

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 ) Docket No. 50-271-LA  
NUCLEAR OPERATIONS, INC. )  
)  
(Vermont Yankee Nuclear Power Station) )

**THE STATE OF VERMONT'S REPLY TO NRC STAFF AND ENTERGY  
ANSWERS TO THE STATE OF VERMONT'S NOTICE OF INTENTION TO  
PARTICIPATE, PETITION TO INTERVENE, AND HEARING REQUEST**

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**INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(i)(2) and the Atomic Safety and Licensing Board’s (“Board”) October 6, 2014 Order Granting Request to Clarify Schedule for Answers and Reply<sup>1</sup> issued in the above-captioned proceeding, the State of Vermont (“State”), through the Vermont Department of Public Service, submits the following reply to U.S. Nuclear Regulatory Commission (“NRC”) Staff (“Staff”), and Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (together, “Entergy”) answers<sup>2</sup> in opposition to the State of Vermont’s Notice of Intention to Participate, Petition to Intervene, and Hearing Request (“Petition”).<sup>3</sup> Both

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<sup>1</sup> Board Order (Granting Request to Clarify Schedule and Answers and Reply) (Oct. 6, 2014) (unpublished) (Agency Documents Access and Management System [ADAMS] Accession No. ML 14279A281); Board Order (Granting Request for Extension of Time and Cancelling Conference Call) (Oct. 27, 2014) (ADAMS Accession No. 14300A494).

<sup>2</sup> NRC Staff’s Answer to Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 20, 2014) (ADAMS Accession No. ML14293A114); Entergy’s Answer Opposing the State of Vermont’s Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 20, 2014) (ADAMS Accession No. ML14293A701).

<sup>3</sup> Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Sept. 22, 2014) (ADAMS Accession No. ML14267A524).

the Staff and Entergy oppose the Petition, arguing that the Petition fails to proffer an admissible contention, and that the requirements for holding a Subpart G Proceeding have not been met. Entergy also argues that the Petition is untimely. As discussed below, the State's Petition should be granted. The State's concern regarding its continued access to Vermont Yankee Nuclear Power Station's ("Vermont Yankee") Emergency Response Data System ("ERDS") or equivalent alternative, addresses a significant public safety issue, is within the scope of the pending License Amendment Request ("LAR"), and does not constitute an impermissible challenge to an NRC regulation.

## **DISCUSSION**

The substantive basis of the State's contention is uncontroverted by both the Staff and Entergy. The Vermont Yankee ERDS provides a clear safety benefit that would necessarily touch on public health, safety and environmental concerns embodied in the State's Radiological Emergency Response Plan ("RERP") if discontinued. State access to ERDS data is a cornerstone of both the Vermont Yankee Emergency Plan and the RERP, and provides a substantial benefit recognized by the NRC for over twenty years. The LAR now before the Board contemplates on-shift staff reductions that can only be justified by the elimination of ERDS. However, Entergy has failed to make the necessary showing that elimination of ERDS meets the emergency planning requirements of 10 C.F.R. § 50.47(b) and does not result in a reduction in the effectiveness of the Vermont Yankee Emergency Plan.

### **I. The Petition Proffers an Admissible Contention Within the Scope of This Proceeding**

Contrary to the assertions of Staff and Entergy, the State's Petition proffers an admissible contention that is both within the scope of the present proceeding and is supported by factual

information and expert opinion. The Petition's contention is within the scope of the instant LAR review for several reasons. First, the LAR is based on the faulty premise that ERDS is not legally required to assure adequate protection of the public health and safety. Staff and Entergy erroneously assume Entergy is free to abandon ERDS if 10 C.F.R. Part 50, Appendix E, VI.2 does not explicitly require it, even if ERDS is necessary to provide adequate protection of the public health and safety. Second, ERDS serves a recognized and significant public health and safety function that lies at the foundation of any NRC LAR proceeding. Third, the staffing reductions proposed by Entergy will result in, as Entergy concedes, the effective elimination of ERDS. A Board determination as to whether continued ERDS operation is necessary or preferable at Vermont Yankee is needed to properly evaluate the proposed ERO staffing reductions.

The State agrees with Staff's assertion that "the scope of any hearing should include the proposed license amendments, and any health, safety or environmental issues fairly raised by them."<sup>4</sup> The impact of the proposed discontinuance of ERDS on the State's ability to protect the health and safety of its citizens is precisely the basis of the State's contention now; a basis that the NRC has historically recognized as important and significant. Of particular concern here is Entergy's failure to provide continued ERDS or equivalent plant condition data relay capabilities to the State in the event of an accident involving the spent fuel pool.

