UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 50-271-LA-3
ENTERGY NUCLEAR VERMONT YANKEE, LLC AND ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	September 22, 2015
(Vermont Yankee Nuclear Power Station)	)	

ENTERGY'S MOTION TO WITHDRAW ITS SEPTEMBER 4, 2014 LICENSE AMENDMENT REQUEST

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.107(a) and 2.323, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. ("Entergy") hereby move the Atomic Safety and Licensing Board ("Board") to withdraw Entergy's license amendment request ("LAR"), dated September 4, 2014, related to the nuclear decommissioning trust for the Vermont Yankee Nuclear Power Station ("Vermont Yankee"), without conditions, and to dismiss this proceeding without prejudice.

II. CONSULTATION

Counsel for Entergy certifies under 10 C.F.R. § 2.323(b) that the movant has made a sincere effort to contact the other parties in this proceeding and resolve the issues raised in this Motion. Neither the Nuclear Regulatory Commission ("NRC") Staff nor the State of Vermont ("State") objects to the withdrawal of the LAR. However, the State intends to file a response opposing unconditional withdrawal of the LAR and seeking instead that the Board impose conditions on the withdrawal.

III. BACKGROUND AND PROCEDURAL HISTORY

On February 17, 2015, the NRC published in the *Federal Register* a notice of proposed action,[1] under 10 C.F.R. §§ 50.92(a)(2)(i) and 2.105, regarding Entergy's LAR.[2] 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 nuclear decommissioning trust funds and, instead, be governed by the provisions in 10 C.F.R. §§ 50.75(h)(1)-(3).[3] The State filed a Petition for Leave to Intervene and Hearing Request on April 20, 2015, with four proposed contentions.[4] On July 6, 2015, the State filed a motion seeking to proffer (1) a new proposed Contention V and (2) additional bases for pending Contentions I, III, and IV.[5] On August 31, 2015, the Board issued LBP-15-24 granting the hearing request, admitting Contentions I and V, and denying admission of Contentions II, III, and IV.[6] On September 18, 2015, the Board issued a Notice of Hearing.[7]

Subsequently, on September 22, 2015, Entergy sent a letter to the NRC informing it of Entergy's plans to withdraw the LAR.[8] A copy of that letter is attached. That letter explains that Entergy has determined that maintaining the existing license conditions represents a manageable

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1 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).

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

3 *Id*. at 1.

4 State of Vermont's Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015).

5 *See* 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).

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

7 *See* Notice of Hearing (Sept. 18, 2015).

8 BVY-15-052, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Withdrawal of License Amendment Request (Sept. 22, 2015) (Attachment "A" to this Motion).

administrative burden and is allowed by the NRC regulations so long as it does not elect to amend those license conditions, as set forth by the provisions of 10 C.F.R. § 50.75(h)(5).[9]

IV. LEGAL STANDARDS

NRC regulations at 10 C.F.R. § 2.107(a) state in part: "Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe."

Licensing boards generally have broad discretion regarding those terms; but, to impose conditions on a withdrawal, the record must demonstrate some legal injury to a private or public interest.[10] An intervenor proposing a condition has an affirmative duty to demonstrate the requisite legal injury,[11] and may even be required to demonstrate bad faith on the part of the applicant.[12]

For example, the licensing board in *Yankee* denied a proposed condition requiring the applicant to provide documents subject to a pending discovery request, despite the withdrawal, because document production is narrowly tailored to the specific subject matter at issue in a given proceeding and intended to facilitate the hearing process.[13] Thus, where a proceeding is mooted by withdrawal of the application, and the application is not likely to be refiled, further document production is neither warranted nor appropriate.[14] That licensing board noted the *Stanislaus* proceeding, in which a licensing board conditioned withdrawal on the preservation of

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[9] *See also* Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,335 (Dec. 24, 2002) ("licensees will have the option of maintaining their existing license conditions or submitting to the new requirements").

[10] *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), LBP-93-25, 38 NRC 304, 315 (1993), *aff'd*, CLI-95-2, 41 NRC 179 (1995).

[11] *Sequoyah*, CLI-95-2, 41 NRC at 192-93.

[12] *See, e.g.*, *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 53-54 (1999). (denying intervenor request for conditions because there was no evidence the withdrawal was "motivated by forum shopping" or "intentionally caused the Intervenors to suffer unwarranted or unusual litigation costs").

[13] *Id*. at 54-55.

