

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman  
Kristine L. Svinicki  
William C. Ostendorff  
Jeff Baran

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE, LLC and  
ENTERGY NUCLEAR OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-LA-2

**CLI-16-12**

**MEMORANDUM AND ORDER**

The State of Vermont has appealed LBP-15-18, in which the Atomic Safety and Licensing Board denied Vermont's request for hearing in this license amendment proceeding.<sup>1</sup> Vermont also seeks reconsideration of our approval of the NRC Staff's recommendation to grant Entergy's related exemption request.<sup>2</sup> For the reasons set forth below, we affirm the Board's

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<sup>1</sup> *The State of Vermont's Notice of Appeal of Atomic Safety and Licensing Board's May 18, 2015 Memorandum and Order Denying Petition for Leave to Intervene and Hearing Request* (June 12, 2015); *The State of Vermont's Brief in Support of Notice of Appeal of Atomic Safety and Licensing Board's May 18, 2015 Memorandum and Order Denying Petition for Leave to Intervene and Hearing Request* (June 12, 2015) (Appeal); LBP-15-18, 81 NRC 793 (2015).

<sup>2</sup> *State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests* (Mar. 12, 2015) (Petition for Reconsideration); Staff Requirements—SECY-14-0125—Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements (Mar. 2, 2015) (ADAMS accession no. ML15061A516) (SRM-SECY-14-0125); "Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements," Commission Paper SECY-14-0125 (Nov. 14, 2014) (ML14227A711) (SECY-14-0125).

denial of Vermont's hearing request. As a matter of discretion, we consider Vermont's petition for reconsideration, but uphold our decision on the exemption request.<sup>3</sup>

## I. BACKGROUND

As one of a number of activities associated with decommissioning the Vermont Yankee Nuclear Power Station, Entergy seeks to amend its Site Emergency Plan and Emergency Action Level Scheme for Vermont Yankee to reflect the plant's permanently shutdown and defueled status. To that end, Entergy filed a request for exemptions from certain emergency planning requirements in 10 C.F.R. § 50.47(b), (c)(2) and 10 C.F.R. Part 50, Appendix E.<sup>4</sup> Shortly thereafter, Entergy filed a license amendment application that would implement the exemptions, if approved.<sup>5</sup> The proposed "Permanently Defueled Emergency Plan" and "Permanently Defueled Emergency Action Level Scheme" would reduce the scope of offsite and onsite emergency planning and extend the time for the notification of state authorities of an emergency declaration or change in classification from fifteen minutes to one hour.<sup>6</sup> Entergy requested that the Staff approve the license amendment with an effective date of April 15, 2016—a little more than fifteen months after shutdown—when Entergy expected the spent fuel stored in the spent fuel pool to have decayed to the extent that the requested exemptions, the revised Emergency Plan, and the revised Emergency Action Level Scheme may be implemented without any additional compensatory actions.<sup>7</sup>

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<sup>3</sup> Vermont has asked us to consolidate our review of the appeal and its petition for reconsideration. Appeal at 17. We do so here at our discretion, in the interest of efficiency.

<sup>4</sup> Letter from Christopher J. Wamser, Entergy Nuclear Operations, Inc., to U.S. NRC Document Control Desk (Mar. 14, 2014) (ML14080A141) (Exemption Request).

<sup>5</sup> Letter from Christopher J. Wamser, Entergy Nuclear Operations, Inc., to U.S. NRC Document Control Desk (June 12, 2014) (ML14168A302) (License Amendment Application).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.*

The Staff published a notice of the license amendment application in the *Federal Register*, with an opportunity to provide comments and request a hearing.<sup>8</sup> Vermont did both, filing its comments and hearing request on February 9, 2015.<sup>9</sup> As part of its hearing request, Vermont also challenged Entergy's proposed exemptions. It asserted that the exemption request and the license amendment application "are dependent on one another" and "cannot be reviewed separately."<sup>10</sup> Specifically, in Contention 1, Vermont argued that "Entergy's license amendment request is not ready for review" because it is "predicated upon and assumes approval of an exemption request that has not been ruled upon by the Nuclear Regulatory Commission and/or Atomic Safety and Licensing Board."<sup>11</sup> In Contention 2, Vermont argued that the license amendment application, along with the requested exemptions, "fails to account for all credible emergency scenarios, undermines the effectiveness of the site emergency plan

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<sup>8</sup> Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 73,106, 73,106-07, 73,109 (Dec. 9, 2014); Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 4949 (Jan. 29, 2015) (reopening public comment period for submission of comments by February 9, 2015).

<sup>9</sup> *State of Vermont's Petition for Leave to Intervene, and Hearing Request* (Feb. 9, 2015) (Hearing Request); *Comments and Declarations of the Vermont Department of Public Service Regarding Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme License Amendment Request BVY 14-033* (Feb. 9, 2015) (Vermont Department of Public Service Comments); *Comments and Declarations of the Vermont Division of Emergency Management and Homeland Security on BVY 14-033 Vermont Yankee Permanently Defueled Emergency Plan and Emergency Action Level Scheme* (Feb. 9, 2015) (Vermont Division of Emergency Management and Homeland Security Comments); *Comments and Declarations of the Vermont Department of Health on Entergy Vermont Yankee's License Amendment Request for the Emergency Planning Zone in Letter BVY 14-033 Dated June 12, 2014 and SECY-14-0125 Dated November 14, 2014* (Feb. 9, 2015) (Vermont Department of Health Comments). Vermont incorporated its comments by reference into its hearing request. Hearing Request at 5, 10.

<sup>10</sup> Hearing Request at 4.

<sup>11</sup> *Id.* at 3.

and off-site emergency planning, and poses an increased risk to the health and safety of Vermont citizens in violation of NRC regulatory requirements.”<sup>12</sup>

The Staff reviewed the license amendment application and the exemption request in parallel and sought our approval to grant the exemption request.<sup>13</sup> At that time, the Staff stated that it would wait for our response before the Staff issued a decision on the license amendment application.<sup>14</sup> The Staff’s review of the exemption request verified Entergy’s supporting analyses and calculations and concluded that granting the exemptions “would provide: (1) an adequate basis for an acceptable state of emergency preparedness; and (2) in conjunction with arrangements made with offsite response agencies, reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at [Vermont Yankee].”<sup>15</sup> We approved the Staff’s recommendation to grant the exemptions in March 2015.<sup>16</sup>

In April 2015, the Staff issued for public comment the draft Environmental Assessment and Finding of No Significant Impact for Entergy’s exemption request; it issued the final

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<sup>12</sup> *Id.* at 6 (citing 10 C.F.R. § 50.54(q)(4) and 10 C.F.R. pt. 50, app. E).