The Staff is incorrect, however, in its apparent argument that reduction of Emergency Response Organization ("ERO") staffing at Vermont Yankee to a level only "necessary for an effective response to credible accidents that may arise from spent fuel storage" somehow

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<sup>4</sup> Staff Answer at 9-10.

obviates the need for continued ERDS function.<sup>5</sup> In fact, a reduction in any ERO staffing levels only increases the value of ERDS data in the event of a spent fuel storage emergency because the ERDS data will help assure that outside assistance for emergency response is fully and timely informed of the conditions during the accident.

A. ERDS provides a clear and substantial safety benefit historically recognized by the NRC

The Staff points to the Vermont Yankee Nuclear Power Station Analysis of Proposed Post-Shutdown On-Shift Staffing as evidence that evaluation of ERDS is beyond the scope of the present LAR,<sup>6</sup> arguing simply that Entergy’s staffing level analysis should not include a review of continued ERDS use because “when the facility is permanently shutdown, the ERDS link from Vermont Yankee to the NRC will no longer be operational so no personnel will be required to activate it and, thus, the task of ERDS activation no longer has to be accounted for as part of a staffing analysis.”<sup>7</sup> This circular argument ignores the more fundamental inquiry: whether discontinuing ERDS, as explicitly called for in the LAR, potentially impacts the ability of the State to protect its citizens in the event of an accident.

ERDS’s genesis was born out of the NRC’s long-standing determination that:

Because the decision made by the State and local authorities with regard to offsite protective actions could significantly affect the public health consequences of a reactor accident, it is the judgment of the NRC that a significant improvement in the NRC’s ability to provide the right recommendation at the right time provides a substantial improvement in the overall protection to the public. An effective emergency response capability in the event of a reactor accident is an essential element of the defense-in-depth approach to protection of the public health and safety. . . . Because the ERDS will provide a significant improvement in the NRC’s ability to perform that role in an emergency, the proposed ERDS

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<sup>5</sup> *Id.*, at 10.

<sup>6</sup> Letter from Christopher J. Wamser, on behalf of Entergy Nuclear Operations, Inc., to NRC, Proposed Changes to the Vermont Yankee Emergency Plan (Mar. 21, 2014) (ADAMS Accession No. ML14085A257), Attachment 4.

<sup>7</sup> Staff Answer at 11.

improvements are therefore justified, and the costs of implementing those improvements are modest.<sup>8</sup>

Furthermore, the NRC later recognized that spent fuel pool accidents can occur even at shutdown reactor sites.<sup>9</sup> While the NRC views the probability of these accidents as low, it recognizes that if they occur, the consequences are severe, with the most serious scenarios resulting in the deaths of thousands of people, permanent contamination of thousands of square miles of land, and billions of dollars of economic loss.<sup>10</sup> The most recent analysis placed heavy reliance on the effectiveness of emergency planning to mitigate the potential consequences of spent fuel pool accidents.<sup>11</sup> It is imperative that the State be able to properly devise and execute emergency response plans using all tools outlined in the State's RERP, given the recognized risk of a serious fuel pool accident. The RERP relies on access to ERDS in large part because of the significant benefits recognized by the NRC.

B. The Vermont Yankee staff reductions proposed in the LAR are predicated on the elimination of ERDS and are material to the findings the NRC must make on the LAR

Entergy proposes to reduce in-shift staffing levels on the grounds that the elimination of the ERDS function makes the staff unnecessary. This reasoning fails to address whether eliminating the ERDS function will endanger the public health and safety. As noted below, even if Staff and Entergy are correct that NRC regulations do not currently require ERDS for shutdown plants, there is no prohibition against arguing, as Vermont does here, that for this plant

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<sup>8</sup> Emergency Response Data System, 56 Fed. Reg. 40178, Aug. 13, 1991.

<sup>9</sup> See Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (October, 2013) (ADAMS Accession No. ML13256A342) at 160 *et. seq.*; A Safety and Regulatory Assessment of Generic BWR and PWR Permanently Shutdown Nuclear Power Plants (NUREG/CR 6451 (1997))(ML082260098) at Table 4.2.

<sup>10</sup> *Id.*

<sup>11</sup> Consequence Study at Appendix A.