[14] *Id*.

discovery documents.[15] The *Yankee* licensing board distinguished that case, noting that, in *Stanislaus*, discovery involved "in excess of a million and a half documents" that had *already* been produced, where the application was *likely* to be resubmitted, and the *applicant* itself had proposed the preservation of discovery documents.[16]

The prospect of a second proceeding, standing alone, is not a legally cognizable harm.[17] Also, the mere potential of a future application and associated litigation does not constitute a legal injury.[18] Likewise, dismissal of a proceeding with admitted contentions is not a legal injury sufficient to warrant the imposition of conditions on withdrawal.[19] Absent a decision on the merits, dismissal with prejudice also is inappropriate.[20] Dismissal with prejudice "is a particularly harsh and punitive term,"[21] and a "severe sanction" that "should be reserved for those unusual situations which involve substantial prejudice to the opposing party or to the public interest in general."[22]

V. THE BOARD SHOULD PERMIT WITHDRAWAL OF THE LAR WITHOUT CONDITIONS AND DISMISS THE PROCEEDING WITHOUT PREJUDICE

Although the NRC's regulations provide that withdrawal after a notice of hearing "shall be on such terms as the presiding officer may prescribe,"[23] the record in this proceeding does not

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15 *Id*. at 55 (citing *Pac. Gas & Elec. Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 53 (1983)).

16 *Id*.

17 *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135 (1982).

18 *See Phila. Elec. Co.* (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 979 (1981); *P.R. Elec. Power Auth.* (N. Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 (1981).

19 *See Yankee*, LBP-99-27, 50 NRC at 56.

20 *Fulton*, ALAB-657, 14 NRC at 973 (citing *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3d Cir. 1976)); *N. Coast*, ALAB-662, 14 NRC at 1133.

21 *Fulton*, ALAB-657, 14 NRC at 974.

22 *N. Coast*, ALAB-662, 14 NRC at 1133 (citing *Fulton*, ALAB-657, 14 NRC at 978-79).

23 10 C.F.R. § 2.107(a).

demonstrate legal injury to a private or public interest,[24] nor does it demonstrate any bad faith on the part of the applicant such that the imposition of conditions on Entergy's withdrawal would be warranted.[25] Here, Entergy has merely determined that maintaining the existing license conditions represents a manageable administrative burden and is permitted by the NRC regulations. This withdrawal, prior to a hearing, will conserve substantial resources of the parties, the Staff, and the Board. The withdrawal effectively imposes the very remedy that the State requested in this proceeding: that Entergy continues to be bound by its current license conditions regarding the decommissioning trust. Placing conditions on the withdrawal would be contrary to established Commission precedent.

During consultations on this motion, the State suggested that conditions on the withdrawal and dismissal with prejudice may be appropriate due to the prospect of a future LAR pertaining to this same subject matter. As an initial matter, Entergy currently has no plans to reinitiate this license amendment proceeding at a future date. Additionally, the mere prospect of a future proceeding on the same subject is not a legally cognizable harm.[26] Nor is the mere potential of a future application and associated litigation sufficient injury to dismiss the proceeding with prejudice.[27] As there has been no decision on the merits in this proceeding, dismissal with prejudice is inappropriate.[28]

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24 *Sequoyah*, LBP-93-25, 38 NRC at 315.

25 *See, e.g.*, *Yankee*, LBP-99-27, 50 NRC at 53-54.

26 *See Perkins*, LBP-82-81, 16 NRC at 1135.

27 *See Fulton*, ALAB-657, 14 NRC at 979; *N. Coast*, ALAB-662, 12 NRC at 1135; *see also Energy Fuels Nuclear, Inc.* (Source Material License No. SUA-1358), LBP-95-20, 42 NRC 197, 198-99 (1995) (finding that the possibility that an applicant could re-file its license amendment application was not sufficient to support "placing onerous conditions" on the withdrawal of the license application).

28 *See Fulton*, ALAB-657, 14 NRC at 973 (citing *Jamison*, 536 F.2d at 564); *N. Coast*, ALAB-662, 12 NRC at 1133.

The State also has suggested that it may request that the Board impose a condition on the LAR withdrawal requiring Entergy to provide substantial additional detail in its disbursement notifications under its current license conditions. Entergy notes that the State's potential request is focused on compliance with the current Vermont Yankee licensing basis, which is outside the scope of the LAR proceeding. Indeed, this Board has recognized that "Commission precedent is clear that the NRC Staff's ongoing enforcement of regulations and license conditions does not trigger hearing rights."[29] The sufficiency of the notifications has not been challenged in either of the State's admitted contentions. That issue falls squarely within the Staff's oversight authority and not within this proceeding. Accordingly, the State has not demonstrated a legal injury that can be redressed by the Board in this proceeding, and therefore, there is no basis for the imposition of any conditions relating to the substance of the notification letters.