<sup>13</sup> SECY-14-0125, at 1. The Staff is required to request our approval “for any reduction in the effectiveness of a licensee’s emergency plan that requires an exemption from the requirements of 10 CFR 50.47(b) and Appendix E to 10 CFR Part 50.” Staff Requirements—SECY-08-0024—Delegation of Commission Authority to Staff to Approve or Deny Emergency Plan Changes that Represent a Decrease in Effectiveness (May 19, 2008), at 1 (ML081400510). The Staff sought our approval after determining that with the requested exemptions, “the resulting set of [emergency planning] requirements could be viewed as a reduction in effectiveness when compared to the operating reactor emergency plan currently in effect at [Vermont Yankee].” SECY-14-0125, at 3.

<sup>14</sup> SECY-14-0125, at 7.

<sup>15</sup> *Id.*

<sup>16</sup> SRM-SECY-14-0125, at 1. Commissioner Baran disapproved in part the Staff’s recommendation. Commission Voting Record, “SECY-14-0125—Request by Entergy Nuclear Operations, Inc., for Exemptions from Certain Emergency Planning Requirements” (Mar. 2, 2015), at 10 (unnumbered) (ML15062A135).

Environmental Assessment and Finding of No Significant Impact on July 31, 2015.<sup>17</sup> The Staff granted the exemption request on December 10, 2015, and approved the license amendment the next day.<sup>18</sup>

Entergy and the Staff filed answers to Vermont's hearing request after we approved the Staff's recommendation to grant Entergy's exemption request but before the Staff issued the exemptions.<sup>19</sup> Both Entergy and the Staff opposed Vermont's request for hearing.<sup>20</sup> They argued that the exemption request and license amendment application are separate licensing actions and that the exemption request may not be challenged in a license amendment proceeding.<sup>21</sup> Entergy and the Staff asserted that Contention 2 is inadmissible because it challenges the underlying exemption request and thus raises issues outside the scope of the

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<sup>17</sup> Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 24,291 (Apr. 30, 2015) (Draft Environmental Assessment); Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 47,960 (Aug. 10, 2015) (Final Environmental Assessment); *Commission Notification of Issuance of Final Environmental Assessment and Finding of No Significant Impact for Publication* (Aug. 4, 2015). For the license amendment application, the Staff relied on a categorical exclusion and thus did not prepare an environmental assessment or environmental impact statement. Letter from James Kim, NRC, to Vice President, Operations, Entergy Nuclear Operations, Inc. (Dec. 11, 2015), Enclosure 2, at 52 (ML15233A166) (Issuance of License Amendment).

<sup>18</sup> *Notice of Issuance of Exemption* (Dec. 10, 2015); Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 78,776 (Dec. 17, 2015); Issuance of License Amendment at 1. The Staff notified us of the issuance of the exemptions. And although the Staff indicated that it expected to issue the license amendment sometime in December, a notification should have been made upon its actual issuance. *Commission Notification of Significant Licensing Action* (Dec. 2, 2015); see *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 470 (2006) (requiring parties to notify the presiding officer of "relevant new developments in a proceeding").

<sup>19</sup> *Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request* (Mar. 6, 2015) (Entergy Answer); *NRC Staff's Answer to State of Vermont's Petition for Leave to Intervene and Hearing Request* (Mar. 6, 2015) (Staff Answer).

<sup>20</sup> Entergy Answer at 1; Staff Answer at 1.

<sup>21</sup> Entergy Answer at 7, 15; Staff Answer at 22, 25, 29-30.

license amendment proceeding.<sup>22</sup> Additionally, they argued that Contention 2 lacked sufficient support to demonstrate a genuine or material dispute with the license amendment application.<sup>23</sup> And because we had, by that time, approved the Staff's recommendation to grant the exemption request, Entergy and the Staff argued that Contention 1, which challenged the ripeness of the license amendment application based on the pending status of the exemption request, was moot.<sup>24</sup>

In LBP-15-18, the Board found Vermont's contentions inadmissible and denied the request for hearing.<sup>25</sup> Vermont filed the instant appeal. Separately, Vermont seeks reconsideration of our approval of the Staff's recommendation to grant the exemption request.<sup>26</sup>

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<sup>22</sup> Entergy Answer at 19-25; Staff Answer at 29-32.

<sup>23</sup> See Entergy Answer at 25-37; Staff Answer at 32-42.

<sup>24</sup> See Entergy Answer at 16-17; Staff Answer at 21-22. They also argued that Contention 1, because it invokes the exemption request, is outside the scope of the proceeding. See Entergy Answer at 17-18; Staff Answer at 22-25. Vermont filed a reply to Entergy's and the Staff's Answers. *The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request* (Mar. 17, 2015). The Board held oral argument on the hearing request on April 8, 2015. See Tr. at 1-35.

Vermont also filed a "notice of supplemental authority" based on the Staff's issuance of the draft Environmental Assessment and Finding of No Significant Impact, which Entergy and the Staff opposed to the extent Vermont sought another opportunity to argue the merits of its petition. *State of Vermont's Notice of Supplemental Authority* (May 4, 2015); *Entergy's Response to the State of Vermont's Notice of Supplemental Authority* (May 11, 2015), at 2; *NRC Staff's Answer to State of Vermont's Notice of Supplemental Authority* (May 11, 2015), at 1. The Board noted these additional filings, but did not otherwise refer to them in making its decision. See LBP-15-18, 81 NRC at 796 n.14.

<sup>25</sup> LBP-15-18, 81 NRC at 801.

<sup>26</sup> Petition for Reconsideration at 1. Vermont sought a stay of the proceeding before the Board pending our decision on the reconsideration petition to avoid having to formulate a reply to the answers without knowing the outcome of our decision. Alternatively, Vermont sought an extension of time to file its reply. *State of Vermont's Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration* (Mar. 12, 2015), at 2 (corrected Mar. 13, 2015 with certification of consultation under 10 C.F.R. § 2.323). The Board denied the stay request, but granted a short extension of the reply deadline. Licensing Board Order (Denying Motion to Stay the Proceeding and Extending Deadline for Reply (Mar. 16, 2015), at 2 (unpublished) (finding no action that could have been stayed and that, in any event, Vermont did not explain how its motion satisfied the stay factors); see also Licensing Board Order (Denying

Entergy and the Staff oppose both the appeal and the petition for reconsideration.<sup>27</sup> We address each in turn.

## II. DISCUSSION

### A. Vermont's Appeal of LBP-15-18

Vermont's appeal of LBP-15-18 qualifies as an appeal as of right under 10 C.F.R. § 2.311(c). We will uphold a licensing board's ruling on standing and contention admissibility unless we find that the board erred as a matter of law or abused its discretion.<sup>28</sup>

As the Board recognized, section 189a. of the Atomic Energy Act of 1954, as amended, provides an opportunity for interested members of the public to request a hearing on a license amendment application.<sup>29</sup> Exemption requests, however, are not among the listed actions that are subject to a hearing under the Atomic Energy Act, and we have interpreted their absence from section 189a. as intentional.<sup>30</sup> We determined that Congress expressly "limited the

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Motion to Stay the Proceeding) (Mar. 13, 2015) (unpublished) (denying stay request for failure to include certification of consultation).