ERDS is necessary to assure adequate protection of the public health and safety. The safety impacts of the elimination of ERDS are necessarily within the scope of the LAR proceeding because the proposed staff reductions are premised upon the elimination of ERDS. Entergy's staff reduction analysis, which Staff and Entergy concede is a proper focus of the Board's review, is predicated on the elimination of the ERDS function. Therefore, the safety implications of that elimination are proper issues for this proceeding.<sup>12</sup> Entergy must, at a minimum, make a showing that ERDS functions can be shifted to other staff, as opposed to simply eliminating the staff assigned to ERDS management, before the LAR can be approved.

The Board should not merely accept at face value Entergy's representations regarding emergency preparedness. This is true even when the State in charge of emergency preparedness is silent on the issue. And it is particularly true here where the State is not silent. Rather, the State of Vermont has represented to the Staff (through formal comments) and continues to represent to the Board here that ERDS is a necessary part of our emergency preparedness system. The scope of the proceeding should include a review of the predicates that facilitate the proposed staffing decreases, and their impact on emergency response programs. In this case, Entergy has failed to provide any analysis of how reducing the proposed staffing levels will not result in an adverse impact due to the loss of a recognized critical communications tool. At a minimum, an examination of the impact of the loss of ERDS on emergency response capabilities by the Board is warranted in order to assess whether the proposed staff reductions are prudent relative to the requirements of § 50.47(b), particularly subsections (1), (2), (5) and (6). (This obligation is discussed in more detail below.) The impact of the loss of ERDS, as a result of the proposed

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<sup>12</sup> LAR, Attachment 4, II.C.9.



staffing reductions, on emergency preparedness is directly material to the findings the Board must make related to the LAR.

C. The State's contention is supported by factual information and expert opinion

The State has consistently voiced concern about the elimination of ERDS throughout the LAR proceeding. The State filed formal and timely comments in response to the LAR and the July 2014 Federal Register notice. The comments, authored by the State's nuclear engineer and decommissioning coordinator, make it clear that elimination of ERDS would have an adverse impact on its Radiological Emergency Response Plan ("RERP").<sup>13</sup> These comments are referenced explicitly in the Petition. Beyond the expert opinion proffered by the State, the core factual basis for the contention remains unchallenged: that reduction or elimination of information to the State hampers its ability to plan for and implement protective actions in the event of an emergency under Vermont Yankee's Emergency Plan and the RERP. The result is a contention that is concise and supported by evidence and an expert.

**II. The Contention is Based on the Provisions of the Vermont Yankee Emergency Plan and the State's Radiological Emergency Response Plan, and Does Not Challenge a Commission Regulation**

The NRC Staff asserts that the State's contention is an impermissible challenge to Commission regulations at 10 C.F.R. Part 50, Appendix E, Section VI addressing ERDS requirements.<sup>14</sup> It argues that the regulation excludes an ERDS requirement at "nuclear power facilities that are shut down permanently or indefinitely," and therefore the State's contention

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<sup>13</sup> Comments from the Vermont Public Service Department regarding the following License Amendment Request published in the Federal Register on July 22, 2014 at 3 (Aug. 21, 2014) (ADAMS Accession No. ML14239A029).

<sup>14</sup> NRC at 12; See also 10 C.F.R. § 50.72(a)(4).

addressing the impact of ERDS discontinuance amounts to a challenge to the regulation.<sup>15</sup>

Entergy further cites to a recent NRC Staff memorandum addressing ERDS requirements at shut down plants,<sup>16</sup> arguing that “licensees of permanently shutdown reactors are not required to participate in the ERDS and generally do not require prior NRC approval to retire the system.”<sup>17</sup> Although Staff and Entergy cite to this Memorandum as though it were a regulation, it is nothing more than the opinion of one Division Director as to the meaning of NRC regulations and is entitled to no special weight in the Board’s consideration of the positions advanced by Vermont.<sup>18</sup>

A. The contention does not challenge an NRC regulation

The State’s contention does not challenge any Commission regulation. First, the cited regulation was passed in 1991 and the exemption in it should be interpreted as applying only to plants that were already shut down at that time. The regulation is framed prospectively, outlining the obligations that operational plants will need to meet going forward. It makes sense, particularly in light of the NRC’s backfit requirements, that the NRC would not make shutdown plants go through the expensive and complicated process of setting up an ERDS system from scratch. The incremental safety *increase* from such a requirement at shutdown plants might not substantially outweigh the enormous costs of setting up such a system. It is an entirely different question, however, whether plants that already have ERDS in place should be allowed to

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<sup>15</sup> 10 C.F.R. Part 50, Appendix E, VI.2.

