

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

ENTERGY NUCLEAR VERMONT YANKEE, LLC)
AND ENTERGY NUCLEAR OPERATIONS, INC.)

(Vermont Yankee Nuclear Power Station))

Docket No. 50-271-LA-3

July 31, 2015

**ENTERGY'S ANSWER OPPOSING STATE OF VERMONT'S NEW CONTENTION V
AND ADDITIONAL BASES FOR PENDING CONTENTIONS I, III, AND IV**

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I. INTRODUCTION AND BACKGROUND

Pursuant to 10 C.F.R. § 2.309(i), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) submit this Answer opposing the motion for leave to file a new proposed Contention V and additional bases for pending Contentions I, III, and IV (“Motion”)¹ that the State of Vermont (“State”) filed on July 6, 2015. As explained below, the Atomic Safety and Licensing Board (“Board”) should deny the Motion.

By way of background, on February 17, 2015, the U.S. Nuclear Regulatory Commission (“NRC”) published in the *Federal Register* a notice of opportunity to request a hearing (“Hearing Notice”)² on Entergy’s September 4, 2014 license amendment request (“LAR”)³ for the Vermont Yankee Nuclear Power Station (“Vermont Yankee”). The LAR seeks NRC approval to exercise the option authorized in 10 C.F.R. § 50.75(h)(5) to delete certain license conditions related to

¹ State of Vermont’s Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV (July 6, 2015) (“Motion”).

² Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8359 (Feb. 17, 2015) (“Hearing Notice”).

³ BVY 14-062, Letter from C. Wamser to NRC Document Control Desk, Proposed Change No. 310 – Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions (Sept. 4, 2014) (“LAR”), available at ADAMS Accession No. ML14254A405.

nuclear decommissioning trust (“NDT”) funds and, instead, be governed by the NDT provisions in 10 C.F.R. §§ 50.75(h)(1)-(3).⁴

The State filed a Petition for Leave to Intervene and Hearing Request (“Petition”) on April 20, 2015 with four proposed contentions that remain pending before the Board.⁵

Contention I alleges that the LAR involves a significant hazard, fails to demonstrate compliance with NRC regulations, and fails to demonstrate adequate protection for public health and safety.⁶

Contention II alleges that the LAR is untimely.⁷ Contention III alleges that a separate request for exemptions, submitted by Entergy on January 6, 2015 (“Exemption Request”),⁸ related to the use of NDT funds for irradiated fuel management expenses, must be considered as part of the LAR.⁹

Contention IV alleges that the LAR is not categorically excluded from environmental review.¹⁰

Entergy and the NRC Staff opposed the admission of all four contentions on May 15, 2015.¹¹

The NRC issued the requested exemptions on June 23, 2015.¹² The State thereafter filed the current Motion that includes (1) a new proposed Contention V, which claims that the LAR is now inaccurate pursuant to 10 C.F.R. §§ 50.9 and 50.90 and fails to comply with 10 C.F.R. §

⁴ *Id.* at 1.

⁵ State of Vermont’s Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) (“Petition”).

⁶ *See id.* at 3.

⁷ *See id.* at 17.

⁸ BVEY 15-002, Letter from C. Wamser to NRC Document Control Desk, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) (Jan. 6, 2015) (“Exemption Request”), *available at* ADAMS Accession No. ML15013A171.

⁹ Petition at 20.

¹⁰ *See id.* at 26.

¹¹ Entergy’s Answer Opposing State of Vermont’s Petition for Leave to Intervene and Hearing Request (May 15, 2015) (“Entergy Answer”); NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request (May 15, 2015). The State filed its Reply on May 22, 2015. The State of Vermont’s Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (May 22, 2015).

¹² Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992 (June 23, 2015) (“Exemption Issuance”). The exemptions were immediately effective. *See id.* at 35,995.

50.75(h)(5) due to the issuance of the exemptions¹³; and (2) a request to add additional bases for pending Contentions I, III, and IV also related to issuance of the exemptions.¹⁴ The Motion repeats many of the same arguments made in the Petition, but repackages them in the context of the issued exemptions.

As demonstrated below, the Motion should be rejected for multiple, independent reasons. First, the Motion is untimely because it does not satisfy the requirements in 10 C.F.R. § 2.309(c)(1) for filings after the original deadline. The Motion relies upon the issuance of the exemptions, but Entergy's Exemption Request and the effect of issuing the exemptions were well known at the time the State filed the Petition. Indeed, the State raised numerous arguments across Contentions I, III, and IV related to the Exemption Request. Moreover, even if the *issuance* of the exemptions itself is considered to be new information, the *substance* of the issuance (*i.e.*, the regulations exempted and the rationale for issuance) is not materially different than the information presented in the Exemption Request for the purposes of contention admissibility. Therefore, the Motion is untimely.

