UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:

Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station

Docket No. 50-271

Reply of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation in Support of Petition for Review of Entergy Nuclear Operation, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund

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INTRODUCTION

The State of Vermont and its co-Petitioners have asked for a comprehensive review of Entergy's use of the Vermont Yankee Nuclear Decommissioning Trust Fund, including two fundamental questions regarding what Entergy can or cannot do with the Fund:

(1) Does "decommissioning" include Entergy's costs that do not reduce radiological contamination, like property taxes, insurance, and legal fees?

(2) Is Entergy entitled to an exemption to use decommissioning funds for the non-decommissioning expense of spent fuel management?

Rather than responding substantively, Entergy Nuclear Operations, Inc. and Entergy Nuclear Vermont Yankee LLC (collectively, Entergy) and the Nuclear Regulatory Commission (NRC or Commission) Staff (Staff) argue that the Commission should leave those questions unanswered. Meanwhile, Entergy continues to make monthly withdrawals for numerous non-decommissioning expenses, including spent fuel management. Although Entergy benefits from the lack of a comprehensive review of its actions, the Commission should not ignore the potential deleterious effects of that approach on other stakeholders, including the following:

- The State of Vermont and its citizens, who will be endangered by a radiologically contaminated site within their borders if the trust fund is insufficient;
- Vermont Yankee Nuclear Power Corporation, Green Mountain Power Corporation, and their ratepayers, who lose 55 cents of every dollar that is withdrawn improperly when it should have remained in the trust fund for later disbursement;
- New Hampshire, Massachusetts, and potentially Connecticut, and their citizens, whose safety will also be impacted if Entergy fails to radiologically decontaminate the Vermont Yankee Nuclear Power Station (Vermont Yankee); and

- Stakeholders at other nuclear power plants across the country, who will not know what expenses are allowed to be withdrawn from decommissioning trust funds.

Additionally, the Commission itself could suffer negative effects from Entergy's approach; if a shortfall occurs, the Commission could be seen as having failed to properly exercise its supervisory authority to prevent such a shortfall.

To date, despite those significant interests, those parties have not been permitted any meaningful say regarding Entergy's planned uses of the Vermont Yankee Nuclear Decommissioning Trust Fund (Decommissioning Fund or Fund)—not even the Commissioners. Now, Entergy asserts multiple arguments for dismissing the Petition for Review. None squarely addresses the merits of the relief requested. Meanwhile, Entergy has already withdrawn nearly $100 million from the Decommissioning Fund, and it plans to withdraw hundreds of millions more to cover the expenses Petitioners challenge.

In approving Entergy's use of the Decommissioning Fund for non-decommissioning purposes, the actions of NRC Staff are based on flawed and untested assumptions that are central features of Entergy's Decommissioning Cost Estimate. Staff used those flawed assumptions as a basis for exempting Entergy from the safeguards created by Commission regulations to provide adequate assurance that Vermont Yankee will be thoroughly and safely decommissioned. Rather than consider the interrelated aspects of Entergy's planned uses of the Decommissioning Fund in a single proceeding in which stakeholders and the public would be entitled to participate, Staff argues for continued fragmentation without transparency or public input.

This Petition presents the Commission with the opportunity to fix the flawed process that has occurred to date. The Commission should take that opportunity and address the issues raised in the Petition, either directly or through a designated Atomic Safety and Licensing Board.

Despite Entergy and Staff's claims to the contrary, the Commission has broad supervisory authority to review each matter presented in the Petition. Further, the Commission not only has the authority to address those matters—it is legally obliged to do so pursuant to the Atomic Energy Act, the Administrative Procedure Act, and the National Environmental Policy Act (NEPA). Those federal statutes and the regulations implementing them require public participation and an opportunity for a hearing before allowing Entergy to undertake its intended uses of the Decommissioning Fund. Because that has not occurred to date, the Commission must provide the comprehensive, participatory review Petitioners have requested.

Entergy and Staff argue that review by the Commission is inappropriate: (1) when a party has requested it; (2) if it does not comply with the requirements for obtaining a hearing under NRC regulations; (3) if the review can be done through rulemaking; (4) if the review can be done through enforcement; or (5) if Staff's actions to date purport to comply with NEPA. Those arguments are flawed and should not persuade the Commission.

A more overarching point bears recognition: in response to Petitioners' challenge to the fragmented approach that Entergy and Staff have followed regarding Entergy's use of the Decommissioning Fund, Entergy and Staff suggest *more* fragmentation. They suggest at various points that Petitioners should raise their challenges through requests for rulemaking, requests for enforcement, or through filings with the Federal Entergy Regulatory Commission (FERC), the Vermont Public Service Board, and the state trial courts. While Entergy and Staff are correct that more fragmentation would inevitably result if the Commission were to decline review here, that is a reason to grant review, not to deny it. That is especially true when it comes to complying with NEPA, which forbids piecemeal review and approvals without any analysis of potential cumulative environmental impacts.

Finally, Entergy and Staff's Answers incorrectly imply that Petitioners are seeking some kind of special treatment. For instance, both Entergy and Staff suggest that Petitioners should address their issues through rulemaking. Entergy characterizes the Petition as containing "conjecture about what NRC regulations *should* require." Entergy Answer at 2. In fact, the Petition is centered around quite the opposite: it is about what the regulations *do* require. It is Entergy, not the Petitioners, that takes issue with what the regulations require. It is Entergy, not the Petitioners, that is using the Decommissioning Fund in ways that the regulations do not allow. Petitioners simply seek that existing regulatory restrictions on the use of decommissioning trust funds be upheld and implemented as written. Staff has exempted Entergy from those crucial protections both explicitly (through the granting of an exemption for spent fuel management expenses) and tacitly (by standing down as Entergy withdraws funds for other non-decommissioning expenses). Petitioners request that the Commission consider the practical effects of those actions and inactions, viewed together, in a forum that permits other affected parties to participate.