<sup>16</sup> Memorandum of Robert Lewis, NRC Director of Division of Preparedness and Response, Office of Nuclear Security and Incident Response, Emergency Response Data Systems at Plants That Have Permanently Ceased Operations (June 2, 2014) (ADAMS Accession No. ML14099A520).

<sup>17</sup> Entergy Answer at 12.

<sup>18</sup> See, e.g., *In the Matter of Private Fuel Storage Facility*, 54 N.R.C. 255 (N.R.C. 2001) (“NUREGs, such as the Standard Review Plan, like all guidance documents, are not legally binding regulations.”).

*decrease* safety at their plants by eliminating those systems to save a relatively small amount of ongoing operating expenses. That is an entirely different analysis. There is no indication in the regulation that it was intended to exempt plants that had already set up an ERDS system, let alone an ERDS system that (as explained in more detail below) the State emergency preparedness program has become dependent upon and continues to rely on.

Second, even if the regulation could be read as exempting plants that are shut down after 1991, the permanent shut down exception contained in 10 C.F.R. Part 50, Appendix E is neither prescriptive nor proscriptive. It imposes no obligation to either continue or discontinue ERDS. Rather, at most, it only removes that regulatory obligation for Vermont Yankee to continue ERDS. It does not prohibit this Board, or the Staff, from imposing an obligation on Entergy to continue the operation of ERDS in order to provide adequate protection for the public health and safety. As discussed above, continued use of ERDS yields recognized and significant safety benefits at minimal cost to plant operators, state and local responders, and the NRC in the event of an emergency and maintains a level of safety required for Vermont Yankee.

Third, and more importantly, NRC Regulations require that when a facility's E-Plan calls for, and relies upon, the use of ERDS in the event of an emergency, discontinuance of ERDS cannot occur until certain analyses have been completed. Under those circumstances, Entergy is required to undertake specific analyses to justify discontinuance of the use of ERDS. Under 10 C.F.R. § 50.54(q)(3), Entergy is required to process a change in the E-Plan and conduct an analysis demonstrating continued E-Plan effectiveness, when, as here, it seeks to discontinue a program that it included as part of its E-Plan. As Vermont stated in its Petition to Intervene, the State has made ERDS notification a critical part of the State's Radiological Emergency Response

Plan.<sup>19</sup> The State has also identified Entergy’s obligations under 10 C.F.R. § 50.47 to provide an adequate emergency plan as a portion of the bases to support Vermont’s contention, and the State has noted Entergy’s failure to explain how the elimination of ERDS does not compromise safety.<sup>20</sup> Since Entergy has made ERDS a part of its E-Plan, it cannot discontinue the use of ERDS without performing the required analysis. Entergy has not performed such an analysis here, and an analysis would likely show that ERDS discontinuance would reduce the effectiveness of the E-Plan.

Vermont Yankee’s E-Plan specifically calls for a continuous ERDS connection with the NRC and for communications capabilities including ERDS with Vermont authorities. The E-Plan makes clear that Vermont Yankee maintains a continuous ERDS connection with NRC Operations Center “to assist them in monitoring the status of an emergency.”<sup>21</sup> While one Division Director at the NRC – in a memorandum that, as explained above, is not binding on this Board – has concluded that “[p]roviding ERDS data to the NRC is not an emergency planning function,”<sup>22</sup> the function of ERDS under the E-Plan extends well beyond the provision of data to the NRC. The E-Plan makes clear that “[b]ecause of the location of the Vermont Yankee Plant, the planning and/or action responsibilities at the state level involves coordination of three states; Vermont, New Hampshire, and Massachusetts. Section 7.0 describes the extensive communications network [including ERDS] between Vermont Yankee and these states as a means of promptly notifying appropriate authorities under accident conditions. . . . Based upon

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<sup>19</sup> State of Vermont Emergency Operations Plan 2013, Incident Annex 9A, Vermont Radiological Emergency Response Plan at 99 §10, 112 § 12 (Aug. 21, 2012); *See also* Petition at 2 and 4. The RERP is not available on ADAMS. The State attaches the RERP, for the Board’s convenience, as Attachment A.