Contention V also should be rejected for failure to satisfy the Commission's contention admissibility requirements in 10 C.F.R. § 2.309(f). In particular, Contention V fails to demonstrate a genuine dispute of material law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi), as it misconstrues the relationship between the LAR and issued exemptions. The LAR and the exemptions are separate and distinct licensing actions and should not be considered together.

Furthermore, Contention V is an impermissible challenge to the NRC's regulations and regulatory process, and thus outside the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii). In this regard, the State again challenges 10 C.F.R. § 50.75(h), and the

¹³ See Motion at 4.

¹⁴ See *id.* at 7.

Commission's generic findings in the 2002 Decommissioning Trust Provisions rulemaking ("NDT Rulemaking"),¹⁵ which explicitly permit deletion of NDT license conditions in place of compliance with the Section 50.75(h) NDT provisions, and do not prohibit exemptions from those regulations.

The State's arguments regarding the exemptions and other topics also go beyond the scope of this hearing as set forth in the Hearing Notice. In this regard, the Commission's long-standing regulatory framework establishes a clear distinction between exemptions and license amendments. The two regulatory actions are governed by separate regulations, subject to separate regulatory reviews, and are evaluated using separate standards and separate processes for public participation. Here, the LAR is the subject of this proceeding; the exemptions are not. The State's claims are outside the scope of this proceeding, and therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

The State's attempts to supplement the bases for Contentions I, III, and IV likewise should be rejected. As Entergy explained in its answer opposing the original filing of these contentions, Contentions I, III, and IV are inadmissible for many reasons.¹⁶ The issuance of the exemptions does not cure the deficiencies with these contentions, particularly given that the State already knew about and raised arguments about the Exemption Request in those contentions.

For these many reasons, the Motion is untimely, Contention V is inadmissible, and the alleged bases do not remedy the deficiencies in Contentions I, III, and IV. Therefore, the Motion should be denied in its entirety.

¹⁵ See Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002); *see also* Minor Changes to Decommissioning Trust Fund Provisions, 68 Fed. Reg. 65,386, 65,387 (Nov. 20, 2003).

¹⁶ See Entergy Answer at 13-26, 29-43.

II. LEGAL STANDARDS

A. Timeliness

Pursuant to the Hearing Notice¹⁷ and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired on April 20, 2015, months prior to the State filing the Motion. As the Commission explained in *Vermont Yankee*: “We likewise frown on intervenors seeking to introduce a new contention later than the deadline established by our regulations, and we accordingly hold them to a higher standard for the admission of such contentions.”¹⁸

A motion for leave to file a new or amended contention after the original deadline must meet the requirements of 10 C.F.R. § 2.309(c)(1), which states:

Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

B. Contention Admissibility

Under 10 C.F.R. § 2.309(f)(1), a hearing request “must set forth with particularity the contentions sought to be raised.” Section 2.309(f)(1) identifies the six admissibility criteria for

¹⁷ Hearing Notice, 80 Fed. Reg. at 8355.

¹⁸ *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 338 (2011).

each proposed contention.¹⁹ Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.²⁰ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”²¹

Of particular relevance here is the longstanding principle that a contention challenging an NRC rule or the basic structure of the Commission’s regulatory process is outside the scope of the proceeding under 10 C.F.R. § 2.309(f)(1)(iii) and, therefore, inadmissible.²² “This includes contentions that advocate stricter requirements than agency rules impose, or that otherwise seek to litigate a generic determination established by a Commission rulemaking.”²³ “Additionally, the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner’s own view regarding the direction regulatory policy should take.”²⁴

For license amendment proceedings, such as this one, the scope of a proceeding is defined by and restricted to the Commission’s notice of opportunity for a hearing.²⁵ The Hearing Notice for this proceeding states: “Contentions shall be limited to matters within the scope of the

¹⁹ Those criteria are: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner’s position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.

²⁰ See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

²¹ Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

²² *Phila. Elec. Co.* (Peach Bottom Atomic Power Station), ALAB-216, 8 AEC 13, 20, *aff’d in part on other grounds*, CLI-74-32, 8 AEC 217 (1974); see also 10 C.F.R. § 2.335(a) (absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding”).

²³ *Crow Butte Res., Inc.* (Marsland Expansion Area), LBP-13-6, 77 NRC 253, 284 (2013), *aff’d*, CLI-14-2, 79 NRC 11 (2014) (citing several previous decisions holding the same).