I. The Commission has plenary authority to address the issues raised in the Petition.

The Atomic Energy Act conveys broad authority to the Commission in situations like this, where Petitioners have raised legitimate concerns with potential impacts on public health, safety, and the environment. *See* 42 U.S.C. § 2201 (Section 161 of the Atomic Energy Act). The Commission's authority includes the ability to establish "by rule, regulation, or order" any "bond, surety, or other financial" requirements necessary "to permit the completion of all requirements established by the Commission for the decontamination, decommissioning, and reclamation of sites, structures, and equipment used in conjunction with byproduct material." *Id.* § 2201(x)(1). The Commission's regulations similarly require such financial assurances and, as

Petitioners have explained, explicitly prohibit the use of decommissioning funds for any purpose other than legitimate decommissioning activities —those that remove a facility from service or reduce residual radioactivity to a level that permits unrestricted use of the site. 10 C.F.R. §§ 50.2; 50.75(h); 50.82(a)(8)(i)(A).

Further, because Entergy has effectively altered the terms of its license without filing for a license amendment, both the Atomic Energy Act and the Administrative Procedure Act require opportunities for public participation and a hearing. Under any interpretation of Entergy's requests, NEPA requires public participation and further review from the Commission.

a. The Petition does not deprive the Commission of its inherent supervisory authority.

Even if a petition "does not fit cleanly into our procedural rules," the Commission can, and often does, "exercise discretion and consider" the substance of a request for relief. *In the Matter of Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 2010 WL 87746, at *3 (Jan. 7, 2010). The Commission has "inherent supervisory authority" over all matters, even those in adjudication. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), 11 N.R.C. 514, 516 (Apr. 17, 1980). The Commission can and should exercise that authority "in the interest of expedition and economy of effort." *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), 48 N.R.C. 129, 130 (Sept. 17, 1998).

While Staff recognizes that the Commission can "exercise[] its supervisory authority on its own impetus," Staff argues that the Commission may "not [do so] upon the request of a party in a proceeding." Staff Answer at 23. That argument is flawed for multiple reasons. The Commission has plenary authority to address each issue raised in the Petition *regardless* of the

way in which the issue comes before the Commissioners. A request for Commission review does not somehow deprive the Commission of authority it had before the request was made. Yet that counterintuitive result is precisely what Staff advocates.

Further, in support of this argument, Entergy and Staff place undue reliance on *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-09-6, 69 NRC 128, 138 (2009). In that case, the Commission held that it was "improper" for Entergy to seek supervisory review for an issue that Entergy simultaneously raised directly in a request for interlocutory review. *Id.* at 138. That is entirely different from the situation here. It is undisputed that Petitioners have not been afforded an opportunity to raise their issues directly. And by no fault of their own: as the Licensing Board noted, "[p]rocedurally, [it] would have been much simpler if Entergy had submitted its LAR [license amendment request] and exemption request together, in which case both would have been subject to a hearing request." *Entergy*, LBP-15-24, slip op. at 18 n.96.

The Commission has held that supervisory review is particularly appropriate when an "issue is novel and has broad implications for this and other proceedings." *N. Atl. Energy Serv. Corp.*, 48 N.R.C. at 130. Petitioners have explained in detail why that is precisely the case here, including by highlighting the fact that other host states and similarly situated parties in those states have a stake in these issues—interests that have become ever more pronounced in light of the recent wave of plant closure announcements. Entergy's responses fail to disprove that fact. First, Entergy claims that Petitioners "contradict themselves" by arguing that the issues raised in the Petition are both "novel" and "routine." Entergy Answer at 15. Relatedly, Entergy claims that its use of trust fund money is "fully consistent with industry and Commission precedent." *Id.* Both of those arguments ignore that the Commissioners have never weighed in on what Staff has allowed industry to do with respect to decommissioning trust funds. Although the Staff's

rubber stamping of industry requests unfortunately may have become somewhat routine,[1] there is no legally binding "Commission precedent" for using those funds in the ways challenged here; no such challenge has ever been raised before—in other words, the issues are novel.

Entergy's final argument is that the issues raised here are not novel because they involve "redundant arguments currently under review or previously rejected in other established processes." *Id.*; *see also id.* at 19, 25 (criticizing Petitioners for restating arguments they have raised elsewhere). There is nothing "redundant" about continuing to raise an issue that the Commission has not yet answered.[2] And Entergy is incorrect in claiming that Petitioners' claims have been "previously rejected." To the contrary, the one independent entity that has provided any substantive review of Petitioners' claims agreed with the State that it had raised a legitimate safety contention worthy of a hearing. *Entergy*, LBP-15-24, at 23-26.[3]

Staff also fails to rebut Petitioners' arguments that these issues have "broad implications for this and other proceedings" and therefore warrant supervisory review. *N. Atl. Energy Serv. Corp.*, 48 N.R.C. at 130. In fact, Staff concedes that Petitioners' arguments "are of broad applicability." Staff Answer at 24. Staff then argues that, despite Commission precedent favoring review in these circumstances, the matter is "more appropriately addressed in a

[1] The fact that exemption approvals have become routine is especially inappropriate in light of the fact that exemptions from Commission regulations are considered "to be an 'extraordinary' equitable remedy to be used only 'sparingly.'" *Honeywell International, Inc.*, CLI-13-1, 77 NRC at 9. Such a state of affairs calls out for more review—it does not, as Staff and Entergy argue, validate continuation of the practice.