<sup>27</sup> See *Entergy's Answer Opposing the State of Vermont's Appeal of the Atomic Safety and Licensing Board's May 18, 2015 Memorandum and Order Denying Petition for Leave to Intervene and Hearing Request* (July 7, 2015) (Entergy Brief on Appeal); *NRC Staff's Brief in Opposition to the State of Vermont's Appeal of LBP-15-18* (July 7, 2015) (Staff Brief on Appeal); *Entergy's Answer Opposing State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests* (Mar. 23, 2015); *NRC Staff Answer to Vermont Petition for Reconsideration of the Commission Decision Approving Entergy's Exemption Requests* (Mar. 23, 2015), at 1.

<sup>28</sup> See, e.g., *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 307 (2012). Although Vermont's standing is not before us on appeal, we observe that Vermont has standing to request a hearing because the facility is located within the state's boundaries. 10 C.F.R. § 2.309(h)(2).

<sup>29</sup> LBP-15-18, 81 NRC at 796-97.

<sup>30</sup> See e.g., *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 94-96 (2000).

opportunity for a hearing to certain designated agency actions . . . that do not include exemptions.”<sup>31</sup>

Nevertheless, we have found that a hearing opportunity is warranted when an exemption request “raises material questions directly connected to an agency licensing action” for which the Act expressly provides a hearing right, as it does for the granting, suspending, revoking, or amending of a license.<sup>32</sup> In *Private Fuel Storage*, we held that a petitioner in the then-ongoing proceeding on the application for an independent spent fuel storage installation (ISFSI) could raise a contention in the licensing proceeding that challenged matters within the scope of the applicant’s request for an exemption from a regulation that otherwise would have applied to the licensing of the ISFSI.<sup>33</sup> We also found that “[b]ecause resolution of the exemption request directly affects the licensability of the proposed ISFSI, the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties.”<sup>34</sup> “To hold otherwise,” we explained, “would exclude critical safety questions from licensing hearings merely on the basis of an ‘exemption’ label.”<sup>35</sup>

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<sup>31</sup> *Id.* at 96 (emphasis omitted).

<sup>32</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001); see also *Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013) (stating that “[a]n exemption standing alone does not give rise to an opportunity for hearing[,] . . . [b]ut when a licensee requests an exemption in a related license amendment application, we consider the hearing rights on the amendment application to encompass the exemption request as well”); *Zion*, CLI-00-5, 51 NRC at 96 (acknowledging that an exemption, “regardless of its label,” could “constitute[] an action for which a hearing is required, i.e., . . . [that it] is in effect” an action covered by hearing rights under the Atomic Energy Act); *United States Department of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982) (recognizing a “statutory right to a hearing on the granting of an exemption” where the grant is “part of a proceeding for the granting, suspending, revoking, or amending of any license or construction permit under the Atomic Energy Act”).

<sup>33</sup> *Private Fuel Storage*, CLI-01-12, 53 NRC at 461, 467.

<sup>34</sup> *Id.* at 467.

<sup>35</sup> *Id.*



Here, the Board found that to reach its decision on Vermont's hearing request, it "need not test the boundaries of the . . . *Private Fuel Storage* decision."<sup>36</sup> The Board instead relied on the fact that we had already approved the Staff's recommendation to grant Entergy's requested exemptions, and it declined to open an adjudicatory proceeding to explore the propriety of our decision.<sup>37</sup> The Board noted that Vermont already had filed a separate petition for reconsideration to challenge our decision on the exemption.<sup>38</sup> Given our action on the exemption request, the Board determined that it was limited to the question whether "Vermont ha[d] asserted admissible contentions concerning whether Entergy's [license amendment application] is consistent with . . . [the] regulations *as exempted*."<sup>39</sup> The Board went on to dismiss both contentions. The Board found Contention 1 mooted by our approval of the Staff's recommendation to grant the exemption request, and the Board found Contention 2 inadmissible for failure to raise a genuine dispute with the license amendment application's compliance with the exempted regulations.<sup>40</sup>

On appeal, Vermont asserts that the Board should have considered "all possible outcomes" of a Commission decision on Vermont's pending petition for reconsideration or should have awaited that decision before finding Contention 1 moot.<sup>41</sup> Vermont characterizes the Board's summary dismissal of the contention as "arbitrary," and "premature," and hypothesized that we might reverse our direction to the Staff regarding the exemption request or

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<sup>36</sup> LBP-15-18, 81 NRC at 797.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 798. The Board left open the possibility that, in ruling on Vermont's petition for reconsideration, we might clarify any exemption-related issues that might be appropriate for adjudication. *Id.* at 798 n.26.

<sup>40</sup> *Id.* at 798-801.

<sup>41</sup> Appeal at 8.

that the Staff itself might deny the request after completing its review.<sup>42</sup> With regard to Contention 2, Vermont asserts that the Board applied too high a standard for the “genuine dispute” prong of our contention admissibility rule.<sup>43</sup> Vermont argues that, contrary to the Board’s ruling, its hearing request and the attached declarations from its experts identified omissions in Entergy’s license amendment application and provided adequate support for a contention of omission.<sup>44</sup> Finally, Vermont argues that the Board’s errors are compounded by the Board’s decision not to apply *Private Fuel Storage* to allow a hearing on the exemption request together with the license amendment application.<sup>45</sup> Because it is dispositive of the question whether Vermont’s contentions raise issues that are within the scope of this proceeding, we begin with an analysis of *Private Fuel Storage*.

As Entergy and the Staff would have it, our *Private Fuel Storage* decision is distinguishable from the circumstances presented here based on the timing of Entergy’s exemption request.<sup>46</sup> Because, they assert, the exemption request preceded the license amendment application, it was not filed as part of an ongoing licensing action for which a hearing right attached, as was the case in *Private Fuel Storage*.<sup>47</sup> Entergy and the Staff also argue that the nature of the proceedings was different, with *Private Fuel Storage* involving an initial license application, and this case involving an already-licensed facility.<sup>48</sup> The Staff adds that in *Private Fuel Storage*, the issue whether to litigate the exemption request was squarely

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<sup>42</sup> *Id.* at 6, 8-9.

<sup>43</sup> *See id.* at 15-16.

<sup>44</sup> *See id.* at 15-17.

<sup>45</sup> *Id.* at 6, 9-12.

<sup>46</sup> Entergy Brief on Appeal at 14-15; Staff Brief on Appeal at 17.

<sup>47</sup> Entergy Brief on Appeal at 14-15; Staff Brief on Appeal at 17.

<sup>48</sup> Entergy Brief on Appeal at 15; Staff Brief on Appeal at 17.

before the Board, whereas in this proceeding our action on the exemption request removed that question from the Board's jurisdiction.<sup>49</sup> The Staff also points out that the two-part exemption request/license amendment application process used here to reduce the emergency planning requirements at Vermont Yankee has been used previously for other permanently shutdown and defueled facilities.<sup>50</sup> We find these arguments unavailing.