²⁴ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008) (citing *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33).

²⁵ See *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

amendment under consideration.”²⁶ Any contention that falls outside the specified scope of the proceeding must be rejected.²⁷ Therefore, contentions that challenge separate licensing actions and submittals, such as the Exemption Request, are not admissible in this proceeding.

III. THE MOTION IS UNTIMELY

As discussed above, the Motion includes two requests. The first request is to admit a new Contention V, which alleges:

The license amendment request should be denied because it is no longer accurate within the meaning of 10 C.F.R. §§ 50.9 and 50.90, does not meet the requirements of 10 C.F.R. § 50.75(h)(5), and because Entergy is no longer in compliance with other provisions of 10 C.F.R. §§ 50.75(h) and 50.82(a)(8)(i)(A)[.]²⁸

In short, Contention V claims that the pending LAR is inaccurate because it fails to address the recent issuance of the requested NDT exemptions.²⁹ The second request is to supplement the bases for pending Contentions I, III, and IV to also reflect the issuance of the exemptions.

The State filed the Motion after the original deadline for contentions in this proceeding. The Motion, however, does not satisfy the requirements in 10 C.F.R. § 2.309(c)(1) for good cause for filings after the original deadline.

First, the information upon which the Motion is based was previously available, contrary to 10 C.F.R. § 2.309(c)(1)(i). As explained above, proposed Contention V and the request to supplement the bases of pending Contentions I, III, and IV relate to the NRC’s June 23, 2015 issuance of exemptions for Vermont Yankee from NDT requirements. The NRC, however,

²⁶ Hearing Notice, 80 Fed. Reg. at 8357.

²⁷ *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) (affirming the board’s rejection of issues raised by intervenors that fell outside the scope of issue identified in the notice of hearing); *see also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998).

²⁸ Motion at 4.

²⁹ *See id.* at 4-6.

issued the exact exemptions that Entergy had requested on January 6, 2015, six months prior to the State submitting its Motion.³⁰ Thus, the State knew about the requested exemptions well before filing its original Petition and should have included all related arguments in that filing. Indeed, pending Contentions I, III, and IV all discuss the Exemption Request, including the claim that the Exemption Request is “inextricably intertwined” with the LAR.³¹ The State concedes this in the Motion, stating that “Entergy filed its request for the exemptions months ago, and the request and its implications were a focus of the State’s Petition to Intervene.”³² The State’s attempts to now add purported new arguments that it could have raised months ago must be rejected.³³

Additionally, even if the Board were to consider the issuance of the exemptions to be new information, it cannot be considered to be materially different from information previously available, contrary to 10 C.F.R. § 2.309(c)(1)(ii). The Commission has consistently held that the publication of a new document does not meet these requirements unless the *facts* in that document are new and materially different from what was previously available.³⁴ Here, the NRC issued the exact exemptions that were requested by Entergy.³⁵ Thus, in the context of the State’s Motion, the facts presented in the *issuance* of the exemptions are not materially different than those in the *application* requesting the exemptions. Indeed, all of the State’s arguments in

³⁰ Compare Exemption Request at 1, with Exemption Issuance, 80 Fed. Reg. at 35,992-995.

³¹ See Petition at 3-17, 20-31.

³² Motion at 2.

³³ See, e.g., *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 53 (2010) (concluding that attempts to “rehash” old arguments are untimely).

³⁴ See, e.g., *Vermont Yankee*, CLI-11-02, 73 NRC at 344; see also *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 493-96 (2010).

³⁵ Compare Exemption Request at 1, with Exemption Issuance, 80 Fed. Reg. at 35,992-995.

Contention V equally apply to the Exemption Request. The State, therefore, should have raised the arguments in Contention V as part of its original Petition.

Similarly, the State's attempt to amend the bases of Contentions I, III, and IV to reference the issuance of the exemptions does not provide materially different information. Indeed, the State's request to supplement the bases does not rely upon the actual issuance of the exemptions, but instead simply repeats earlier arguments about the NDT withdrawal notice requirements.³⁶ For example, Contention I already reflects that issuance of the exemptions and granting the LAR would authorize withdrawals from the NDT fund for irradiated fuel management without the 30-day notifications.³⁷ The actual issuance of the exemptions does not provide materially different information.

For these reasons, the information upon which the Motion is based was previously available and the Motion is not based on materially different information. Therefore, the Motion does not satisfy the requirements in 10 C.F.R. § 2.309(c)(1) and must be rejected as untimely.