[2] Entergy's use the term "Commission precedent" when referring to matters that have not been the subject of review by the Commissioners suggests that the problems Petitioners raise are, in fact, widespread and that review and clarification from the Commission is warranted.

[3] As explained in the Petition for Review, when faced with the prospect of a hearing, which would require it to disclose information about precisely how it seeks to use the Decommissioning Fund, Entergy withdrew its request (ADAMS Accession No. ML15265A583).

rulemaking." *Id.* As explained in detail below, the possibility of rulemaking is not a reason to deny review here.

Nor is there any support for Staff's claim that "a moot proceeding such as this is not the best forum to decide broadly applicable issues like those Vermont raises." *Id.* First, nothing is "moot" about this proceeding. There is a concrete, live, and ongoing dispute regarding the challenged withdrawals from the Decommissioning Fund—withdrawals that continue to proceed each month. To the extent Staff was attempting to equate the Petition with the 30-day notice proceeding at the Atomic Safety and Licensing Board (Docket No. 50-271-LA-3), the matters are not equivalent—the Petition for Review is much broader in scope. Additionally, while Staff has asked the Board to vacate its ruling in that matter, LBP-15-24, on the grounds of mootness, the State has opposed that request. Finally, Staff recognize elsewhere in their Answer that the Commission previously has exercised supervisory review "even in moot cases where necessary to clarify important issues for the future." Staff Answer at 21.

Staff musters only one other argument for its claim that Petitioners' issues are not novel: that these "issues were considered by the Commission in 1996 and 2002." *Id.* at 24. But the 1996 and 2002 regulations are the very ones from which Entergy has sought—and obtained—an exemption. What was considered and promulgated in 1996 and 2002 was what Petitioners advocate here: using decommissioning funds for decommissioning expenses and nothing else until a site has been radiologically decontaminated. Or, as the 2002 rule explicitly states: "the definition of 'Decommission' in § 50.2 . . . do[es] *not* include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license." 10 C.F.R. § 50.75 n.1 (emphasis added). Thus, Staff is correct that the Commission

previously "considered" this issue, but misconstrues the outcome of that consideration—in fact, the Commission rejected the approach defended by Entergy and Staff.[4]

b. The Commission should not deny review based on the requirements for obtaining a hearing.

Entergy and Staff argue that the Commission cannot address the Petition without applying procedural requirements for obtaining a hearing or otherwise challenging a Staff decision. That argument is premature. If the Commission grants the request to convene an evidentiary hearing pursuant to its supervisory authority or authority under 10 C.F.R. § 2.104(a), Petitioners could then satisfy the requirements of 10 C.F.R. § 2.309 and other requirements to obtain party status and present specific contentions for adjudication.[5]

However, that showing should not substantively be necessary in this case, since an Atomic Safety and Licensing Board has already concluded that Petitioners met the requirements of 10 C.F.R. § 2.309 for obtaining a hearing on matters directly related to the issues raised here. *See Entergy*, LBP-15-24. In that proceeding, the Licensing Board held that the State's contention that Entergy was using the Decommissioning Fund for improper purposes "raises health and environmental concerns . . . because the decommissioning fund exists to ensure that companies will be able to decontaminate the site." *Id.* at 22. The Board concluded that the State

[4] Staff makes this same error throughout its Answer. For instance, Staff notes that the 1996 rules "removed the requirement for a decommissioning plan and its accompanying safety and environmental reviews" and that the "Commission made this change, in part, because . . . 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." Staff Answer at 4. Staff has exempted Entergy from some of those very same concerns articulated in Section 50.82.

[5] Similarly, despite Entergy's attempts to apply the provisions related to reconsideration of a decision of the hearing officer (10 C.F.R. §§ 2.323(e) or 2.345), review of decisions (10 C.F.R. § 2.241), or reconsideration of a Commission decision (10 C.F.R. § 2.341(d)), *see, e.g.*, Entergy Answer at 30-31, those regulations are not applicable until the Commission grants the hearing Petitioners request.

had presented documentary support warranting a hearing on whether Entergy's Decommissioning Cost Estimate fails to account for two significant expenses: (1) the recent discovery of strontium-90 in places where it had not previously been found, and (2) the possibility of spent fuel storage well beyond the 2052 date that Entergy chose as the time when all fuel theoretically will be removed from Vermont Yankee. *Id.* at 23-26. The Board explained that support included "an official filing with the NRC, a spokesman's statements concerning non-decommissioning expenses, and an expert opinion on the likelihood of cost overruns." *Id.* at 28.

Entergy and Staff's Answers ignore those holdings, despite the fact that Petitioners discussed the Board's ruling throughout the Petition for Review. Instead, Entergy and Staff simply reiterate the arguments they made to the Licensing Board without any recognition that the Board rejected those arguments.

