 (slip op. at 14).

144 Petitioners also submitted a separate request to the NRC seeking "public participation" in the exemption proceeding, noting that the Commission had not yet granted it a hearing on this matter, nor any opportunity for public comment. Letter from W. Griffin et al., to W. Dean, Docket No. 50-271; Request for Public Participation on Entergy's January 6, 2015 Exemption Request (June 5, 2015), *available at* ADAMS Accession No. ML15261A017. On June 16, 2015, the NRC notified Petitioners of its decision to decline that request. Letter from W. Dean to W. Griffin et al., Vermont Yankee Nuclear Power Station – Request for Public Participation on Entergy's January 6, 2015, Decommissioning Trust Fund Exemption Request (June 16, 2015), *available at* ADAMS Accession No. ML15162B001. To the extent the Petition can be read to request reconsideration of the NRC's decision in its June 16, 2015 letter, this, too, is untimely and unsubstantiated under the requirements of 10 C.F.R. § 2.345.

145 Petition at 36-40.

146 *Id*. at 41-47.

147 *Id*. at 38.

standards set by the Environmental Protection Agency, and the State itself has noted that "[t]he water is not available for consumption, the levels detected are well below the EPA's safe drinking water threshold, and there is no immediate risk to health."[148] The State further conceded that strontium-90 "is found in low levels all around the world" and that "the specific source of the [strontium-90] is unclear."[149] Petitioners offer nothing beyond gross conjecture to explain how the detection of very low levels of strontium-90—the source of which remains "unclear"—demonstrates the "enormous escalations in decommissioning costs" they contemplate. Contrary to the requirements of 10 C.F.R. § 2.345, such bare speculation falls far short of demonstrating "clear and material error."

Petitioners also assert that "NRC Staff's grant of an exemption to use decommissioning funds for spent fuel management . . . was arbitrary and an abuse of discretion" because Entergy's spent fuel management plan did not consider the possibility of indefinite spent fuel storage.[150] Petitioners speculate that a failure by DOE to pick up spent fuel at Vermont Yankee by 2052 would lead to higher than expected spent fuel management costs that would deplete the NDT such that it would "not have the funding necessary to complete radiological decommissioning."[151] However, this alarmist claim[152] distorts the scope of the exemption and disregards the entirety of the Commission's robust decommissioning oversight regime.

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148 Vermont Department of Health Communications Office, *Strontium-90 Detected in Ground Water Monitoring Wells at Vermont Yankee* (Feb. 9, 2015), *available at* http://healthvermont.gov/news/2015/020915_vy_strontium90.aspx.

149 *Id*.

150 Petition at 35; *see also id*. at 41-47.

151 *Id*. at 46.

152 Due to the U.S. Government's failure to develop a permanent repository for the disposal of spent fuel, Entergy—like all similarly situated utilities—had to make reasonable assumptions regarding future DOE performance. As the Government still retains the legal obligation to accept Entergy's spent fuel, an assumption of indefinite storage is unreasonable at this time. As DOE's plans and schedules for accepting spent fuel from Vermont Yankee (and other nuclear plants) develop, Entergy will update its spent fuel management strategy accordingly.

Nothing in the Commingled Funds Exemption permits Entergy to deplete the NDT to the exclusion of radiological decommissioning. The exemption merely permits the use of NDT funds for certain spent fuel management expenses *subject to* all other regulatory requirements and license conditions applicable to Vermont Yankee. Entergy's use of the NDT is still subject to a prohibition against the use of NDT funds where the expenditure would "reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise."[153] Petitioners' speculation disregards the scope of the exemption and the remaining applicability of the NRC regulatory regime, and is entirely devoid of a factual basis.

In sum, Petitioners' challenge to the issuance of the Commingled Funds Exemption is untimely, fails to demonstrate a "clear and material error," fails to identify a hearing opportunity under the AEA, is duplicative of their filing before the D.C. Circuit, and fails to otherwise identify any extraordinary circumstance warranting *sua sponte* review. Accordingly, the Petition must be summarily rejected.