IV. CONTENTION V IS INADMISSIBLE

Even if the Motion were timely filed, Contention V should nonetheless be denied, because it is inadmissible under 10 C.F.R. § 2.309(f). As demonstrated below, it does not demonstrate a genuine dispute with the LAR, is an impermissible challenge to NRC regulations, raises issues outside the scope of this proceeding, and is not properly supported.

A. Contention V Does Not Demonstrate a Genuine Dispute on a Material Issue of Fact or Law

The State's claims that the LAR is not complete and accurate under 10 C.F.R. §§ 50.9 and 50.90 and does not satisfy the requirements of 10 C.F.R. § 50.75(h)(5) are all based on its

³⁶ See Motion at 7.

³⁷ See, e.g., Petition at 5-6.

conclusion that the LAR must be revised to reflect the separately-issued exemptions.³⁸ These claims, however, are based on a flawed understanding of the relationship between the LAR and the issued exemptions, and the exemption process in general. Therefore, Contention V does not demonstrate a genuine dispute on a material issue of fact or law, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

1. The State's Arguments Regarding Completeness and Accuracy of the LAR Should Be Rejected

The LAR and the Exemption Request were, and continue to be, separate and distinct licensing actions with separate purposes and separate results. Entergy submitted the LAR on September 4, 2014, pursuant to 10 C.F.R. § 50.90, seeking NRC approval to exercise its option to eliminate portions of Condition 3.J. from the Vermont Yankee license in favor of complying with the regulatory requirements in 10 C.F.R. § 50.75(h).³⁹ This action was consistent with the Commission's statements during the NDT Rulemaking that "licensees will have the option of maintaining their existing license conditions or submitting to the new requirements,"⁴⁰ and "will be able to decide *for themselves* whether they prefer to keep or eliminate their specific license conditions."⁴¹ One of the results of approval of the LAR would be the authorized elimination of certain 30-day notification requirements under Section 50.75(h)(1)(iv).⁴²

³⁸ See Motion at 4-6.

³⁹ See LAR at 1.

⁴⁰ Decommissioning Trust Provisions, 67 Fed. Reg. at 78,335.

⁴¹ *Id.* at 78,339 (emphasis added).

⁴² Entergy views its LAR as similar to a nearly-identical license amendment request approved by the NRC in May 2003 for Comanche Peak. See Letter from D. Jaffe, NRC, to C. Terry, TXU Energy, Comanche Peak Steam Electric Station (CPSES), Units 1 and 2 – Issuance of Amendments Re: Deletion of Unnecessary License Conditions and Reporting Requirements (TAC Nos. MB5770 and MB5771) (May 15, 2003), *available at* ADAMS Accession No. ML031350770. In both cases, the applicant did not seek any exemptions as part of the amendment request.

Separate from the LAR, Entergy submitted the Exemption Request on January 6, 2015, pursuant to 10 C.F.R. § 50.12, seeking (1) an exemption from 10 C.F.R. § 50.82(a)(8)(i)(A) to use a portion of the funds from the Vermont Yankee NDT for certain costs for the management of irradiated fuel, and (2) an exemption from 10 C.F.R. § 50.75(h)(1)(iv) for the same reason and to allow disbursements for irradiated fuel management activities to be made without prior notice, similar to other disbursements from the NDT.⁴³ Unlike the LAR, which addresses the applicable regulatory requirements for the entire NDT, the Exemption Request addressed only a specific subject matter—use of the NDT for certain irradiated fuel management expenses.⁴⁴ The NRC issued the requested exemptions on June 23, 2015.⁴⁵ The use of exemptions for these purposes is entirely consistent with the Commission’s expectations and precedent for other plants similarly situated.⁴⁶

In short, the LAR affects *whether the regulations or license conditions apply* to Vermont Yankee pursuant to 10 C.F.R. § 50.75(h)(5). The LAR is independent and separate from *how the regulations are applied*, which is addressed by the regulations themselves as exempted. Accordingly, Entergy continues to seek application of the regulations at 10 C.F.R. § 50.75(h) in place of the NDT license condition, and thus there is no need or requirement to modify the LAR following issuance of the exemptions. In other words, the issuance of the exemptions is separate

⁴³ See Exemption Request at 1.

⁴⁴ See LAR at 1; Exemption Request at 1.

⁴⁵ See Exemption Issuance, 80 Fed. Reg. at 35,992.