In its attempt to distinguish this case, the Staff minimizes the importance of the exemption request to the license amendment application, stating that "the license amendment merely reflects or implements the requested exemptions."<sup>51</sup> But this link between the license amendment application and the exemption request is precisely the reason that we find the two actions sufficiently related to warrant a hearing opportunity for both. Vermont, quoting from our decision in *Private Fuel Storage*, gets to the heart of the matter—"[b]ecause 'the exemption is necessary for the applicant to . . . amend its license,' it 'trigger[s] the right to a hearing under the [Atomic Energy Act].'"<sup>52</sup>

We find that Entergy's license amendment application and exemption request are essentially two necessary parts of the action to change Vermont Yankee's emergency planning requirements, and therefore matters related to the exemption request may be challenged as part of this license amendment proceeding. The emergency planning requirements themselves illustrate how the two licensing actions are intertwined. The types of changes that Entergy proposes to make to its Site Emergency Plan and Emergency Action Level Scheme require pre-approval from the NRC in the form of a license amendment.<sup>53</sup> And because section 50.54(q)(4)

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<sup>49</sup> Staff Brief on Appeal at 17.

<sup>50</sup> *Id.* at 17-18.

<sup>51</sup> *Id.* at 16.

<sup>52</sup> Appeal at 11 (quoting *Private Fuel Storage*, CLI-01-12, 53 NRC at 470).

<sup>53</sup> See 10 C.F.R. § 50.54(q)(4) ("The changes to a licensee's emergency plan that reduce the effectiveness of the plan . . . may not be implemented without prior approval by the NRC. A

requires that any application to amend an emergency plan include a certification that the plan, as amended, will continue to meet the requirements of 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50, Appendix E—the regulations that contain the emergency planning standards that Entergy seeks to eliminate from its license—exemptions from these requirements also are necessary before Entergy may proceed with its license amendment application.<sup>54</sup>

In other words, if the NRC were to reject Entergy's request for exemptions from section 50.47(b) and Appendix E, Entergy would not be able to certify that its revised plan and Emergency Action Level Scheme meet the standards in those regulations to amend its license. A license amendment application alone, based on the language and structure of the regulations as presently written,<sup>55</sup> would not be sufficient to accomplish Entergy's goal of reducing the scope of its emergency plan, and Entergy acknowledges as much in both its exemption request and its license amendment application.<sup>56</sup>

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licensee desiring to make such a change . . . shall submit an application for an amendment to its license.”).

<sup>54</sup> See *id.* (stating that the license amendment application must include “the basis for concluding that the licensee’s emergency plan, as revised, will continue to meet the requirements in appendix E to this part and, for nuclear power reactor licensees, the planning standards of § 50.47(b)”).

<sup>55</sup> Our current emergency planning regulations do not expressly address the circumstances faced by plants in the process of decommissioning. When we approved the Staff’s recommendation to grant emergency planning exemptions for the Crystal River Nuclear Plant, we also directed the Staff to proceed with a rulemaking, with a completion date of early 2019, to address emergency planning and preparedness for plants that are or will be undergoing decommissioning. Staff Requirements—SECY-14-0118—Request by Duke Energy Florida, Inc., for Exemptions from Certain Emergency Planning Requirements (Dec. 30, 2014), at 1 (ML14364A111). We acknowledged that exemptions and license amendments would be addressed in the interim. *Id.* at 1. The Staff has published an Advance Notice of Proposed Rulemaking to obtain input from the public as the Staff prepares the regulatory basis for such a rule. Regulatory Improvements for Decommissioning Power Reactors, 80 Fed. Reg. 72,358 (Nov. 19, 2015) (Advance Notice of Proposed Rulemaking); Regulatory Improvements for Decommissioning Power Reactors, 80 Fed. Reg. 80,709 (Dec. 28, 2015) (extending the comment period until March 18, 2016).

<sup>56</sup> See Exemption Request at 2 (notifying the Staff of Entergy’s plans to submit for NRC review and approval a Permanently Defueled Emergency Plan and Permanently Defueled Emergency Action Level Scheme “based on the exemptions requested herein”); License Amendment

Entergy and the Staff asserted that this case is more analogous to the facts in *Zion*, where we denied a hearing request that challenged a request for exemptions from certain physical security requirements in 10 C.F.R. § 73.55.<sup>57</sup> *Zion* Station also had been permanently shutdown and defueled, and the licensee, Commonwealth Edison, had begun to prepare for decommissioning.<sup>58</sup> Commonwealth Edison sought the exemptions in order to submit a defueled physical security plan.<sup>59</sup> But Commonwealth Edison did not request a license amendment,<sup>60</sup> and so the issues addressed in the exemption request were not tied to a license amendment request or other action that required a hearing opportunity under the Atomic Energy Act.<sup>61</sup>

Here, in contrast, we have before us Entergy's exemption request and license amendment application, and a regulation (section 50.54(q)(4)) that requires both submittals for Entergy to make the desired changes to its Site Emergency Plan and Emergency Action Level Scheme. Moreover, the analyses that Entergy provided in support of its exemption request also support Entergy's license amendment application.<sup>62</sup> The two licensing actions overlap, to the point that they are, in essence, two parts of the same action. They are inextricably intertwined. To be sure, we make this determination based on the case presented here—not every

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Application at 2 (explaining that the proposed Permanently Defueled Emergency Plan and Permanently Defueled Emergency Action Level Scheme “are predicated on approval of [previously submitted] requests for exemptions from portions of 10 CFR 50.47(b), 10 CFR 50.47(c)(2) and 10 CFR Part 50, Appendix E”).

<sup>57</sup> Entergy Answer at 20-21; Staff Answer at 25.

<sup>58</sup> *Zion*, CLI-00-5, 51 NRC at 92-93.

<sup>59</sup> *Id.* at 93.

<sup>60</sup> *See id.*

<sup>61</sup> *Id.* at 96.

<sup>62</sup> *See* License Amendment Application at 2 (citing the exemption request analysis to support the timing of the requested license amendment).

exemption request that is in some way related to a license amendment application will therefore be subject to challenge in an adjudication. Such a determination is entirely dependent upon the facts and circumstances of each case.<sup>63</sup>

Even though we have granted other exemptions and accompanying license amendments to reduce the scope of emergency planning for other plants in the process of decommissioning, until this case we have not had occasion to pass upon the scope of an associated hearing opportunity under section 189a. of the Atomic Energy Act. And although Vermont asserts that the Board erred in not addressing this issue, under these circumstances, we do not fault the Board for not applying our *Private Fuel Storage* decision or addressing the connection between the exemption request and the license amendment application.