For example, while Staff takes up its refrain that "Vermont has not demonstrated a substantial risk to public health and safety" (Staff Answer at 25), the Licensing Board held precisely the opposite: "Given the demonstrated existence of [strontium-90] leaks, Vermont has provided sufficiently supported expert opinion to show at the contention admissibility stage why this inadvertent release of radionuclides is *enough of a risk to public health and safety* to warrant 'merits' consideration as an unforeseen expense." *Id.* at 25 (emphasis added). Similarly, the Commission has previously warned that "inadequate attention to decommissioning financial assurance" is a safety issue because it "could result in significant adverse health, safety and environmental impacts." *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion

Facility), CLI-13-01, 77 NRC 1, 7 (2013) (citing Final Rule: *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018, 24019 (June 27, 1988)).[6]

The Commission should not deprive Petitioners of any opportunity for a hearing, or even the ability to provide public comment, on important safety issues. Thus, while the Licensing Board was correct that "[p]rocedurally, [it] would have been much simpler if Entergy had submitted its LAR [license amendment request] and exemption request together, in which case both *would have been subject to a hearing request*," *Entergy*, LBP-15-24, slip op. at 18 n.96 (emphasis added), Entergy and NRC Staff are incorrect in their claim that Petitioners can be a denied their hearing rights based on Entergy's procedural decisions. *See, e.g.*, Staff Answer at 36 (claiming that an exemption request triggers hearing rights only if the licensee "submitted [it] as a license amendment"). To hold otherwise would place form over substance in matters concerning public health, safety, and the environment.[7]

Further, Entergy and Staff fail to rebut Petitioners' argument that Entergy's actions require a license amendment—and thus trigger the opportunity for a hearing that is embodied in both Section 189a of the Atomic Energy Act and 5 U.S.C. § 551(7) of the Administrative Procedure Act. For instance, Petitioners noted that License Condition 3(J)(a)(iv) requires written notification to the NRC for material amendments of the Master Trust Agreement. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Facility Operating License No. DPR-28, Condition

[6] Staff is thus incorrect in its claim that "a permanently shut down facility . . . cannot pose the kind of safety risk that would warrant the Commission ordering a discretionary hearing on Vermont's Petition." Staff Answer at 27.

[7] Spun out to its logical conclusion, Staff's position is that hearing rights—or any public participation at all—still would not be triggered even if a licensee sought to be exempted from *all* NRC regulations. The Commission should not abide the notion that the mere packaging of a request by a licensee should shelter it from meaningful review, especially when it involves issues of such import.

3(J)(a)(iv). As explained in detail in the Petition, Entergy has failed to provide any such notification, and that failure has not been met with reprimand. Entergy should not be permitted to contravene the terms of its license, and Staff should not be permitted to tacitly approve such contraventions. Such actions effectively modify license conditions that would otherwise prohibit Entergy's withdrawals; that *de facto* license amendment requires a hearing.

Similarly, a hearing is required regarding Entergy's uses of trust funds for non-decommissioning expenses at this stage. Those actions contravene License Condition 3(J)(a)(i), which requires that a "decommissioning trust agreement must be in a form acceptable to the NRC." Entergy concedes that a trust agreement is acceptable only if it conforms to the requirements of 10 C.F.R. § 50.75(e) and (h). Entergy Answer at 27. Entergy then incorrectly claims that Petitioners' "Alleged Contractual Restrictions are not among the terms and conditions codified at 10 C.F.R. §§ 50.75(e) or (h)." *Id.* To the contrary, Petitioners' arguments challenging Entergy's use of the Decommissioning Fund are explicitly embodied in 10 C.F.R. § 50.75(h), which states that withdrawals "from the trust . . . are *restricted to decommissioning expenses* . . . until final decommissioning has been completed." 10 C.F.R. § 50.75(h)(iv) (emphasis added). As Entergy noted, the Commission has explained that "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." Entergy Answer at 27, citing Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,333 (Dec. 24, 2004). Entergy cannot contravene its license by using the Decommissioning Fund for non-decommissioning expenses without undergoing the license amendment process and being granted an amendment.[8]

[8] For similar reasons, Staff is incorrect in claiming that the provisions the Commission required to be place in the Master Trust Agreement "are not the provisions that Vermont asserts Entergy is violating." Staff Answer at 46.

Ultimately Entergy and Staff fail to present a compelling case for denying the comprehensive review sought by Petitioners. Indeed, their arguments that Commission regulations do not allow for a hearing is directly contradicted by the Atomic Safety and Licensing Board's conclusion that Petitioners met procedural and substantive requirements for a hearing on the safety impacts of Entergy's planned withdrawals from the decommissioning fund. *Entergy*, LBP-15-24. Although Entergy managed to successfully evade that hearing, the determination stands that the issues raised by Petitioner merited a hearing. Both Entergy and Staff's Answers ignore that decision and reiterate many of the arguments that the Licensing Board explicitly rejected.

c. The possibility of rulemaking does not warrant dismissing the Petition.

Entergy and Staff claim that the Commission should decline review because Petitioners should raise their issues through rulemaking. Entergy and Staff point out that (after the Petition was filed) Staff issued an Advanced Notice of Proposed Rulemaking regarding proposed revisions to the decommissioning regulations. Although Petitioners agree that rulemaking is preferable to the ad hoc processes Staff has employed to date, that does not diminish the need for the Commission to review the improper withdrawals Entergy is making from the Decommissioning Fund now. The proposed rulemaking will not be complete until 2019 at the earliest, and many of the expenses Petitioners are challenging have occurred already or will occur before then. Further, additional rulemaking is pointless if the Commission continues to allow Staff to exempt licensees from regulations whenever a licensee claims to have excess funds. Finally, if any party should seek a rulemaking process, it is Entergy, not the Petitioners, since Entergy is using the Decommissioning Fund in ways that the regulations do not permit.

d. The possibility of enforcement does not warrant dismissing the Petition.