⁴⁶ See Letter from M. Orenak to T. Hobbs, Crystal River Unit 3 Nuclear Generating Plant - Exemptions from the Requirements of 10 CFR Part 50, Sections 50.82(a)(8)(i)(A) and 50.75(h)(2) (TAC No. MF3875) (Jan. 26, 2015), *available at* ADAMS Accession No. ML14247A545; Letter from C. Gratton to D. Heacock, Kewaunee Power Station - Exemptions from the Requirements of 10 CFR Part 50, Section 50.82(a)(8)(i)(A) and Section 50.75(h)(1)(iv) (TAC No. MF1438) (May 21, 2014), *available at* ADAMS Accession No. ML13337A287; Letter from T. Wengert to T. Palmisano, San Onofre Nuclear Generating Station, Units 2 and 3 - Exemptions from the Requirements of 10 CFR Part 50, Sections [sic] 50.82(a)(8)(i)(A) and Section 50.75(h)(2) (TAC Nos. MF3544 and MF3545) (Sept. 5, 2014), *available at* ADAMS Accession No. ML14101A132.

from and not material to the LAR, and need not be discussed in the LAR itself.⁴⁷ Thus, Entergy has fully satisfied the requirement in 10 C.F.R. § 50.9(a) that the LAR be complete and accurate in all material respects⁴⁸ and the requirement in 10 C.F.R. § 50.90 that the LAR “fully describ[e] the changes desired.” The State’s claims to the contrary should be rejected for not demonstrating a genuine dispute on a material issue of fact or law with the LAR.

2. The State’s Arguments Regarding Compliance with Section 50.75(h)(5) Should Be Rejected

The State’s claims that the LAR does not satisfy the requirements of Section 50.75(h)(5) also must be rejected. The LAR has been, and continues to be, consistent with 10 C.F.R. § 50.75(h)(5). Section 50.75(h)(5) states:

The provisions of paragraphs (h)(1) through (h)(3) of this section do not apply to any licensee that as of December 24, 2003, has existing license conditions relating to decommissioning trust agreements, so long as the licensee does not elect to amend those license conditions. If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.

Consistent with that provision, Entergy has elected to amend Condition 3.J. in the Vermont Yankee license in a manner that “is in accordance with the provisions of paragraph (h) of this

⁴⁷ 10 C.F.R. § 50.9(a) requires information to be complete and accurate in all *material* respects. The Commission has defined “material” information as having “a natural tendency or capability to influence a reasonable agency expert.” *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491 (1976), *aff’d*, 571 F.2d 1289 (4th Cir. 1978). For the reasons discussed above, the issuance of the exemptions would not influence an agency expert regarding the LAR, because that action is separate from the LAR. Moreover, the State’s arguments regarding 10 C.F.R. §§ 50.9(a) and 50.90 seek to elevate form over substance. The NRC is well aware of the issuance of the exemptions, whether that action is discussed in the LAR or not.

⁴⁸ One licensing board has explained that Section 50.9(a) only “mandates that the application be complete and accurate *when it is filed*, it does not require that it be supplemented or updated.” *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-11-32, 74 NRC 654, 668 n.31 (2011), *declined review*, 75 NRC 681 (2012). That board further explained that any duty to supplement and update the application would fall under the requirement in 10 C.F.R. § 50.9(b) to “notify the Commission of information identified by the applicant as having, for the regulated activity, a significant implication for *public health and safety* or *common defense and security*.” *Id.* The issuance of the requested exemptions does not have a significant implication for public health and safety or common defense and security with respect to the LAR, which addresses NDT reporting requirements and other administrative procedures.

section.” Indeed, the LAR itself seeks deletion of all of the NDT provisions in the Vermont Yankee license in exchange for compliance with Section 50.75(h). The issuance of the exemptions does not change this request, because the exemptions are separate from the LAR.

As discussed above, assuming the NRC approves the LAR, then the requirements of Section 50.75(h)(1)(iv) will apply to Vermont Yankee in place of the existing license condition. The recently-approved exemptions from Section 50.75(h)(5) would apply only to those expenses for management of irradiated fuel that are intended to be withdrawn from the NDT.⁴⁹ To be clear, Entergy is not exempted from Section 50.75(h)(1)(iv) in its entirety. For these reasons, the State’s arguments regarding Section 50.75(h)(5) do not demonstrate a genuine dispute on a material issue of fact or law.⁵⁰

The separate and distinct nature of the LAR and exemptions is further illustrated by the fact that the Exemption Request accomplishes an important purpose on its own. Specifically, the approved exemptions permit Entergy to make withdrawals from the NDT for certain irradiated fuel management expenses. The sole effect of not granting the LAR would be to continue the requirements in Condition 3.J. of the Vermont Yankee license, including the requirement to submit 30-day prior notifications to the NRC for expenses to be reimbursed from the NDT. Rejection of the LAR would not impact Entergy’s ability to withdraw certain irradiated fuel

⁴⁹ See Exemption Issuance, 80 Fed. Reg. at 35,992-995. Those expenses already have been reported to the NRC as part of the Exemption Request and are consistent with the updated irradiated fuel management program submitted pursuant to 10 C.F.R. § 50.54(bb). The requirements of Section 50.75(h)(1)(iv) would continue to apply to all other expenses.