<sup>20</sup> *Id.*

<sup>21</sup> Emergency Plan, Entergy Vermont Yankee, Revision 54, § 7.10 at 42 (Dec. 19, 2013). The E-Plan is not readily available on ADAMS. The State attaches the E-Plan, for the Board’s convenience, as Attachment B.

<sup>22</sup> Lewis Memo at 2.

the accident assessment, protective measures are recommended and implemented by each state according to actions and decisions prescribed by each state's Emergency Plan."<sup>23</sup>

Vermont is challenging Entergy's failure to justify its staffing reduction proposal, and necessarily the elimination of ERDS, not the regulation that Entergy claims excuses it from having an ERDS program under certain circumstances that are not applicable here.

B. Entergy has failed to perform an ERDS-specific evaluation required by NRC regulations

The non-binding Staff memorandum providing further guidance as to ERDS requirements, cited by Entergy in its answer, reiterates the Staff and Entergy contention that "[t]he requirements in Section VI of [Part 50] Appendix E do not apply to nuclear power reactor licensees who have submitted a certificate of permanent cessation of operation."<sup>24</sup> However, the memorandum goes on to state, that:

[i]f the licensee's emergency plan did describe ERDS or its use during an emergency, the licensee would need to process a change to the plan as required by § 50.54(q)(3) to delete the ERDS information. . . . If the licensee's emergency plan relies upon ERDS for the provision of assessment data to the emergency response organization, which is an emergency planning function, the licensee will need to evaluate whether removing ERDS results in a reduction in effectiveness for its special circumstances."<sup>25</sup>

To the extent the Staff memorandum provides any guidance in this proceeding, it fully supports the position urged by the State: that Entergy's current proposal to effectively eliminate ERDS should be rejected.

The E-Plan is explicit that ERDS is a critical communications link to establish coordination with Vermont response agencies, and that coordination with the state agencies is a

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<sup>23</sup> E-Plan, § 8.5 at 58.

<sup>24</sup> Lewis Memo at 1.

<sup>25</sup> *Id.* at 1-2.

key component to the overall efficacy of the E-Plan. This means that the continued provision of ERDS data to the NRC and Vermont serves an essential emergency planning function under the E-Plan. The NRC recognized the importance of the State's access to ERDS under the E-Plan and the State's own RERP, and executed a memorandum of understanding allowing ERDS access from the NRC to Vermont almost 18 years ago.<sup>26</sup> Vermont's access to ERDS is made via the NRC, not the Vermont Yankee plant. Curtailment of ERDS data to the NRC would adversely impact emergency planning functions under the E-Plan and the RERP.

The E-Plan's clear mention and use of ERDS requires Vermont Yankee to "perform and retain an analysis that concludes that the removal of ERDS is not a reduction in effectiveness."<sup>27</sup> Entergy has failed to perform any such analysis, either as part of the LAR or independently, prior to seeking ERDS removal. While Entergy has performed an analysis that concludes the proposed staffing reductions will not reduce the effectiveness of the E-Plan, the analysis focused exclusively on the impacts of changes in staffing levels. ERDS was discontinued by fiat in an attachment to the LAR. No analysis uniquely examining the effect of ERDS removal on E-Plan effectiveness was conducted by Entergy as required by 10 C.F.R. § 50.54(q)(3). Furthermore, Vermont is not required to demonstrate that the required analysis will confirm that ERDS discontinuance would result in the E-Plan failing to meet the requirements of 10 C.F.R. § 50.47(b) since the obligation to perform the analysis is a regulatory requirement that Entergy has not met. However, given the significance of the ERDS information to appropriate coordination of emergency planning by Vermont and adjacent states, a safety advantage noted by Entergy in its E-Plan, it is likely that Entergy's analysis, if done properly, will demonstrate that

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<sup>26</sup> Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Vermont, 62 Fed. Reg. 6281-2 (Dec. 10, 1996).

<sup>27</sup> Lewis Memo at 2; 10 C.F.R. 50.54(q)(3).