Because Vermont's contentions are not outside the scope of the proceeding, it is necessary to review Vermont's contentions under the remaining contention admissibility factors. In addition to demonstrating that the issue raised is within the scope of the proceeding, for a contention to be admitted a petitioner must meet the following criteria:

- (1) provide a specific statement of the issue of law or fact to be raised or controverted;
- (2) provide a brief explanation of the basis for the contention;
- (3) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (4) provide a concise statement of the alleged facts or expert opinions that support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue; and
- (5) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with references to specific portions of the application (including the applicant's environmental report and

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<sup>63</sup> For example, although we find unavailing here Entergy's and the Staff's arguments regarding the three-month difference between the exemption request and license amendment application as support for their position that the two actions are separate, the timing of an exemption request relative to an action for which a hearing opportunity would be required under the Atomic Energy Act is one of many factors that would be considered.

safety report) that the petitioner disputes and the supporting reasons for each dispute, or if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the contention must identify each failure and the supporting reasons for the petitioner's belief.<sup>64</sup>

In Contention 1, Vermont asserted that "Entergy's license amendment request is not ready for review, as the amendment request is predicated upon and assumes approval of an exemption request that has not been ruled upon by the Nuclear Regulatory Commission and/or Atomic Safety and Licensing Board."<sup>65</sup> Vermont claimed that it "is inappropriate, both as a matter of law and public policy," to review the license amendment application until a decision has been made on the exemption request.<sup>66</sup> Vermont also expressed concern that the license amendment application "assumes actions by the NRC that have not yet occurred" and, according to Vermont, "more importantly may never occur in the future."<sup>67</sup>

To the extent that Vermont argues that review of the license amendment application must await a decision on the exemption request, we find the contention inadmissible. In that sense, Vermont does not challenge the substance of the exemption request and license amendment application and thus does not articulate a genuine dispute with either document. Rather, it takes issue with the timing of the Staff's review—an issue that is not cognizable in an

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<sup>64</sup> 10 C.F.R. § 2.309(f)(1)(i)-(vi).

<sup>65</sup> Hearing Request at 3.

<sup>66</sup> *Id.* at 4-5 ("Neither the State nor the NRC is able to evaluate the full extent to which the proposed license amendment will or will not meet NRC safety and environmental requirements until the final decision on the exemption request[] is made.").

<sup>67</sup> *Id.* at 4.

adjudicatory proceeding.<sup>68</sup> “[A] licensing proceeding before this agency is plainly not the proper forum . . . for challenges to the basic structure of the Commission’s regulatory process.”<sup>69</sup>

Our regulations contemplate that we may be called upon to review applications that make predictive findings on future actions that may or may not come to pass.<sup>70</sup> And with respect to the emergency planning revisions that are at issue here, the agency has completed review of a number of substantively similar requests at other permanently shutdown and defueled plants, demonstrating that the agency can effectively review an exemption request and related license amendment application at the same time.<sup>71</sup>

Vermont also requested that we or the Board hold the proceeding and the deadline to file hearing requests in abeyance “until at least 30 days after . . . [the agency] has taken final action” on the exemption request and that we “provide a meaningful opportunity for the State to provide comments and request a hearing with respect to the exemption[] request.”<sup>72</sup> We consider the stay of a proceeding or other agency action to be an extraordinary remedy, and

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<sup>68</sup> See *id.* at 3-5; *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 3 & n.2 (2008) (rejecting a challenge to a Staff decision to docket an application for review and explaining that “it is the license application, not the NRC staff review, that is at issue” in an adjudicatory proceeding (quoting *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998))).

<sup>69</sup> *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

<sup>70</sup> Cf. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 322 (2009). For example, as was the case in *Shearon Harris*, under Part 52 an applicant for a combined license may reference a reactor design that is undergoing design certification rulemaking. The applicant does so “at its own risk,” given that the design certification might not be granted. *Id.* (quoting 10 C.F.R. § 52.55(c)).

<sup>71</sup> See, e.g., 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); Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Station, 80 Fed. Reg. 19,358 (Apr. 10, 2015); Dominion Energy Kewaunee, Inc.; Kewaunee Power Station, 79 Fed. Reg. 65,715 (Nov. 5, 2014).

<sup>72</sup> Hearing Request at 5. Vermont renews this request on appeal, asking us to provide it with an opportunity to submit new or amended contentions. Appeal at 17-18.



Vermont has not addressed any of the factors that would demonstrate that a stay is warranted here.<sup>73</sup> Moreover, Vermont provided comments and requested a hearing with respect to both the exemption request and the license amendment application. It also filed comments on the Environmental Assessment associated with the exemption request.<sup>74</sup> Therefore, Vermont already has received the opportunity to request a hearing and to express its views in this proceeding. With this contention, however, Vermont has—instead of challenging the applications—impermissibly challenged the way the agency conducts its business. We do not admit Contention 1, and we decline to hold the proceeding in abeyance.

Vermont challenged the substance of the exemption request and license amendment application in Contention 2. In its statement of the contention, Vermont asserted that:

Entergy's license amendment request, if approved along with the predicate requested exemptions, fails to account for all credible emergency scenarios, undermines the effectiveness of the site emergency plan and off-site emergency planning, and poses an increased risk to the health and safety of Vermont citizens in violation of NRC regulatory requirements 10 C.F.R. § 50.54(q)(4) and Appendix E to Part 50.<sup>75</sup>

Vermont claimed that there are several purported deficiencies in Entergy's exemption request and license amendment application; these include a lack of implementing procedures, which Vermont argued were necessary for the state to respond effectively to

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<sup>73</sup> See *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158-59 (2011) (applying the stay factors in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001), which focus on whether continuing the adjudication will jeopardize health and safety, impede fair and efficient decision making, and hinder implementation of rule or policy changes); *Shearon Harris*, CLI-09-8, 69 NRC at 329 (declining to hold the adjudicatory proceeding on a combined license application in abeyance pending the completion of the design certification rulemaking for the design referenced in the application).

<sup>74</sup> See Final Environmental Assessment, 80 Fed. Reg. at 47,962-63; *Comments of the State of Vermont* (June 1, 2015) (ML15159A183).

<sup>75</sup> Hearing Request at 6.

an emergency at the plant.<sup>76</sup> In addition, Vermont asserted that the exemption request and license amendment application would leave Entergy with “no effective means” to communicate critical information to the state during an emergency; that they fail to analyze all credible beyond-design-basis accident scenarios, including those arising from hostile action; that they fail to address heightened safety concerns from the presence of high-burnup fuel; and that they fail to adopt effective radiation monitoring standards.<sup>77</sup> Vermont concludes that the license amendment application and exemption request would result in a “clear reduction in emergency plan effectiveness that cannot meet the requirements of 10 CFR § 50.54(q)(4) and companion Part 50, Appendix E emergency plan requirements.”<sup>78</sup>

Entergy and the Staff, however, both have acknowledged that the exemption request and the license amendment application would reduce the effectiveness of the current Vermont Yankee emergency plan.<sup>79</sup> That fact is not in dispute. The reduction in effectiveness is the reason that Entergy must obtain NRC approval to amend its Emergency Plan and Emergency Action Level Scheme.<sup>80</sup> The relevant issue here is the

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<sup>76</sup> *Id.* at 6-8; *see also* Vermont Division of Emergency Management and Homeland Security Comments at 5.

<sup>77</sup> Hearing Request at 7-9; *see also* Vermont Department of Public Service Comments at 1-3; Vermont Division of Emergency Management and Homeland Security Comments at 4-5; Vermont Department of Health Comments at 2, 4-6.