⁵⁰ The State also incorrectly claims that Entergy has stated that “the exchange between the license provisions and the regulations can occur only if [t]he provisions in 10 CFR 50.75(h) include substantially similar decommissioning trust requirements as those found in VY OL License Condition 3.J.” Motion at 6 (quoting LAR, Attachment, at 2). Entergy made a statement regarding “substantially similar” in the LAR when it was comparing Condition 3.J. with the requirements of Section 50.75(h); Entergy did not identify a standard that would only allow the NRC to grant the LAR when the license condition and regulations are substantially similar. No such standard exists.

management expenses from the NDT. Therefore, the State's arguments regarding the use of NDT funds for irradiated fuel management are not material to the Staff's findings on the LAR.

3. The State's Arguments Regarding the 30-day Notice Provision Should Be Rejected

The State's desire to retain the 30-day notice provision, which it repeats as part of Contention V, also fails to demonstrate a genuine dispute.⁵¹ In the NDT Rulemaking in late 2002, the Commission generically determined that, for "licensees who have complied with 10 CFR 50.82(a)(4)," *i.e.*, have submitted a Post Shutdown Decommissioning Activities Report ("PSDAR"), the requirement for a "30-day disbursement notice" would cause "problems . . . for licensees during the process of decommissioning," and "would not add *any* assurances that funding is available and would duplicate notification requirements at § 50.82."⁵² Such is the case with Vermont Yankee.⁵³

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In summary, the purpose of the LAR is to delete the Vermont Yankee NDT-related license conditions and to submit the NDT to the requirements of 10 C.F.R. § 50.75(h).

Regardless of whether or not an exemption applies, the LAR stands alone as fulfilling this purpose, and this purpose is specifically contemplated by the regulations under Section

⁵¹ See Motion at 6.

⁵² Decommissioning Trust Provisions, 67 Fed. Reg. at 78,336 (emphasis added).

⁵³ The State's concerns about the elimination of the 30-day notice requirement and Entergy's planned use of decommissioning funds also are addressed by other requirements in the NRC regulations. All of the decommissioning-related activities and associated cost estimates already have been submitted to the NRC pursuant to 10 C.F.R. § 50.82(a)(4) for review as part of the PSDAR and site-specific Decommissioning Cost Estimate ("DCE"), and Entergy will continue to provide updates on the status of decommissioning funding annually pursuant to separate regulatory requirements. See 10 C.F.R. §§ 50.75(f)(2), 50.82(a)(8)(v) and (vii). Decommissioning expense reimbursements from the NDT must be consistent with the activities and costs identified in the PSDAR and DCE and with the terms of the issued exemptions, regardless of whether the license condition or the provisions of Section 50.75(h)(1)(iv) govern, or be subject to separate provisions in the regulations, which are not affected by the status of the LAR or the approved exemptions. See 10 C.F.R. §§ 50.82(a)(6), 50.82(a)(8)(i) and (vi). Those requirements ensure that the NDT remains sufficiently funded. The 30-day notifications do not add any further assurances that funding is available and duplicate the reports already made under Section 50.82 or in support of the exemption request.

50.75(h)(5). Specific to the requirements of Section 50.75(h)(1)(iv), the LAR does not propose any changes to reporting requirements that are inconsistent with the regulations, nor any changes that could allow for disbursements from the NDT for expenses other than those permitted by the regulations. Instead, the LAR simply requests that the regulations in Section 50.75(h) apply to Vermont Yankee.

The exemptions are part of a distinct licensing process and only apply to a portion of Section 50.75(h)(1)(iv). On this basis, the LAR as submitted is complete and accurate, and entirely separate from the exemptions. The State's arguments to the contrary do not demonstrate a genuine dispute, as required by 10 C.F.R. § 2.309(f)(1)(vi), and must be rejected. For these same reasons, the issues raised in Contention V have no bearing on whether the health and safety of the public would be endangered by granting the LAR, and therefore are immaterial, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

B. Contention V Is an Impermissible Challenge to NRC Regulations

The State argues in the Motion that the LAR is defective because it would result in regulations that are different than those in 10 C.F.R. § 50.75(h) due to the issued exemptions.⁵⁴ That is incorrect. Entergy seeks to do only what has been approved by the Commission through rulemaking. Thus, the State's arguments to the contrary impermissibly challenge the NRC's regulations.