Entergy and Staff also argue that the Commission should decline review because Petitioners should avail themselves of the enforcement process provided in 10 C.F.R. § 2.206. Those arguments also miss the mark. Petitioners are challenging systemic issues that the Commission must address not only for Vermont Yankee, but for the many other plants that are currently decommissioning or will be in the near term. And the issues raised by Petitioners include challenges to Staff actions (or in some cases, inactions) that grant Entergy greater authority and latitude than what is permitted by regulation and Entergy's operating license. Those decisions require a hearing with full opportunity to participate, rather than the limited participation allowed in a normal enforcement proceeding. The possibility that some of Entergy's actions warrant enforcement proceedings does not preclude the comprehensive review requested by Petitioners.

Staff's actions, including approval of the exemptions, have expanded Entergy's authority to use the Decommissioning Fund for purposes not originally allowed by its license. That *de facto* license amendment elevates this matter above an action to enforce *existing* license conditions under the enforcement provisions of 10 C.F.R. § 2.206. Staff and Entergy are thus incorrect in asserting that an enforcement proceeding is the only avenue available to Petitioners.

First, enforcement proceedings are appropriate only for "regular oversight activities," i.e., actions that do not require NRC approval. The cases cited by Entergy and Staff are distinguishable on that basis. *See Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 NRC __, slip op. at 16 (Nov. 9, 2015) (denying petition for a hearing regarding NRC's evaluation of seismic data for current operating plant and recommending Section 2.206 enforcement because petition raised matters involving "regular

oversight activities" by the NRC); *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167, slip op. at 9, 16 (2014) (denying petition for a hearing regarding design changes for steam generators and recommending enforcement proceeding because "NRC oversight activities, such as inspections, performance assessments, and enforcement . . . only concern compliance with the terms of an existing license" and licensee's activities did "not require NRC approval").

By contrast, rather than mere oversight, here Staff formally approved Entergy's request for an exemption to use the Decommissioning Fund for spent fuel management expenses. That approval was required, unlike in the cases cited by Entergy and Staff. Further, in one of those cases, petitioners argued that NRC's approval of seismic data that allowed for operation outside of license conditions constituted a *de facto* license amendment, thus triggering a hearing under section 189a of the Atomic Energy Act. *See Diablo Canyon*, CLI-15-14, 81 NRC 729. The Commission referred that issue to a Licensing Board, which concluded that the petitioners had not demonstrated a *de facto* amendment, but, importantly, recognized that a *de facto* amendment can occur:

> Additionally, the Commission has recognized—although it appears never to have actually confronted—other circumstances that might be tantamount to a license amendment. Hearing rights may also be triggered when the substance of an NRC action, while not formally labeled as a license amendment, in effect accomplishes the same thing.

Pacific Gas & Elec. Co. (Diablo Canyon Power Plant, Units 1 & 2), LBP-15-27, slip op. at 8 (Sept. 28, 2015).

The Board noted that "[a]s the Commission has explained, a *de facto* license amendment would exist, and hearing rights would be triggered, if the NRC were to grant a licensee 'greater operating authority' or otherwise alter 'the terms of the license' or permit the licensee to go

beyond its existing license authority." *Id.* (quoting *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 328 (1996)).

As explained in detail above, the exemption approvals granted Entergy the latitude to use the Decommissioning Fund for purposes not allowed under its license. That decision permits Entergy to go beyond its existing license authority and constitutes a *de facto* amendment that warrants more comprehensive review than a standard enforcement proceeding. Such a proceeding is inadequate here because it is limited in scope and does not allow for a hearing. *See* R. Goldsmith, *Regulatory Reform and the Revival of Nuclear Power*, 20 Hofstra L. Rev. 159, 205-06 (1991) (noting that the author reviewed 38 petitions filed under Section 2.206 from 1981 to 1986 and "[i]n each case the petition was denied without a hearing").

Because Staff approved exemptions that give Entergy expanded authority beyond what its license allows, Petitioners have hearing rights under section 189a of the Atomic Energy Act, and an enforcement proceeding is not an adequate substitute for those rights.

e. NEPA requires the requested public participation and further environmental analysis.

Staff provides no response to Petitioners' argument that "public scrutiny [is] an 'essential' part of the NEPA process," and an agency thus must provide a reasoned basis for declining to afford opportunity for public involvement. *Brodsky v. NRC*, 704 F.3d 113, 120 (2d Cir. 2013) (quoting 40 C.F.R. § 1500.1(b)).

While Entergy and Staff argue that the National Environmental Policy Act (NEPA) does not require any additional review of Entergy's actions related to the Decommissioning Fund, the Commission should reject those deficient post-hoc attempts to justify Staff's actions as NEPA-compliant. Entergy and Staff's Answers misconstrue NEPA's requirements regarding both the

need to analyze potential environmental impacts and the need to analyze cumulative impacts. Simply put, as it stands, major federal action (and inaction) has occurred that significantly affects the environment without the review that NEPA requires. The Commission can remedy that situation by granting the requested hearing and including as part of that hearing the NEPA-mandated environmental analysis.

Staff seems to assert that NEPA is only triggered when a matter "involve[s] a license amendment or other *affirmative* NRC action." Staff Answer at 52 (emphasis added). This is incorrect. The requirements of NEPA apply not only to affirmative actions of an agency, but also to actions of a licensee that "are *potentially* subject to Federal control and responsibility." *Id.* § 1508.18 (emphasis added). There is no question that the Decommissioning Fund is subject to the Commission's control and responsibility. *See, e.g.*, *Pennington v. Zionsolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014) (Posner, J.) ("The decommissioning of nuclear facilities is closely regulated by the Nuclear Regulatory Commission, and its regulatory authority embraces every potential malfeasance or misfeasance of assets dedicated to the decommissioning process.").