### D. Petitioners' Challenges Regarding Entergy's Pre-Disbursement Notifications Fail to Justify *Sua Sponte* Review of LBP-15-28, Fail to Otherwise Satisfy the Procedural Requirements for a Petition for Review, Are Procedurally Improper, and Lack Substantive Basis

As previously noted, Vermont Yankee License Condition 3.J. requires the trustee of the Vermont Yankee NDT to give the NRC "30 days prior written notice of payment" ("pre-disbursement notifications") for disbursements from the NDT. Entergy submitted,[154] and later requested withdrawal of,[155] an LAR seeking to delete this condition and, instead, be governed by

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153 10 C.F.R. § 50.82(a)(8)(i)(B).

154 BVY 14-062, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Proposed Change No. 310 – Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions (Sept. 4, 2014), *available at* ADAMS Accession No. ML14254A405.

155 Entergy Motion to Withdraw Its September 4, 2014 License Amendment Request (Sept. 22, 2015).

the requirements of 10 C.F.R. § 50.75(h) regarding NDTs. The State requested imposition of sweeping conditions on the withdrawal.[156] In LBP-15-28, the ASLB approved Entergy's request to withdraw the LAR, and imposed a limited condition requiring Entergy to provide certain additional details in its pre-disbursement notifications. As relevant here, the condition requires Entergy to "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."[157]

Petitioners argue that "the Commission should require Entergy to provide detailed information supporting *all* proposed withdrawals from the Decommissioning fund, not just those in the six categories that were the subject of the license amendment proceeding," and should "order Entergy to provide additional information for both past and future withdrawals."[158] The ASLB, however, rejected such a broad condition.[159] Therefore, these arguments effectively challenge the ASLB decision in LBP-15-28, and should have been raised in a petition for review under 10 C.F.R. § 2.341—but Petitioners elected not to file such a petition.

Even if the Commission were to very generously view the instant Petition as a petition for review of LBP-15-28, the Petition fails to provide information required by § 2.341(b)(2), and fails to identify a "material question" as required by § 2.341(b)(4). Accordingly, this challenge

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156 *E.g.*, State of Vermont's Response to Entergy's Motion to Withdraw at 3 (Oct. 2, 2015) (requesting a condition requiring Entergy to provide the State "all supporting documentation" for all past and future disbursements from the NDT).

157 LBP-15-28 (slip op. at 14). As recited by the Board in its decision, "[t]hose six line items are '(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.'" *Id*. (slip op. at 11). Item 6, as stated in the initial petition to intervene, was actually "Replacement of structures during SAFSTOR." State of Vermont's Petition for Leave to Intervene and Hearing Request at 10 (Apr. 20, 2015), *available at* ADAMS Accession No. ML15111A087. The Board's reference to "dry cask storage" in Item 6 appears to be an error from LBP-15-24 that propagated into LBP-15-28.

158 Petition at 49.

159 LBP-15-28 (slip op. at 11).

is procedurally deficient, lacks substantive basis, fails to justify Commission *sua sponte* review, and must be summarily rejected.

As an initial matter, Entergy notes that it is fully complying with its license conditions, NRC regulations, and conditions imposed by the ASLB in LBP-15-28. To the extent the Petition can be read to allege otherwise, Petitioners' recourse (as noted in LBP-15-28)[160] is to file a petition for enforcement under 10 C.F.R. § 2.206. Notably, the content of Entergy's pre-disbursement notifications is consistent with those submitted by other licensees with similar license conditions.[161] To the extent Petitioners are opining about what Commission policy "should" require in such notifications, the appropriate procedural mechanism is a petition for rulemaking under 10 C.F.R. § 2.802.

As to Petitioners' challenge to LBP-15-28, contrary to 10 C.F.R. § 2.341(b)(2)(ii)-(iii), the Petition does not offer "record citation" to where the challenged matter was discussed before the ASLB, or an explanation as to why the ASLB's decision was "erroneous." Accordingly, as a procedural matter, the Petition must be rejected. Petitioners also fail to identify, much less demonstrate the existence of, a "substantial question" under § 2.341(b)(4).[162]

Further, in the NDT Rulemaking in late 2002, following the amendment incorporating Condition 3.J. into the Vermont Yankee License, the NRC amended its regulations to add a new

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160 *Id*. (slip op. at 12).

161 *See, e.g.*, Letter from J. Japalucci and G. Van Noordennen to W. Dean, Zion Nuclear Power Station, Units 1 and 2, Pre-Notice of Disbursement from Decommissioning Trust (May 7, 2015), *available at* ADAMS Accession No. ML15132A655.