<sup>78</sup> Hearing Request at 8. Vermont also alludes to the proposed revisions as discontinuing a federal requirement for Entergy to support state planning and monitoring activities and advances a more specific request for the NRC to require Entergy to financially support state agencies that would be responsible for responding to an emergency under the revised plan. *See id.* at 6; Vermont Division of Emergency Management and Homeland Security Comments at 7; Vermont Department of Health Comments at 7. The NRC’s regulations do not require a licensee to provide funding to state or local organizations as part of its emergency planning. The provision of such funding to Vermont is therefore a matter beyond this proceeding’s scope.

<sup>79</sup> *See, e.g.*, SECY-14-0125, at 3-4; License Amendment Application at 1.

<sup>80</sup> *See* 10 C.F.R. § 50.54(q)(4).

safety of Entergy's proposal given the plant's shutdown and defueled status. And although Vermont has catalogued a number of concerns, Vermont's arguments do not articulate an admissible contention with respect to the proposed Permanently Defueled Emergency Plan and Permanently Defueled Emergency Action Level Scheme.

For example, Vermont's claim that there would be "no effective" means of communication between Entergy and Vermont in the event of an emergency does not include supporting facts or opinion to demonstrate a genuine dispute—in particular, Vermont does not address the fact that the notification requirements will remain "largely unchanged" under the exemption request and license amendment application, except for an increase in notification time limits from fifteen minutes to one hour.<sup>81</sup> Similarly, Vermont's claim regarding the presence of high-burnup fuel does not specifically challenge Entergy's consideration of high-burnup fuel in the exemption request.<sup>82</sup> Additionally, Vermont's claim that Entergy should consider additional accident scenarios, including hostile action, did not explain why the analyses that Entergy relied upon in its exemption request and license amendment application are inadequate.<sup>83</sup> Vermont's argument regarding the lack of effective radiation monitoring standards similarly falls short.<sup>84</sup> Although expert declarations may serve as support for a proposed contention,

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<sup>81</sup> Entergy Answer at 35-36; Exemption Request, Attachment 1, at 20-21; License Amendment Application, Attachment 1, at 1.

<sup>82</sup> See Entergy Answer at 32 (citing Exemption Request, Attachment 2, at 5-6).

<sup>83</sup> See *id.* at 28-32; Staff Answer at 32-36.

<sup>84</sup> See Staff Answer at 37.

the statements from Vermont's experts are conclusory in nature and do not provide the rationale that is missing from Vermont's hearing request.<sup>85</sup>

Nor did Vermont explain why the purported deficiencies in Entergy's proposal would be required under NRC regulations, i.e., that they would be material to the NRC's decision on the exemption request and license amendment application.<sup>86</sup> Vermont asserted that Entergy must provide implementing procedures with its proposed revisions, but it did not explain why the procedures would be necessary at this stage for Entergy to comply with the emergency planning requirements. Vermont's claims amount to generalized grievances and are insufficient to establish a genuine, material dispute with either application.<sup>87</sup> Contention 2 is inadmissible.

#### **B. Vermont's Petition for Reconsideration**

The authority to reconsider our actions is inherent in our authority to make them in the first instance.<sup>88</sup> There is, however, no procedural mechanism for an external entity to seek revisions to a Commission direction to the Staff in a Staff Requirements Memorandum—the type of decision that Vermont asks us to reverse here.<sup>89</sup> The provisions that Vermont references as authority for its petition—10 C.F.R. §§ 2.341(d) and 2.345—govern reconsideration of adjudicatory decisions, and do not apply to the directives we issue to the Staff outside of an adjudicatory proceeding.<sup>90</sup> As a general matter, our Staff Requirements

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<sup>85</sup> See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (explaining that conclusory statements, even if made by an expert, are insufficient to support the admission of a contention).

<sup>86</sup> See 10 C.F.R. § 2.309(f)(1)(iv).

<sup>87</sup> See *id.* § 2.309(f)(1)(v), (vi).

<sup>88</sup> *U.S. Department of Energy (High-Level Waste Repository)*, CLI-14-1, 79 NRC 1, 2 (2014).

<sup>89</sup> *Id.* at 3-4.

<sup>90</sup> See Petition for Reconsideration at 1.

Memoranda are not subject to reconsideration. But purely as a matter of discretion, we consider Vermont's petition. As discussed below, however, we are not persuaded to reverse our decision.

First, Vermont argues that our Staff Requirements Memorandum violates NRC precedent that requires a hearing opportunity when an exemption request is directly related to a license amendment application.<sup>91</sup> Our decision today addresses this point. And in raising contentions that challenge the matters underlying both the exemption request and the license amendment application, Vermont has received that opportunity. Vermont also filed comments that addressed both the exemption request and the license amendment application.<sup>92</sup>

Second, Vermont argues that the Staff Requirements Memorandum violates the National Environmental Policy Act (NEPA).<sup>93</sup> Vermont claims that our decision granted the exemption request, amounting to a "major federal action" that required an environmental analysis.<sup>94</sup> Vermont's characterization of our action, however, is incorrect.<sup>95</sup> In any event, the Staff performed the requisite environmental analysis here. After the issuance of the Staff Requirements Memorandum and prior to issuing a decision on the exemption request, the Staff—consistent with the NRC's obligations under NEPA—prepared an Environmental Assessment.<sup>96</sup> And although NEPA does not require it, the Staff published the draft

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<sup>91</sup> See *id.* at 1, 4.

<sup>92</sup> The Staff considered and responded to these comments in the Safety Evaluation Report for the license amendment. See Issuance of License Amendment, Enclosure 2, at 40-47.

<sup>93</sup> Petition for Reconsideration 1.

<sup>94</sup> *Id.* at 6.

<sup>95</sup> In its more recent filings, Vermont characterizes our action accurately, thereby moving away from this argument. See, e.g., Appeal at 7 (acknowledging that we did not "approve[] the exemption request, but . . . accepted the Staff's recommendation that the exemption request be granted by the Staff").

<sup>96</sup> See Draft Environmental Assessment, 80 Fed. Reg. at 24,291.

Environmental Assessment for public comment. Vermont submitted comments on the draft, which the Staff addressed in the final Environmental Assessment.<sup>97</sup> Only after the completion of the NEPA process did the Staff complete its review and issue the exemptions. The agency's obligations under NEPA therefore have been fulfilled.