The LAR's request to delete portions of Condition 3.J. in place of compliance with NRC regulations is entirely consistent with 10 C.F.R. § 50.75(h).⁵⁵ The plain language of Section 50.75(h) and the Statement of Considerations for the Section 50.75(h) rulemaking do not identify any limitations on that action for the reasons proffered by the State, nor do they identify any

⁵⁴ See Motion at 4-6.

⁵⁵ See LAR at 1.

requirement to consider exemptions from Section 50.75(h) that would be applied only after the LAR is granted.⁵⁶ The State's claims to the contrary directly attack the Commission's regulations and are, therefore, outside the scope of this proceeding.

As provided in 10 C.F.R. § 2.335(a), a proposed contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding." The State has not requested a waiver, much less satisfied the stringent requirements governing such a waiver request.⁵⁷

In summary, Contention V directly challenges the NRC regulations at 10 C.F.R. § 50.75(h) for license amendments related to NDT provisions and, as such, should be rejected as outside the scope of this proceeding in accordance with 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a). The Commission has very recently confirmed that "a contention that challenges an agency regulation does not raise an issue appropriately within the scope of this individual licensing proceeding and is not admissible absent a waiver."⁵⁸

C. Contention V Raises Issues Outside the Scope of this Proceeding

In addition to being outside the scope of this proceeding because they challenge NRC regulations, as discussed above, the arguments raised in the Motion also are outside the scope of this narrow LAR proceeding because they raise issues beyond those identified in the Hearing

⁵⁶ See Decommissioning Trust Provisions, 67 Fed. Reg. at 78,332; Minor Changes to Decommissioning Trust Fund Provisions, 68 Fed. Reg. at 65,386.

⁵⁷ These requirements include the submission of a petition and affidavit demonstrating "special circumstances." 10 C.F.R. § 2.335(b). NRC precedent dictates that a Section 2.335 petition can only be granted in "unusual and compelling circumstances." *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988), *aff'd*, CLI-88-10, 28 NRC 573, 597 (1988), *recons. denied*, CLI-89-3, 29 NRC 234 (1989) (citation omitted). The State has not submitted such an affidavit, has not identified any "special circumstances," and has not identified "unusual and compelling circumstances." See also *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989)).

⁵⁸ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC ___, slip op. at 4 (Apr. 23, 2015).

Notice. That scope has not changed with the issuance of the exemptions. Nonetheless, Contention V is based primarily on the issued exemptions, which are an entirely separate matter.⁵⁹ The State also raises other issues that are outside the scope of this proceeding (an factually unsupported), including the Master Trust Agreement and agreements alleged by the State to have been reached between Entergy and the State in 2002.⁶⁰ The scope of this proceeding does not include, and is not required to include, approval of the entire decommissioning project or even all issues related to the NDT.⁶¹

Additionally, as Entergy discussed in its response to Contention III, Entergy's exemptions and the LAR are separate licensing actions.⁶² With limited exceptions, challenges to separate licensing matters—even if allegedly connected in some fashion—are outside the scope of this proceeding.⁶³ Those limited exceptions do not apply here, because Entergy need not demonstrate that the Exemption Request has been or will be granted in order for the Commission to grant the LAR.⁶⁴ The LAR stands alone. The issuance of the exemptions does not change this analysis.

⁵⁹ See Motion at 4-7.

⁶⁰ See *id.* at 6. In fact, the State is not even a party to the Master Trust Agreement, which is made by and between only Entergy Nuclear Vermont Yankee, LLC and the trustee. See Petition, Exhibit 2, at S-1.

⁶¹ See generally LAR.

⁶² See Entergy Answer at 32-34.

⁶³ See *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), LBP-08-26, 68 NRC 905, 922-23 (2008) (rejecting a contention alleging a connection between the proposed license renewal and a later potential expansion of the Independent Spent Fuel Storage Installation ("ISFSI") to accommodate additional spent fuel, because the ISFSI expansion was "a separate project, subject to a separate proceeding"); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 733 (2006) ("The current proceeding concerns the renewal of the reactor operating license pursuant to 10 C.F.R. Parts 51 and 54, and not the ISFSI, which is licensed pursuant to 10 C.F.R. Part 72.").

⁶⁴ See Entergy Answer at 32-34; see also *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001) (permitting an exemption request to be adjudicated in an ongoing, contested initial licensing proceeding where the exemption request "directly affect[ed] the licensability" of the facility).