Staff also places undue reliance on past environmental reviews without explaining the context in which those reviews took place. For instance, Staff cites to a generic impact statement regarding decommissioning that found there were no significant impacts to decommissioning. *See, e.g.*, Staff Answer at 56. However, that analysis presupposed that decommissioning was accomplished with adequate funding from a decommissioning trust fund that had not been depleted by way of exemptions allowing the fund to be used for non-decommissioning expenses. If anything, the generic environmental impact statement supports the proposition that *only* if all decommissioning regulations are complied with is it acceptable under NEPA to decommission a plant without further environmental review.

Staff also takes an overly expansive view of what regulatory actions can be categorically excluded from NEPA. The categorical exclusion provision that Staff cites underscores why NEPA should apply here because the only exemptions it allows to be excluded are ones that are "requirements of an administrative, managerial, or organizational nature." 10 C.F.R. § 51.22(c)(25)(vi)(I); *see also* Staff Answer at 65 (referring to this as "an administrative exemption"). Staff concedes that it "would be inappropriate" to grant a categorical exclusion "where the action at issue has a significant effect on the environment." Staff Answer at 66. The actual test is a "potential" significant effect. *See, e.g.*, *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1030 (9th Cir. 2006). And Staff is incorrect in claiming that the exemption it granted Entergy was from "an administrative requirement that does not affect the environment." Staff Answer at 66. It is more than just "administrative" to approve the use of hundreds of millions of dollars that would otherwise be reserved for removing radiological contamination from a nuclear site.

Further, Staff claims that it "fully explained and justified" how it met each of the criteria for a categorical exclusion under 10 C.F.R. § 51.22(c)(25) (Staff Answer at 66), but it did not. The chart provided on pages 41-42 of Entergy's Answer shows the criteria of 10 C.F.R. § 51.22(c)(25) on one column, followed by *the entirety* of Staff's analysis of each criteria. For most, if not all, of the criteria, the analysis is conclusory and fails to provide any recognition that releasing $225 Million from the Decommissioning Fund for non-decommissioning expenses increases the risk that the site will remain radiologically contaminated. Staff's Answer provides no additional justification; it merely reiterates its original unsupported and conclusory statements.

Finally, Staff fails to justify the lack of a cumulative analysis evaluating the potential environmental impacts from the entirety of Entergy's planned uses of the Decommissioning Fund. As the Licensing Board correctly held, those uses present a "risk to public health and safety" sufficient to warrant a hearing on these matters. *Entergy*, LBP-15-24, at 25. In such circumstances, NEPA review is clearly triggered as well.

II. Entergy and Staff's few substantive responses fail to rebut Petitioners' arguments that Entergy's planned use of the Decommissioning Fund threatens public health, safety, and the environment.

Entergy and Staff focus almost exclusively on procedurally based arguments asking the Commission to decline Petitioners the meaningful comprehensive review that they seek. In nearly 120 combined pages of filings, substantive responses are scarce. Further, in the few instances in which Entergy and Staff confront substantive issues, they fail to squarely address the key arguments made by Petitioners. For instance, Entergy provides citations to guidance or other documents listing property taxes or insurance payments as "examples of the types of costs that licensees would be expected to incur during the decommissioning period." Entergy Answer at 21. But Petitioners are not contesting that a licensee should expect to incur those costs during decommissioning. Rather, Petitioners contend that those costs do not meet the regulatory definition of a "decommissioning" expense because they do not "reduce residual radioactivity." 10 C.F.R. § 50.2; *see also, e.g.*, NUREG-1713, Final Report, at 4, § (B)(3) (2004) (to meet NRC's definition of "decommissioning" and thus be a proper withdrawal from the Decommissioning Fund, the activity must "reduce residual radioactivity"). Neither Entergy nor Staff attempt to explain how the expenses Petitioners challenge "reduce residual radioactivity" at Vermont Yankee.

Staff's filing is particularly bereft of any substantive justification for its actions (and inactions). Courts have long held that an "agency must fully explicate its course of inquiry, its analysis, and its reasoning." *Tanners' Council of Am., Inc. v. Train*, 540 F.2d 1188, 1191 (4th Cir. 1976). Staff's actions to date do not meet that standard and are thus arbitrary and an abuse of discretion.

On certain topics, Staff provides no substantive explanation for its actions. For instance, Petitioners have pointed out that Staff recently accepted a parental guarantee that is effectively meaningless, since it drops to $0 at the very moment it is needed. Petition at 17. Staff provides no response. Both Entergy and Staff also fail to respond to Petitioners' argument that Staff's routine granting of exemptions creates a dangerous incentive for licensees to defer the transfer of spent fuel from a spent fuel pool to the safer storage method of dry casks. Petition at 42. Entergy does not even attempt to address that claim. Staff's only response is that "Vermont fails to explain how the exemption creates this incentive and its argument is vague." Staff Answer at 44. In fact, Petitioners explained that the Commission has "recognized that dry-cask storage is safer than spent fuel pools." Petition at 42 (citing COMSECY-13-0030 at 2 (Nov. 12, 2013)). Petitioners further explained that "[i]f merchant-generators are routinely granted exemptions to use decommissioning funds for spent fuel management expenses—as they have been to date—they will be motivated to keep fuel stored in spent fuel pools as long as possible, rather than moving fuel to safer dry-cask storage." Petition at 42 (citation omitted). Indeed, licensees are unlikely to pay for spent fuel costs out of pocket (as would necessarily happen for any such expenses incurred while the plant is operating) if they can defer them until after closure, at which point they can safely assume that Staff will allow use of decommissioning funds for those expenses. The Commission should not permit continuation of a practice that incentivizes

licensees to take actions that are objectively more dangerous to public health, safety, and the environment.