ERDS functionality must be continued even after plant shutdown. Specifically, ERDS is a primary provision for “prompt communications among principal response organizations to emergency personnel and the public” under the E-Plan and the State’s RERP.<sup>28</sup>

**III. The contention has not been made to challenge the NRC Staff’s no significant hazards consideration determination.**

Although the State does not accept the legality of the Commission’s determination that a no significant hazards consideration determination by Staff cannot be challenged in a proceeding related to the application for an amendment to an operating license, in this case the State’s contention does not challenge the Staff’s no significant hazards consideration (“NSHC”) *determination*. Rather, the State does challenges the *bases* offered by the Staff for its determination. As is apparent from Entergy’s answer to the State’s Petition to Intervene, Entergy relies on the Staff’s NSHC finding as part of its argument opposing the State.<sup>29</sup> The merits of the Staff’s erroneous conclusion regarding the existence of a significant hazard consideration, as well as Entergy’s similar conclusion, are therefore necessarily part of the evidence the State can and does dispute.

The State contends that eliminating the staff positions that are essential to operate the ERDS system creates a risk of increased harm to the public in the event of an accident involving spent fuel and compromises the effectiveness of Entergy’s E-Plan, reducing the margin of safety at Vermont Yankee. That is a challenge to the *bases* of the Staff’s and Entergy’s assertions regarding no significant hazards, but not to the *determination* itself. Essentially, any challenge to a proposed amendment based on safety considerations would have to involve such a challenge to the *bases* of a NSHC finding. It cannot be that the State’s challenge to the “no significant

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<sup>28</sup> 10 C.F.R. § 50.47(b)(6).

<sup>29</sup> Entergy Answer at 3-4 and 17.

hazards consideration” *bases* is a challenge to the Commission’s decisions regarding challenges to the Staff’s NSHC *determination*. If such a challenge were prohibited, the provision for a hearing on proposed amendments where the Staff has made a NSHC determination would be meaningless because no party could “[d]emonstrate 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.”<sup>30</sup> The State contends that Entergy has failed to make a necessary showing that removal of ERDS does not create a significant safety problem.

The Staff may choose, in the face of the challenges raised by the State, to avoid a confrontation on the issue of its *determination* by waiting for conclusion of this hearing before deciding whether to issue the amendment requested by Entergy. Since the amendment, if allowed to go into effect, would permit Entergy to discharge several employees whose training and experience are essential to ERDS operation and make refilling those positions if the State prevails in the hearing difficult, prudence would suggest that the Staff should postpone any action on the proposed amendment. Unless and until it decides to act – an action which it is obligated to take only after affording the State with advanced notice<sup>31</sup> – a challenge to the Staff’s *determination* is not necessary.

The Petition’s reference to the § 50.92(b)(2) criteria is not made as a challenge to Staff’s NSHC *determination*, *per se*, but instead contends that the Board should not accept the NSHC *determination* as evidence that significant hazards would not be present if the license amendment were granted without a hearing. The Staff’s NSHC *determination* may provide the Staff with a

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<sup>30</sup> 10 C.F.R. § 2.309(f)(1)(iv). A board determination that Vermont has presented an admissible contention would appear to be a finding that there is a significant hazard consideration associated with the proposed amendment. No Commission law of which Vermont is aware addresses the implication of that situation and we do not need to speculate on it here.

<sup>31</sup> 10 C.F.R. § 50.91(b)(4).



procedural mechanism to grant the LAR before completion of a hearing, but it does not provide evidence or a substantive basis to grant the LAR. The Petition addresses the substantive impact of granting the amendment (eliminating ERDS) now on the consequences of an accident.

#### **IV. The Petition Should Not Be Dismissed as Untimely As It Did Not Prejudice Any Party to the Proceeding**

Although the NRC Staff does not argue that the State's filing was untimely, Entergy does attempt to make that argument. In doing so, Entergy fails to mention two things. First, it fails to make any effort to explain how it was prejudiced in any way by the way in which the State made this filing. It was not. Second, it fails to mention that the reason for the delay was that the State was engaged in negotiations with Entergy to attempt to resolve this matter without the need for a hearing. It was not until just before the deadline for the filing that it became apparent to the State that it would need to go forward with a filing. The State then informed Entergy in advance of the September 22 deadline that it would be filing a Petition. On the date of the deadline for the filing, September 22, regrettably, the State did not have the proper e-filing capability in place.

The Petition was sent directly to NRC Secretary Vietti-Cook via e-mail on September 22, with carbon copies to three other NRC Staff, and provided to an Entergy executive soon thereafter.<sup>32</sup> The NRC and Entergy were fully aware of the Petition before the filing deadline. The petition was properly e-filed less than two days later, and as soon as the State had the capability to do so.