For these reasons, Contention V raises issues that are outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), and should be denied.

V. THE STATE’S ATTEMPT TO ADD FURTHER BASES FOR CONTENTIONS I, III, AND IV SHOULD BE REJECTED

The State claims that the bases for Contention V also support its pending Contentions I, III, and IV.⁶⁵ Specifically, the State argues that the issuance of the NDT exemptions provides an additional basis for admission of these contentions, because “[t]he Staff’s granting of the exemption makes clear that, if this LAR is granted, Entergy will no longer be subject to any requirement of providing 30-day notice for withdrawals from the decommissioning trust fund not only for decommissioning expenses, but also for spent fuel management expenses.”⁶⁶

In addition to being untimely, as discussed in Section III above, the State’s attempt to supplement the bases for Contentions I, III, and IV should be rejected because it does not cure the existing deficiencies with those pending contentions. Issuance of the requested exemptions does not alter any of the reasons for why these three contentions already are inadmissible. The purported new bases repeat previous arguments and should be rejected for the same reasons discussed previously.

With respect to pending Contention I, Entergy explained in its Answer that the contention impermissibly challenges NRC regulations; raises issues outside the scope of this proceeding; and is unsupported, immaterial, and fails to raise a genuine dispute, including claims about the sufficiency of the NDT.⁶⁷ Those arguments are not impacted by the issuance of the exemptions.⁶⁸ Indeed, only a small portion of the contention even addresses the Exemption

⁶⁵ Motion at 7.

⁶⁶ *Id.*

⁶⁷ *See* Entergy Answer at 13-26.

⁶⁸ *See id.*

Request,⁶⁹ and Entergy explained that those issues are outside of the scope of this proceeding.⁷⁰ The NRC's issuance of the exemptions does not bring those topics within scope.

Similarly, Entergy explained that Contention III is inadmissible because the State's claim that the Exemption Request must be considered in conjunction with the LAR raises issues that are immaterial, fail to raise a genuine dispute with the LAR, are unsupported, impermissibly attack Commission regulations, and are outside the scope of this proceeding.⁷¹ Here again, Entergy's arguments did not rely on the Exemption Request remaining pending before the NRC.⁷² In fact, now that the NRC has granted the Exemption Request, the State's arguments about hearing rights connected with that Exemption Request are moot and should be rejected.

Finally, Entergy explained that Contention IV was inadmissible because it raises issues that are immaterial and outside the scope of this proceeding, does not demonstrate a genuine dispute, and is unsupported.⁷³ These arguments also are not affected by the NRC issuing the exemptions.⁷⁴ Indeed, Contention IV addresses the environmental review for the LAR and only a small portion even mentions the Exemption Request.⁷⁵ Entergy explained that those issues related to the Exemption Request are outside of the scope of this proceeding.⁷⁶ Again, the NRC's issuance of the exemptions does not bring those topics within scope.

⁶⁹ See, e.g., Petition at 6 (claiming that the LAR is "inextricably intertwined" with other filings, including "the request for exemptions from certain regulatory requirements to allow for the use [of] the alleged excess funds toward irradiated fuel management"); see also *id.* at 9-10 (discussing use of NDT funds, including for irradiated fuel expenses).

⁷⁰ See Entergy Answer at 17.

⁷¹ See *id.* at 29-36.

⁷² See *id.*

⁷³ See *id.* at 36-43.

⁷⁴ See *id.*

⁷⁵ See Petition at 26-31; see also *id.* at 28 (claiming that the NRC must consider the environmental risk before granting the exemptions).

⁷⁶ See Entergy Answer at 37.

In summary, the NRC's issuance of the exemptions does not cure the many deficiencies with Contentions I, III, and IV. Therefore, those contentions remain inadmissible, and the State's attempt to supplement the bases should be rejected.

VI. CONCLUSION

As demonstrated above, the State's Motion should be rejected because it is untimely under 10 C.F.R. § 2.309(c)(1), the new Contention V does not satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1), and the additional bases do not cure the existing deficiencies with Contentions I, III, and IV.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 31st day of July 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

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

(Vermont Yankee Nuclear Power Station)

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)
) Docket No. 50-271-LA-3

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) July 31, 2015
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the foregoing
“Entergy’s Answer Opposing State of Vermont’s New Contention V and Additional Bases for
Pending Contentions I, III, and IV” were served upon the Electronic Information Exchange (the
NRC’s E-Filing System) in the above-captioned proceeding.

Signed (electronically) by Stephen J. Burdick

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