Similarly, in response to Petitioners' detailed arguments explaining that FERC regulations and the Master Trust Agreement forbid the use of decommissioning trust funds for spent fuel management before a site is radiologically decontaminated, Staff provides no substantive response at all. Instead, Staff claims it is without "legal authority" to enforce FERC regulations, and that the only avenue at the NRC for addressing non-compliance with the Master Trust Agreement is through an enforcement proceeding. Staff Answer at 47-48. In other words, Staff's position is that it can—indeed, must—ignore FERC regulations and the Master Trust Agreement when evaluating exemption requests. That is not the case.

First, it is by definition arbitrary and an abuse of discretion for an agency to "turn[] a blind eye to significant information." *Nat. Res. Def. Council v. EPA*, 804 F.3d 149, 166 (2d Cir. 2015). In determining whether to grant special dispensation to Entergy to use decommissioning funds in a manner that Commission regulations do not permit, other restrictions on use of that money constitute "significant information" that must be considered. *Id.*; *see also, e.g., id.* at 169 (holding that agency action is arbitrary and an abuse of discretion if it was "based on a flawed record that failed to consider an important aspect of the problem"); *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (holding that an agency may not "entirely fail to consider an important aspect of the problem" when deciding whether regulation is appropriate).'

Second, the fact that FERC has enforcement authority does not relieve the NRC of its obligation to refrain from approving actions that clearly violate FERC regulations. Regardless of what part of the C.F.R. a regulation appears in, duly passed regulations are federal law, and federal agencies must respect and abide by them. Yet, under Staff's view, it can—and should—

entirely ignore FERC regulations even if doing so leads the Commission to approve licensee actions that (as here) are directly contrary to duly promulgated federal regulations.

Third, Staff's position stands in marked contrast to the Commission's usual policy of requiring licensees to describe "the status of compliance" with other federal and state laws. 10 C.F.R. § 51.45(d). Here, not only has Entergy failed to demonstrate its compliance with FERC regulations and the Master Trust Agreement, but Petitioners have explained in detail why Entergy is currently out of compliance.[9]

Staff also fails to justify its conclusion that "special circumstances presented by the situation justified the grant of the exemption" to Entergy. Staff Answer at 16. Staff's response on this issue is telling: "Staff performed an independent *cash flow analysis* of the [Decommissioning Fund] and confirmed that there was reasonable assurance of adequate funding to complete radiological decommissioning and to pay for spent fuel management." *Id.* (emphasis added). Performing only a cash flow analysis, while failing to verify any of the inputs Entergy provided, least of all conducting an independent safety analysis, is entirely inadequate to justify granting an exemption from these important safeguards. *Id.*

[9] Although Entergy cites extensively from a "rate application" that its predecessor filed with FERC in 1994 (Entergy Answer at 23 n.101), Entergy provides no response to Petitioners' arguments that Entergy is failing to comply with FERC regulations and orders, including 18 C.F.R. § 35.32(a)(6), which limits expenditures to decommissioning expenses, and subsection (a)(7), which requires the return of excess funds to ratepayers. Entergy cites *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Stations), CLI-00-6, 51 NRC 193, 210-11 (2000) for the proposition that "[t]he 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" and should be addressed by FERC or a state "Board of Public Utilities" (alteration marks omitted). But that is Petitioners' point—the Commission does not have authority to approve expenditure of alleged excess funds without FERC approval because any excess funds (or 55% of such funds as is the case here) belong to the ratepayers who created the Decommissioning Fund.

Based upon nothing more than a cash flow analysis, Staff concluded that there is "*no* corresponding safety benefit" to requiring Entergy to keep an estimated $225 million in the Decommissioning Fund, rather than withdrawing that money for spent fuel expenses. Staff Answer at 16 (emphasis added). Staff fails to explain how maintaining those dollars in the Decommissioning Fund does not promote safety. In fact, it is clear that maintaining that money in the Fund would promote safety by improving Entergy's ability to cover unforeseen expenses related to radiologically decontaminating the site.

Further, by failing to provide a meaningful review of any of the inputs provided by Entergy, Staff has effectively converted the Decommissioning Cost *Estimate* into a Decommissioning Cost *Guarantee*. That decision is especially problematic with regard to two assumptions Entergy made to support its claim of excess funds: the failure to account for the recent discovery of strontium-90, and the failure to account for spent fuel remaining onsite after 2052. Staff and Entergy continue to echo their previous retorts that Petitioners' arguments are "speculative." Staff Answer at 43; Entergy Answer at 32, 33. They do not acknowledge that those dismissals were squarely rejected by the Licensing Board in LBP-15-24:

> Though the NRC Staff describes Vermont's claims about strontium-90 as "speculative," we conclude that they are adequately supported by references to water monitoring conducted by the Vermont Department of Public Health and an expert opinion. While Strontium-90 is currently present at the site at levels below the Environmental Protection Agency's limits, Vermont questions whether additional leaks of strontium-90 or other radionuclides are the type of unforeseen expense for which Entergy must prepare.

Entergy, LBP-15-24 at 23-25 (footnotes omitted).