Finally, Vermont argues that we should review existing emergency planning and response obligations that Entergy has to the State beyond those required by NRC regulations that are reflected in memoranda of understanding and letters of agreement between Entergy and the State of Vermont.<sup>98</sup> State and local governments play a vital role in emergency planning; indeed, they serve on the front lines of any emergency event within their jurisdiction. And we acknowledge that the State of Vermont and the local communities in the vicinity of Vermont Yankee have a strong interest in the decommissioning activities that will be undertaken at the plant. Our regulatory processes provide an opportunity for interested governmental entities and members of the public to express their views and to learn more about what to expect over the decommissioning phase. The Staff has held public meetings near the plant and, more recently, has sought public comment to help the agency develop the regulatory basis for a rule that will improve the existing regulations by tailoring them for decommissioning plants, including our emergency planning requirements.<sup>99</sup> Although the plant has shut down, the agency's safety and security oversight has not ceased, and we continue to ensure that Entergy remains in compliance with our regulations. To the extent, however, that Vermont and Entergy

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<sup>97</sup> See Final Environmental Assessment, 80 Fed. Reg. at 47,962-63. On the basis of the Environmental Assessment, the Staff concluded that the proposed action "will not have a significant effect on the quality of the human environment" and therefore that it would not prepare an environmental impact statement. *Id.* at 47,963; see 10 C.F.R. § 51.20(a)(1) (requiring the agency to prepare an environmental impact statement under NEPA for major actions that have a significant environmental effect).

<sup>98</sup> Petition for Reconsideration at 9-10.

<sup>99</sup> See Advance Notice of Proposed Rulemaking, 80 Fed. Reg. at 72,358.

have agreed to requirements beyond those imposed by our regulations, any changes to those requirements must be negotiated between the two parties themselves. We decline to step into the middle of a dispute that resides outside of our jurisdiction. Our decision on the Staff's recommendation, reflected in SRM-SECY-14-0125, stands.

### III. CONCLUSION

As discussed above, we find that Vermont has not raised an admissible contention, and we therefore *affirm* the Board's decision denying the hearing request. Additionally, we *consider* as a matter of discretion Vermont's petition for reconsideration, but *sustain* our approval of the Staff's recommendation to grant the exemption request. We *terminate* the proceeding.

IT IS SO ORDERED.

For the Commission

**NRC Seal**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 23<sup>rd</sup> day of June, 2016.

## **Additional Views of Commissioner Svinicki**

I fully join my colleagues' conclusion that neither of Vermont's contentions meets our contention admissibility requirements regardless of whether the contentions are within the scope of this proceeding. Thus, as the Board concluded, I do not see a reason to "test the boundaries of the . . . *Private Fuel Storage* decision"<sup>1</sup> to answer the scope question since we have effectively decided this case on other grounds. Nonetheless, if confronted with the issue, I would disagree with my colleagues and find Vermont's contentions out of scope because *Private Fuel Storage* is distinguishable from the instant case.

In *Private Fuel Storage* the Commission provided a critical explanation of the principles underlying its holding.

To speak in terms of a hearing on [an] exemption is a convenient shorthand, which we ourselves use in today's Order. It is important to recognize at the outset, though, that the certified question does not focus directly on the exemption itself, but, as the Board said, "on exemption-related matters." At bottom, what Utah proposes to litigate is whether [the applicant's] ISFSI design, which is dependent on an exemption from otherwise controlling seismic regulations, is adequate to withstand plausible earthquake risks.<sup>2</sup>

Thus, *Private Fuel Storage* rests on the core insight that the AEA does not provide an opportunity to seek a hearing on exemption requests even when an exemption request is "related" to a licensing action. Rather, when there are matters within the scope of a licensing action that are also the subject of an exemption request, then the exemption request does not remove those matters from the scope of the licensing proceeding. Viewed in this light, the exemption request at issue in *Private Fuel Storage* appears significantly different than the exemption request at issue in this proceeding. The former replaced one set of regulatory requirements with another while the latter removes a set of regulatory requirements altogether. Because of this difference, the two exemptions have very different effects on their related licensing proceedings, as explained below.

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<sup>1</sup> LBP-15-18, 81 NRC at 797.

<sup>2</sup> *Private Fuel Storage*, CLI-01-12, 53 NRC at 465-66 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 100 (2001)).



In *Private Fuel Storage* the applicant for an ISFSI in Utah sought an exemption from 10 C.F.R. § 72.102, which required an ISFSI applicant west of the Rocky Mountain Front to perform a deterministic seismic hazards analysis to meet the seismic evaluation and design standards for licensing.<sup>3</sup> Instead, the applicant proposed to calculate the design earthquake for the facility using a more recent probabilistic approach, “in accordance with the guidance in Regulatory Guide 1.165, and applying the risk-informed approach of 10 C.F.R. Part 60.”<sup>4</sup> Ultimately, the Staff approved the exemption request and thereby allowed the applicant to demonstrate the adequacy of the facility’s seismic design through an alternate methodology.<sup>5</sup> Consequently, the adequacy of the applicant’s *alternate* demonstration was within the scope of the underlying license proceeding and a topic suitable for a hearing.<sup>6</sup> Otherwise, the petitioners would have been unable to challenge a critical part of the safety analysis simply because it also happened to be the subject of an exemption.

In contrast, the exemption request at issue in this proceeding completely exempts Vermont Yankee from certain regulatory requirements in 10 C.F.R. § 50.47 and 10 C.F.R. part 50, Appendix E, which largely relate to emergency planning for the off-site consequences of accident scenarios that are no longer credible at the site.<sup>7</sup> Neither the exemption request nor its approval substitutes those regulations with alternate requirements.<sup>8</sup> As a result, the effect of the exemption request on this licensing proceeding is fundamentally different than the effect the exemption request had on

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<sup>3</sup> *Id.* at 461, 463.

<sup>4</sup> *Id.* at 463 (internal quotation marks omitted).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 467. Moreover, as a corollary, because the exemption from the regulation was granted, and the new standard imposed by the Staff was not within an applicable regulation, the question of whether the new standard was adequate itself was also within the scope of the proceeding. *Id.* at 470.

<sup>7</sup> Exemption Request, Attach. 1.

<sup>8</sup> SRM-SECY-14-0125; SECY-14-0125.

the *Private Fuel Storage* licensing proceeding. Because the exemption request in *Private Fuel Storage* exempted the applicant from one set of seismic requirements but imposed another set of requirements, the issue of the plant's seismic adequacy remained in the licensing proceeding. In contrast, in this proceeding the exemption request exempted the licensee from a set of emergency planning requirements altogether and without imposing replacement requirements; as a result, the issue of whether the license amendment application meets the exempted requirements is no longer within the scope of this proceeding.

As a result, the license amendment request in this proceeding does not attempt to show compliance with the exempted regulations or compliance with an alternate set of requirements, as the license application in *Private Fuel Storage* was required to do.<sup>9</sup> Instead, the license amendment request attempts to demonstrate compliance with the regulations that remain applicable to the facility after the exemption. Rather than challenge Entergy's compliance with the remaining applicable regulations, Vermont's challenges essentially seek to question whether Entergy should still be required to meet the exempted regulatory provisions.<sup>10</sup> Consequently, the issues that Vermont seeks to litigate, predominantly related to off-site emergency planning, are outside of this proceeding's scope.<sup>11</sup> To hold otherwise would allow Vermont to do what we have long held the Atomic Energy Act does not provide for: seek a hearing on the adequacy of an exemption request itself.<sup>12</sup>

Nonetheless, Vermont argues that *Private Fuel Storage* supports its request for a hearing on the exemption request.<sup>13</sup> Vermont contends that *Private Fuel Storage* stands for the proposition

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<sup>9</sup> License Amendment Application; see *Private Fuel Storage*, CLI-01-12, 53 NRC at 467 ("The safe design of the facility is a matter that [the applicant] must establish to obtain a license.").