162 The considerations in § 2.341(b)(4) are: (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) A substantial and important question of law, policy, or discretion has been raised; (iv) The conduct of the proceeding involved a prejudicial procedural error; or (v) Any other consideration which the Commission may deem to be in the public interest.

provision at 10 C.F.R. § 50.75(h) governing NDT agreements.[163] The updated regulations specify requirements very similar to those in Condition 3.J. with one exception—the regulations do not require "30 days prior written notice" for all disbursements from the NDT. The Commission generically determined that, for "licensees who have complied with 10 CFR 50.82(a)(4)," *i.e.*, have submitted a PSDAR, the requirement for a "30-day disbursement notice" would cause "problems . . . for licensees during the process of decommissioning," and "would not add *any* assurances that funding is available and would duplicate notification requirements at § 50.82."[164] Therefore, absent Vermont Yankee's license conditions, NRC regulations would not even require the pre-disbursement notifications, much less the level of detail demanded by Petitioners.

Therefore, the Petition fails to identify a "substantial question" suitable for Commission review. Nor do Petitioners identify any other extraordinary circumstance suitable for *sua sponte* review.

Accordingly, this challenge is procedurally deficient, lacks substantive basis, fails to justify Commission *sua sponte* review, and must be summarily rejected.

### E. Petitioners' Challenges Regarding NEPA Impermissibly Attack Commission Regulations, Fail to Identify a Hearing Opportunity Under the AEA, Fail to Justify *Sua Sponte* Review, and Lack Substantive Basis

As a general matter, "[t]he Commission has analyzed the major environmental impacts associated with decommissioning in the Generic Environmental Impact Statement (GEIS), NUREG-0586, August 1988, published in conjunction with the Commission's final

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163 Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002). After submission of a DCE, licensees must submit annual status reports to the NRC showing, among other things, decommissioning expenditures. *See* 10 C.F.R. § 50.82(a)(8)(v).

164 Decommissioning Trust Provisions, 67 Fed. Reg. at 78,336 (emphasis added). *Cf.* Petition at 48 (arguing the exact opposite—that such notifications are "necessary to protect against encroachments on the Decommissioning Fund").

decommissioning rule (53 FR 24018; June 27, 1988)."[165] NUREG-0586 ("Decommissioning GEIS") was updated in 2002 to address "over 200 facility-years' worth of additional decommissioning experience."[166] On a site-specific basis, the Commission elected to require decommissioning licensees to submit, with the PSDAR, an assessment of whether its proposed activities are "bounded" by existing analyses of environmental impacts.[167] As noted in NRC guidance:

> The NRC staff will use the PSDAR, and any written notification of changes required of a licensee, to schedule inspections and provide regulatory oversight of decommissioning activities. Licensees must also notify the NRC of changes that would significantly increase the decommissioning costs and send a copy of this notification to the affected States.[168]

Petitioners argue that "Entergy's planned decommissioning activities" including NDT "withdrawals for purposes other than radiological decommissioning" require a "proper NEPA analysis."[169] Petitioners further assert that these are "'major federal actions' within the meaning of NEPA,"[170] and that the NRC is improperly segmenting these reviews.[171] However, Petitioners' assertions simply disregard the relevant facts and are entirely baseless. Moreover, Petitioners' arguments impermissibly challenge Commission regulations regarding categorical

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165 Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,296.

166 Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities: Regarding the Decommissioning of Nuclear Power Reactors (NUREG-0586, Supplement 1, Volume 1: Main Report, Appendices A through M) at 1-2 (Nov. 2002), *available at* ADAMS Accession Nos. ML023470304 & ML023470323; *see also* Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities: Regarding the Decommissioning of Nuclear Power Reactors (NUREG-0586, Supplement 1, Volume 2: Appendices N, O and P), *available at* ADAMS Accession Nos. ML023500187, ML023500211, & ML023500223 (collectively, "Decommissioning GEIS").

167 Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,279.

168 Regulatory Guide 1.184, Rev. 1, Decommissioning of Nuclear Power Reactors at 12 (Oct. 2013), *available at* ADAMS Accession No. ML13144A840.

169 Petition at 50.

170 *Id*. at 52.