To Petitioners' argument that spent fuel likely will remain at the site after 2052, Staff provides no response other than to fault Petitioners for failing to provide a calculation of

expenses beyond that year. Staff Answer at 43.[10] Staff fails to recognize that it is the licensee's responsibility to identify and quantify those expenses, not the host State's (or co-Petitioners'). Entergy's response, as with the strontium-90 issue, is to call Petitioners' arguments "speculat[ive]" and "alarmist." Entergy Answer at 33. Entergy even says it is "unreasonable" to assume that the federal government may not pick up the fuel. *Id.* at 33 n.152. Again, the Licensing Board held otherwise: "Vermont has correctly noted that the indefinite storage of spent fuel on-site *is a very possible outcome*" and thus has "sufficient support" to warrant a hearing. *Entergy*, LBP-15-24 at 26 (emphasis added).

Staff's apparent position that exemptions can issue whenever a decommissioning trust fund "contains more money than needed to cover the cost of radiological decommissioning" (Staff Answer at 16) is untenable. By that logic, the purpose for which the licensee seeks to use alleged "excess" funds is entirely irrelevant. Petitioners have challenged Entergy's use of the Decommissioning Fund for expenses that include its lobbying fees to the Nuclear Energy

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[10] In that same sentence, Staff disavows any review of the attachments to the Petition. Staff Answer at 43 n.205. One of those attachments explicitly makes the very calculation Staff faults Petitioners for not making:

> Entergy's claimed "excess" of around $176 million at the end of decommissioning in 2076 mostly disappears if Entergy includes the estimated annual expenses of $4 million (and consequent lost interest) for spent fuel management from 2053 to 2076 (rather than assuming, as Entergy does, that those expenses are "$0"). And even if a small portion of that alleged "excess" money still remains in the [Decommissioning] Fund by 2076, it would not be nearly enough to pay for ongoing spent fuel management expenses in the future.

Petition Exhibit 2 at 23 n.4. Nor is Staff served by its claim that Petitioners are prohibited from arguing in any forum "that Entergy consider costs beyond th[e] 60-year time period" since NRC regulations require the completion of decommissioning within 60 years. Staff Answer at 50-51. Staff appears to take the illogical position that, even if the federal government stated that fuel must remain at nuclear reactors beyond 60 years, all Decommissioning Cost Estimates would nevertheless have to pretend that such fuel will be removed within the next 60 years, and the licensee need not identify how it will fund fuel storage beyond that time period.

Institute. *See* Decommissioning Cost Estimate at line 1a.2.38 (listing "NEI Annual Fee" as a spent fuel management expense). Under the Staff's interpretation, once a licensee alleges an "excess," it may access the Fund for expenses with even *less* of a nexus to decommissioning. Thus, not only does Staff fail to meaningfully address the issues raised by Petitioners—it opens the door to even broader abuse of decommissioning funds.[11]

Finally, Staff's reliance on a future ability to require "additional financial assurance" through annual reviews is misplaced. Staff Answer at 36-37. Staff made similar arguments to the Licensing Board, and the Board determined that a hearing was still warranted. One of the key risks associated that reliance springs from Entergy's decision to place Vermont Yankee in SAFSTOR for the next six decades. Thus, the full extent of the problems associated with spent fuel remaining onsite beyond 2052 or the additional costs for cleaning up strontium-90 may not be realized for decades. Entergy's withdrawal of hundreds of millions of dollars for non-decommissioning expenses, on the other hand, is occurring now. As the Petition notes, Entergy has—on at least two separate occasions—made clear that it will not commit to making up any shortfall in the Decommissioning Fund. Petition at 16 n.5. While Petitioners genuinely appreciate Staff's reiteration "that it will pursue Entergy if there is a shortfall" (Staff Answer at 44), there is no guarantee that there will be an entity with sufficient funding to pursue 60 years

[11] In addition to failing to justify allowing Entergy to make withdrawals for non-decommissioning expenses contrary to 10 C.F.R. § 50.82, Staff ignores the other two prongs of that section—that even legitimate decommissioning expenditures are allowable only if they will not: (1) "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" (10 C.F.R. § 50.82(8)(B)); and (2) "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" (10 C.F.R. §50.82(8)(C)). Although Staff references those requirements (Staff Answer at 7), it does not demonstrate that its current actions comply, but merely notes that it will examine the fund's balance in annual reviews. Staff Answer at 8.

from now. The far better course—and the one the Commission must follow to ensure public health, safety, and the environment—is to prevent a shortfall in the first place.

CONCLUSION

The Commission should reject Entergy and Staff's argument that the public, interested parties, and even the Commissioners themselves, should have no voice in the use of funds that were collected from ratepayers for the purpose of safely decommissioning Vermont Yankee. Staff and Entergy assert that they alone can decide whether the Decommissioning Fund is so substantial that more than a third of it can be diverted to non-decommissioning purposes—despite the prohibition against such a diversion in NRC Regulations—and still provide assurance of full and safe decommissioning of Vermont Yankee 60 years from now. Far from comforting the Commission that review is unnecessary, Staff and Entergy's arguments that exemptions from important decommissioning safeguards have become routine should signal the need for Commission oversight. For these reasons, and the reasons explained in the Petition, the Commissioners should grant review of this matter and grant the relief Petitioners have requested.

Respectfully submitted, this 17th day of December 2015,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT	)	Docket No. 50-271
YANKEE, LLC AND ENTERGY	)	
NUCLEAR OPERATIONS, INC.	)	December 17, 2015
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the Reply of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation in Support of Petition for Review of Entergy Nuclear Operation, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding, this 17th day of December 2015.

/Signed (electronically) by/
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Dated at Montpelier, Vermont
this 17th day of December 2015