Furthermore, the parties were in no way prejudiced by the two-day lag between the direct filing to Secretary Vietti-Cook and filing via the NRC e-filing system. The Staff requested and the Board granted the parties 25 days to respond to the Petition from the date of the e-filing

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<sup>32</sup> E-mail from Kyle Landis-Marinello to Secretary Vietti-Cook (Sept. 22, 2014), attached, for the Board's convenience, as Attachment C.

submission as opposed to the earlier direct filing. Such accommodation by the Board is adequate relief, if any is warranted. Lastly, the safety concerns associated with the LAR and outlined in the Petition significantly outweigh any perceived prejudice that may have occurred to any party. Based on the foregoing, the State respectfully requests that the Board accept the Petition.

**V. A Subpart G Proceeding is Appropriate in This Proceeding and is Supported by the Petition**

The State reiterates its request that the Board hold a full evidentiary hearing under 10 C.F.R. Part 2, Subpart G. Energy's complete lack of analysis of the impact of ERDS discontinuance on safety in the LAR, particularly given Staff requests to articulate the safety justification bases for its proposed staff cuts, brings Energy's motives sufficiently into question to justify a Subpart G hearing. Energy's failure to fully and timely advise the State of its proposed plans to eliminate ERDS or to consult with the State as required by NRC also supports the State's belief that some expanded discovery from Energy may be required to best determine the facts in this case. 10 C.F.R. § 2.309(g).<sup>33</sup> Alternatively, if the Board determines that the requirements for a Subpart G hearing have not been met, the State agrees that a hearing held under Subpart L would be appropriate.

Subpart G hearings should be held, *inter alia*, when the presiding officer finds that resolution of the contention "necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter."<sup>34</sup> Here, the State's contention is fundamentally tied to Energy's failure to account for, or even analyze, the loss of ERDS capability relative to

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<sup>33</sup> See Petition at 1.

<sup>34</sup> 10 C.F.R. § 2.310(d).

Vermont Yankee's E-Plan requirements as well as those of the State RERP. Entergy's omission of any meaningful engagement with the ERDS component in the LAR – as contemplated by Staff's own interpretation of the Part 50, Appendix E – at least calls into question its motives for doing so and its commitment to transparency. It is unclear from the LAR whether the omission was made in error or intentionally, and, if intentional, the basis by which Entergy made such a decision. In either event, the potential impacts to health and safety protection protocols under the plant and state emergency plans due to the omission are significant and warrant an opportunity to conduct extensive discovery in order to develop a full record for the Board.

While a Subpart G hearing is warranted under these circumstances, the State defers to the recommendation of Entergy that a Subpart L hearing be held in the event that the presiding officer determines that the requirements for a Subpart G hearing have not been met. The State does note, however, that even if a Subpart L hearing were held, the Board would not be deprived of the opportunity to more effectively develop the record relative to the important safety issue embodied in the contention by allowing selective use of discovery procedures and cross-examination.<sup>35</sup>

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<sup>35</sup> See 10 C.F.R. §§ 2.336(e)(1) and 2.1204(b)(3).

## CONCLUSION

The State's contention is properly and appropriately before the Board. The contention is within the scope of the proceeding, is supported by fact and expert opinion, and is material to the LAR now under consideration. It does improperly challenges neither a NRC regulation, nor the Staff NSHC determination. No party was prejudiced by the State's late filing of the Petition via the NRC e-filing system. As a result of the foregoing, the State respectfully requests that this Board accept the State of Vermont's Petition, grant the State party status in the proceeding, and hold a hearing pursuant to 10 C.F.R. Part 2, Subpart G, or, alternatively, hold a hearing pursuant to Part 2, Subpart L including the use of discovery and cross-examination.

Respectfully submitted,

/Signed (electronically) by/  
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Dated at Montpelier, Vermont  
This 31st day of October, 2014

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 ) Docket No. 50-271-LA  
NUCLEAR OPERATIONS, INC. )  
 )  
(Vermont Yankee Nuclear Power Station) )

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the forgoing Vermont Department Of Public Service's Reply to NRC Staff and Entergy Answers to Vermont Department of Public Service's Notice of Intention to Participate, Petition to Intervene, and Hearing Request, dated October 31, 2014, have been served upon the Electronic Information Exchange, the NRC's E-filing System, in the above-captioned proceeding, this 4th day of November, 2014. This constitutes a refiling of the same initially filed on October 31, 2014.

/Signed (electronically) by/  
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Dated at Montpelier, Vermont  
this 4th day of November, 2014