171 *Id*. at 54.

exclusions and decommissioning without a waiver to do so. Accordingly, these challenges should be summarily dismissed.

The Decommissioning GEIS covers the decommissioning process from start to finish, without segmentation, as demanded by Petitioners, and the U.S. Supreme Court has held that generic analysis is "clearly an appropriate method" of meeting the NRC's statutory obligations under NEPA.[172] In addition, the scope of the Decommissioning GEIS is not limited to radiological decommissioning.[173] Remarkably, the Petition does not cite or even reference the Decommissioning GEIS. Accordingly, as Petitioners have chosen to disregard, rather than dispute, the content of the Decommissioning GEIS, they have failed to raise a legitimate challenge to the NRC's consideration of the environmental impacts of decommissioning.

Furthermore, Petitioners' argument that PSDAR review is a major federal action requiring a separate environmental review and hearing opportunity improperly challenges Commission regulations.[174] Prior to the 1996 decommissioning rulemaking, Commission regulations *did* require an environmental review and a hearing opportunity at the PSDAR stage.[175] But the Commission made a purposeful decision to change that process in the 1996 amendments to its decommissioning regulations at 10 C.F.R. §§ 50.75 and 50.82.[176] The Commission explicitly addressed the very arguments Petitioners raise here.[177] In the 1996 rulemaking proceeding, commenters argued that "NRC should define decommissioning as a

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172 *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100-01 (1983).

173 Decommissioning GEIS at 1-4 to 1-6.

174 Petition at 52.

175 *See* Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,278.

176 *Id*. at 39,284 (concluding that "[t]he degree of regulatory oversight required for a nuclear power reactor during its decommissioning stage is considerably less than that required for the facility during its operating stage" because "the activities performed by the licensee during decommissioning do not have a significant potential to impact public health and safety").

177 *E.g.*, Petition at 52.

major federal action requiring an EA or EIS."[178] The Commission rejected those comments because the regulations require decommissioning activities to be "bounded by the impacts evaluated by previous applicable GEISs as well as any site-specific EIS."[179] In fact, "the final rule prohibits major decommissioning activities that could result in significant environmental impacts not previously reviewed."[180] In other words, the Commission has concluded that decommissioning is not a separate "major federal action" because decommissioning activities are limited to those already evaluated as part of a broader "major federal action."[181]

The Petition is therefore an impermissible collateral attack on Commission regulations at 10 C.F.R. §§ 50.75 and 50.82. Petitioners have neither requested nor received a waiver to do so. Accordingly, this impermissible challenge must be summarily dismissed pursuant to 10 C.F.R. § 2.335.

Petitioners also assert that "exemption requests . . . constitute 'major federal actions' within the meaning of NEPA," and allege the NRC has not satisfied its NEPA obligations as to the Commingled Funds Exemption.[182] As explained above, to the extent the Petition can be viewed as a petition for reconsideration, it is: untimely, fails to identify a hearing opportunity under the AEA, and is duplicative of a proceeding before the D.C. Circuit. With regard to Petitioners' NEPA arguments, they also fail to demonstrate a "clear and material error," or otherwise identify any extraordinary circumstance warranting *sua sponte* review.

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178 Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,283.

179 *Id.*

180 *Id*.

181 *See also* Decommissioning GEIS at N-5 (noting "the agency's determination that decommissioning is not a [major federal] action").

182 Petition at 52, 56-58.

Petitioners cite a litany of NEPA case law, most of which is entirely irrelevant to the facts at issue in the Petition. For example, Petitioners cite *Brodsky* to suggest that the NRC cannot "grant an exemption without the public comment and participation process that NEPA requires."[183] But the NEPA process at issue in *Brodsky* involved an Environmental Assessment and Finding of No Significant Impact.[184] Here, the Commingled Funds Exemption was subject to a categorical exclusion under NRC regulations. Accordingly, *Brodsky* is neither relevant nor instructive on the NRC's NEPA obligations regarding the Commingled Funds Exemption.