Finally, the State also suggested that it may request that the Board impose a condition requiring Entergy to provide disclosures relevant to this proceeding despite withdrawal of the LAR. However, as in *Yankee*: (1) the disclosures would not facilitate a hearing because the proceeding is mooted by the withdrawal of the LAR, and (2) unlike *Stanislaus*, no documents have been produced, and the LAR is not likely to be resubmitted. Accordingly, such a condition would be arbitrary here. Moreover, such a condition would not address any alleged legal injury that is related to the LAR proceeding, and would require the expenditure of significant resources by Entergy with no corresponding benefit related to the proceeding.[30]

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[29] *Vermont Yankee*, LBP-15-24, 82 NRC at __ (slip op. at 16).

[30] Entergy also notes that conditions on withdrawal are intended to be "curative" of the legal injury sustained by the party or the public as a result of the applicant's prosecution of the application. *Sequoyah*, LBP-93-25, 38 NRC at 315 (citing *Alamance Indus., Inc. v. Filene's*, 291 U.S. 1, 19-21 (1935)). The potential conditions identified by the State are not curative of any possible legal injury sustained as part of this proceeding.

In summary, the record in this proceeding does not demonstrate legal injury, or otherwise substantiate the imposition of conditions on withdrawal or dismissal with prejudice. Established NRC precedent demonstrates that the State's purported bases for proffering conditions—the fact that contentions have been admitted in this proceeding, and the prospect of a future LAR pertaining to this same subject matter—do not constitute legal injury for purposes of 10 C.F.R. § 2.107(a). Accordingly, the Board should permit withdrawal of the LAR, without conditions, and dismiss this proceeding without prejudice.

VI. CONCLUSION

For the foregoing reasons, the Board should grant Entergy's request to withdraw the LAR without conditions, and dismiss the proceeding without prejudice.

Respectfully submitted,

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

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Counsel for Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.

Dated in Washington, DC
this 22nd day of September 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 50-271-LA-3
ENTERGY NUCLEAR VERMONT YANKEE, LLC AND ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	September 22, 2015
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the foregoing "Entergy's Motion to Withdraw Its September 4, 2014 License Amendment Request" were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned proceeding.

Signed (electronically) by Ryan K. Lighty

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Attachment A

Entergy Nuclear Operations, Inc.
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320 Governor Hunt Rd.
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802-257-7711

Christopher J. Wamser
Site Vice President

BVY 15-052

September 22, 2015

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

SUBJECT: Withdrawal of License Amendment Request
Vermont Yankee Nuclear Power Station
Docket No. 50-271
License No. DPR-28

REFERENCE:

1. Letter, Entergy Nuclear Operations, Inc. to USNRC, "Proposed Change No. 310 - Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions," BVY 14-062, dated September 4, 2014 (TAC No. MF4798) (ADAMS Accession No. ML14254A405)

2. Letter, USNRC to Entergy Nuclear Operations, Inc., "Vermont Yankee Nuclear Power Station – Exemptions from the Requirements of 10 CFR Part 50, Sections 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv)," NVY 15-075, dated June 17, 2015 (TAC No. MF5575) (ADAMS Accession No. ML15128A194)

Dear Sir or Madam:

By letter dated September 4, 2014 (Reference 1), Entergy Nuclear Operations, Inc. (Entergy) submitted a proposed amendment to Renewed Facility Operating License (OL) No. DPR-28 for Vermont Yankee Nuclear Power Station (VYNPS). The proposed changes would delete from the VYNPS OL certain license conditions which impose specific requirements on the decommissioning trust fund, on the basis that upon approval of the amendment, the provisions of 10 CFR 50.75(h) that specify the regulatory requirements for decommissioning trust funds will apply.

Entergy has determined that maintaining the existing license conditions represents a manageable administrative burden and is allowed by the regulations so long as it does not elect to amend those license conditions, as set forth by the provisions of 10 CFR 50.75(h)(5). On this basis, Entergy is withdrawing the license amendment request. Entergy has also determined that this action requires no changes to the exemptions from specific requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) as approved by Reference 2.

This letter contains no new regulatory commitments.

Should you have any questions concerning this letter or require additional information, please contact Mr. Coley Chappell at 802-451-3374.

Attachment A

Sincerely,

CJW/plc

cc: Mr. Daniel H. Dorman
Regional Administrator, Region 1
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