<sup>10</sup> Hearing Request at 3-10.

<sup>11</sup> 10 C.F.R. § 2.309(f)(1)(iii).

<sup>12</sup> *Private Fuel Storage*, CLI-01-12, 53 NRC at 466; *Zion*, CLI-00-05, 51 NRC at 96-98.

<sup>13</sup> Appeal at 9-12.

that the Commission does not only grant “a hearing on exemption requests that are directly related to an already-admitted contention. The proper focus is on *whether the exemption is necessary for the applicant to obtain an initial license or amend its license.*”<sup>14</sup> Vermont notes that the license amendment request is dependent on the exemption request.<sup>15</sup> Thus, Vermont concludes, “Because ‘the exemption is necessary for the applicant to . . . amend its license,’ it ‘trigger[s] the right to a hearing under the AEA.’”<sup>16</sup>

Vermont advances an interpretation of *Private Fuel Storage* that appears reasonable on the surface. However, Vermont’s argument ultimately rests on an insufficiently nuanced reading of that case. As noted above, the Commission in *Private Fuel Storage* explicitly cautioned that speaking “in terms of a hearing on [the applicant’s] exemption is a convenient shorthand.”<sup>17</sup> The Commission clarified that the issue actually before it was whether the licensing hearing could include “exemption-related matters.”<sup>18</sup> Vermont’s arguments do not address this pivotal distinction. Rather, Vermont reads the Commission’s “shorthand” literally and seeks a hearing on the exemption request itself without any showing that the issues it seeks to litigate are part of the instant licensing action, like the seismic design in *Private Fuel Storage*. As a result, Vermont would greatly expand *Private Fuel Storage* to essentially allow a hearing on an exemption request whenever it happened to be accompanied by an implementing license amendment. Such a holding would significantly undermine our long-standing conclusion that Congress purposefully

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<sup>14</sup> *Id.* at 10 (quoting *Private Fuel Storage*, CLI-01-12, 54 NRC at 470 (emphasis added in Appeal)).

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* (quoting *Private Fuel Storage*, CLI-01-12, 54 NRC at 470 (omission and alteration in original)).

<sup>17</sup> *Private Fuel Storage*, CLI-01-12, 54 NRC at 465.

<sup>18</sup> *Id.* (internal quotation marks omitted).

declined to require hearings on exemptions.<sup>19</sup> Therefore, I would decline to adopt Vermont's reading of *Private Fuel Storage*.

Vermont reminds us that *Private Fuel Storage* warned against “exclud[ing] critical safety questions from licensing hearings merely on the basis of an ‘exemption’ label.”<sup>20</sup> As *Private Fuel Storage* recognized, the exemption request cannot “remove a matter germane to a licensing proceeding from consideration in a hearing.”<sup>21</sup> However, by exempting the applicant from certain regulatory requirements, the exemption request at issue in this proceeding shapes the scope of the requirements the applicant must meet.<sup>22</sup> While this impacts the licensing proceeding, it does so in a way that we have consistently held is not susceptible to challenge in NRC licensing proceedings.<sup>23</sup> Thus, the challenges Vermont raises, while certainly germane to the exemption, are not germane to the licensing action at hand. Ignoring this distinction would elevate form over substance and allow a petitioner to raise wide-ranging challenges to an exemption request, which the Commission has never allowed, based on the happenstance of a temporal connection between an exemption request and a following license amendment request.

For these reasons, I do not join my colleagues' discussion of whether *Private Fuel Storage* is controlling precedent for this case and would instead find Vermont's contentions to be outside the scope of this proceeding.

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<sup>19</sup> *Zion*, CLI-00-05, 51 NRC at 96-98.

<sup>20</sup> Appeal at 11 (quoting *Private Fuel Storage*, CLI-01-12, 53 NRC at 467).

<sup>21</sup> *Private Fuel Storage*, CLI-01-12, 53 NRC at 467.

<sup>22</sup> In that sense, an exemption is similar to our regulations, which also shape the scope of our licensing proceedings in a manner that is not normally open to adjudicatory challenges. *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 380 (2012) (explaining that “a contention may not challenge an agency rule or regulation in any adjudicatory proceeding absent a waiver”).

<sup>23</sup> *Id.* at 466; *Zion*, CLI-00-05, 51 NRC at 96-98.

## **Commissioner Baran, Concurring in Part and Dissenting in Part**

I concur in part with and dissent in part from the Commission's decision.

I agree with the portion of the decision that discusses the Commission's *Private Fuel Storage* decision and finds that matters related to Entergy's exemption request are sufficiently related to the company's license amendment request to entitle the State of Vermont to challenge the substance of the exemptions in this proceeding. I also join the majority in its decision to consider Vermont's Motion for Reconsideration as a matter of discretion.

However, I respectfully dissent from the portions of the decision that (1) address contention admissibility and (2) sustain the Commission's prior approval of the Staff's recommendation to grant the exemption request. The Board did not address the admissibility of the contentions as they were proposed because the Board deferred to the Commission's previous approval of Entergy's exemption and decided that it would be improper for the Board to rule on the appropriateness of the Commission's action. Therefore, the Board limited its inquiry to whether Vermont raised an admissible contention with the regulations as exempted. Given its understandably narrow reading of the question before it, the Board found Contentions 1 and 2 inadmissible. However, the Commission has now determined that the issue of whether the exemption should be granted is directly linked to the question of whether the license amendment request should be granted, and the Commission has agreed to consider Vermont's Motion for Reconsideration as a matter of discretion. Therefore, I would remand Contentions 1 and 2 to the Board to make a fresh contention admissibility determination taking into account today's decision, and I would hold Vermont's Motion for Reconsideration in abeyance until after the Board's new contention admissibility decision, any potential hearing, and any potential appeals. As the Commission recently emphasized, threshold issues such as contention admissibility are ordinarily decided by our Boards in the first instance.<sup>1</sup>

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<sup>1</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-14, 81 NRC 729, 735 n.27 (2015) (citing *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 560 & n.36 (2013) ("Licensing boards are the

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appropriate finders of fact in most circumstances; referral of a matter for a fact-specific dispute occurs in the ordinary course of business.”)).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
ENTERGY NUCLEAR VERMONT YANKEE, LLC ) Docket No. 50-271-LA-2  
AND ENTERGY NUCLEAR OPERATIONS, INC. )  
)  
(Vermont Yankee Nuclear Power Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-16-12)** have been served upon the following persons by the Electronic Information Exchange.

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**COMMISSION MEMORANDUM AND ORDER (CLI-16-12)**

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[Original signed by Clara Sola \_\_\_\_\_]  
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Dated at Rockville, Maryland  
this 23<sup>rd</sup> day of June, 2015