Petitioners also cite *Jones* and *Alaska Ctr.* for the proposition that, in granting an exemption, the NRC cannot "avoid" its NEPA responsibilities "by merely asserting" that an activity will not affect the environment, and that it has a duty to "provide a reasoned explanation."[185] Petitioners then claim that "Staff failed to provide such an explanation to support" approval of the Commingled Funds Exemption, arguing that it merely used a "checklist approach," and that its "analysis consisted merely of a recitation of the factors in" the categorical exclusion regulation.[186] But these assertions again ignore facts. The Staff analyzed the request against a categorical exclusion specified in NRC regulations. And, far from merely providing a "recitation of the factors" in 10 C.F.R. § 51.22(c)(25), the Staff's analysis—as summarized in the table below—demonstrably provided a "reasoned explanation" for each and every criterion.

| 10 C.F.R. § 51.22(c)(25) | Staff Analysis (80 Fed. Reg. at 35,994) |
|---|---|
| (i) There is no significant hazards consideration; | The Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, has determined that approval of the exemption request involves no significant hazards consideration because allowing the licensee to use withdrawals from the Trust, in accordance with the updated |

183 *Id.* at 51 (citing *Brodsky v. NRC*, 704 F.3d 113, 124 (2d Cir. 2013)).

184 *Brodsky*, 704 F.3d at 117.

185 Petition at 56 (citing *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986); *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999)).

186 *Id.* at 57.

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|---|---|
| | Irradiated Fuel Management Plan and PSDAR, without prior notification to the NRC at the permanently shutdown and defueled VY power reactor, does not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. |
| (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;<br>(iii) There is no significant increase in individual or cumulative public or occupational radiation exposure; | The exempted decommissioning trust fund regulations are unrelated to any operational restriction. Accordingly, there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and no significant increase in individual or cumulative public or occupational radiation exposure. |
| (iv) There is no significant construction impact; | The exempted regulation is not associated with construction, so there is no significant construction impact. |
| (v) There is no significant increase in the potential for or consequences from radiological accidents; and | The exempted regulation does not concern the source term (i.e., potential amount of radiation in an accident), nor mitigation. Thus, there is no significant increase in the potential for or consequences from radiological accidents |
| (vi) The requirements from which an exemption is sought involve:<br>(A) Recordkeeping requirements;<br>(B) Reporting requirements;<br>…<br>(I) Other requirements of an administrative, managerial, or organizational nature. | The requirements for using decommissioning trust funds for decommissioning activities and for providing prior written notice for other withdrawals from which the exemption is sought involve recordkeeping requirements, reporting requirements, or other requirements of an administrative, managerial, or organizational nature. |

Petitioners also claim that the Commission, contrary to NEPA requirements, "failed to analyze cumulative impacts" in granting the Commingled Funds Exemption.[187] This, too, is unsupported. The Commission cannot declare a category of actions subject to categorical exclusion—in other words, codify a category in 10 C.F.R. § 51.22(c)—unless and until it "first find[s] that the category of actions does not individually or *cumulatively* have a significant effect on the human environment."[188] Petitioners' assertions that the NRC has not considered cumulative impacts for categorical exclusions under 10 C.F.R. § 51.22(c) is simply without a basis in fact.

[187] *Id*.

[188] 10 C.F.R. § 51.22(a) (emphasis added).

In summary, the NRC has fulfilled its obligations under NEPA as to the NRC decommissioning regime, generally, and the Vermont Yankee PSDAR review and Commingled Funds Exemption, specifically. Petitioners' unsupported claims to the contrary lack substantive basis, impermissibly challenge the Commission's categorical exclusion rule and decommissioning rule without a waiver, and otherwise fail to identify any extraordinary circumstance warranting *sua sponte* review. Accordingly, the Commission should summarily dismiss the Petition.

## VI. CONCLUSION

As demonstrated above, the Petition is deficient for numerous procedural reasons and should be rejected for failure to satisfy *any* criteria set forth in the Commission's Rules of Practice and Procedure in 10 C.F.R. Part 2. The Petition also fails to sufficiently challenge any of Entergy's decommissioning-related activities, which are fully consistent with NRC regulations, guidance, and precedent. For these many reasons, the Petition should be summarily rejected.

Respectfully submitted,

*Executed in Accord with 10 C.F.R. § 2.304(d)*

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Dated in Washington, DC
this 7th day of December 2015

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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

## CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Entergy's Answer Opposing November 4, 2015 Petition Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

*Signed (electronically) by Ryan K. Lighty*

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