

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)

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

(Vermont Yankee Nuclear Power Station))

Docket No. 50-271

December 7, 2015

**ENTERGY’S ANSWER OPPOSING NOVEMBER 4, 2015 PETITION FILED BY THE
STATE OF VERMONT, VERMONT YANKEE NUCLEAR POWER CORPORATION,
AND GREEN MOUNTAIN POWER CORPORATION**

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I. INTRODUCTION

Pursuant to the November 10, 2015 Order of the Secretary, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) submit this Answer opposing the Petition of the State of Vermont (“State”), the Vermont Yankee Nuclear Power Corporation (“VYNPC”), and the Green Mountain Power Corporation (“GMPC”) (collectively, “Petitioners”) for Review of Entergy Nuclear Operation, Inc.’s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (“Petition”) filed on November 4, 2015.¹ As explained below, the Commission should deny the Petition because it is procedurally and substantively deficient on numerous grounds.

Petitioners demand a hearing on issues related to the Vermont Yankee nuclear decommissioning trust (“NDT”) to:

- (1) reverse NRC Staff’s June 17, 2015 grant of Entergy’s exemption requests to use the Decommissioning Fund for spent

¹ The State attached three documents, labeled as “exhibits,” to the Petition: Exhibit 1, Master Decommissioning Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002); Exhibit 2, State of Vermont’s PSDAR Comments (Mar. 6, 2015); and Exhibit 3, Declaration of William Irwin, Sc.D, CHP (Apr. 20, 2015).

fuel management expenses before radiological decommissioning is complete;

- (2) review all of Entergy's requests for withdrawals from the Decommissioning Fund, and prohibit Entergy from making future withdrawals for expenses that do not meet the NRC's definition of decommissioning;
- (3) require Entergy to provide detail in its 30-day notices;
- (4) find Entergy's December 19, 2014, filings ([Post-Shutdown Decommissioning Activities Report ("PSDAR")], Decommissioning Cost Estimate [{"DCE"}], and Updated Irradiated Fuel Management) deficient insofar as those filings contemplate using the Decommissioning Fund for spent fuel management and other non-decommissioning expenses before radiological decommissioning is complete;
- (5) undertake the environmental review required by [the National Environmental Policy Act ("NEPA")] before deciding whether Entergy may proceed with non-compliant uses of the Decommissioning Fund; and
- (6) take any other actions necessary to protect the Decommissioning Fund until radiological decommissioning is complete.²

In support of such demands, the Petition presents and references—without any coherent procedural basis—a hodge-podge of generalized grievances, duplicative pleadings, untimely appeals, impermissible challenges to NRC regulations, and conjecture about what NRC regulations *should* require. This extra-procedural Petition should be rejected for failure to satisfy *any* criteria set forth in the Commission's Rules of Practice and Procedure in 10 C.F.R. Part 2.

On one hand, the Petition fails to identify a "proceeding" for which it demands a hearing. On the other hand, the Petition references multiple completed or ongoing proceedings in which Petitioners (individually or collectively) are currently participating in, have previously participated in, or could have but chose not to participate in. Ostensibly, Petitioners now demand

² Petition at 8-9 (internal citations omitted).

that the Commission ignore these prior efforts (or lack thereof) and instead conjure up a new proceeding from whole cloth—presumably to create yet another forum for their various purported grievances. This demand, which ignores the requirements and procedures in 10 C.F.R. Part 2 in their entirety, is an impermissible challenge to the NRC’s regulations and regulatory process, contrary to 10 C.F.R. § 2.335.

Further, as Petitioners make no attempt to identify what, if any, 10 C.F.R. Part 2 procedures apply to, or even permit the filing of, their Petition, Entergy is left to speculate as to the possible regulatory requirements that could arguably apply to the Petition. Nonetheless, for each possible construction of the Petition, it must be summarily rejected:

- To the extent it can be viewed as a hearing request under 10 C.F.R. § 2.309, it cites no opportunity to request a hearing; it cites no basis under Section 189(a) of the Atomic Energy Act of 1954, as amended (“AEA”) for entitlement to a hearing; the time to request a hearing for any previous opportunities has long since passed; and it fails to address the late filing criteria in 10 C.F.R. § 2.309(c) or to submit any contention under 10 C.F.R. § 2.309(f).
- To the extent it can be viewed as a petition for reconsideration of a previously-granted exemption under 10 C.F.R. § 2.345, it is untimely, fails to demonstrate a “clear and material error,” and is duplicative of an appeal Petitioners already have filed with the U.S. Court of Appeals for the District of Columbia Circuit.
- To the extent it challenges the outcome of LBP-15-28,³ which granted Entergy’s withdrawal of a license amendment request (“LAR”), Petitioners should have submitted a petition for review under 10 C.F.R. § 2.341; and to the extent the instant Petition can be viewed as that petition for review, it fails to demonstrate why the decision was “erroneous,” fails to demonstrate a “substantial question,” and lacks a substantive basis.
- To the extent it suggests what Commission decommissioning and environmental policy “should be,” Petitioners should have filed a petition for rulemaking under 10 C.F.R. § 2.802.
- To the extent it claims that Entergy is not complying with its license conditions or NRC regulations, Petitioners should have filed a petition under 10 C.F.R. § 2.206.

³ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-28, 82 NRC __ (Oct. 15, 2015) (slip op.) (“LBP-15-28”).

Notwithstanding the multitude of procedural deficiencies, the Petition also is devoid of a substantive basis. As explained further in the discussion below and contrary to Petitioners' various vague and unsupported claims, Entergy's decommissioning-related activities are fully consistent with NRC regulations, guidance, and precedent.

For these many reasons, the Petition should be summarily rejected.

II. REGULATORY AND PROCEDURAL BACKGROUND

A. Brief Overview of Decommissioning Requirements

Under NRC regulations, decommissioning a nuclear reactor means to safely remove the facility from service, reduce residual radioactivity to a level that allows releasing the property for unrestricted use (or restricted use subject to conditions), and terminate the license.⁴ During the operating life of a plant, NRC regulations require that a licensee maintain financial assurance for decommissioning.⁵ Licensees report on the status of decommissioning funding at least once every two years during operation.⁶

Once a licensee decides to cease operations permanently, NRC regulations impose additional requirements that govern three sequential phases for decommissioning activities: (1) initial activities; (2) major decommissioning and storage activities; and (3) license termination activities. The following are the key activities and filings that a licensee must undertake:

1. Certification of Permanent Cessation of Operations (within 30 days of public announcement of decision regarding permanent cessation)⁷
2. Certification of Permanent Removal of Fuel (once fuel has been permanently removed from the reactor vessel)⁸

⁴ 10 C.F.R. § 50.2.

⁵ 10 C.F.R. § 50.75(c).

⁶ 10 C.F.R. § 50.75(f).

⁷ 10 C.F.R. § 50.82(a)(1)(i).

⁸ 10 C.F.R. § 50.82(a)(1)(ii).

3. PSDAR, including a description of planned decommissioning activities (within two years of permanently ceasing operations)⁹
4. Irradiated Fuel Management Program (“IFMP”) (within two years of permanently ceasing operations)¹⁰
5. Site-Specific DCE (within two years of permanently ceasing operations)¹¹
6. Status Reports on Decommissioning Funding Assurance, Expenditures, and Remaining Costs (annually following the DCE)¹²
7. License Termination Plan (at least two years prior to license termination)¹³

B. Entergy’s Purchase of Vermont Yankee and License Condition 3.J

On May 17, 2002, the NRC issued an Order approving the transfer of the Vermont Yankee Operating License, DPR-28 (“Vermont Yankee License”), from VYNPC to Entergy (“Transfer Order”).¹⁴ The Transfer Order required the NDT to be “subject to or consistent with” certain requirements, including the following:

(i) The decommissioning trust agreement must be in a form acceptable to the NRC. . . .

(iii) The decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of payment. The decommissioning trust agreement shall further contain a provision that no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director of the Office of Nuclear Reactor Regulation.

⁹ 10 C.F.R. § 50.82(a)(4)(i).

¹⁰ 10 C.F.R. § 50.54(bb).

¹¹ 10 C.F.R. §§ 50.82(a)(4)(i), (a)(8)(iii).

¹² 10 C.F.R. §§ 50.75(f)(2), 50.82(a)(8)(v).

¹³ 10 C.F.R. § 50.82(a)(9).

¹⁴ Letter from R. Pulsifer to R. Barkhurst and M. Kansler, Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (May 17, 2002) (“Transfer Order”), available at ADAMS Accession No. ML020390198; see also Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station); Order Approving Transfer of License and Conforming Amendment, 67 Fed. Reg. 36,269 (May 23, 2002) (“Transfer Order Notice”).

(iv) The decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without 30 days prior written notification to the Director of the Office of Nuclear Reactor Regulation. . . .

(3) Entergy Nuclear VY shall take all necessary steps to ensure that the decommissioning trust is maintained in accordance with the application and the requirements of this Order, and consistent with the safety evaluation supporting this Order. . . .¹⁵

On July 31, 2002, the NRC issued a conforming amendment to the Vermont Yankee License incorporating each of these requirements as part of a condition on the license (“Condition 3.J.”).¹⁶

C. Vermont Yankee Initial Decommissioning Activities

By letter dated September 23, 2013, Entergy informed the NRC that Vermont Yankee would permanently cease operations at the end of the operating cycle.¹⁷ Entergy ceased power operations at Vermont Yankee on December 29, 2014, and subsequently submitted its certifications of permanent cessation of power operations and permanent removal of fuel from the reactor vessel to the NRC on January 12, 2015.¹⁸

Entergy submitted, in December 2014: (1) an update to the Vermont Yankee IFMP,¹⁹ and (2) the Vermont Yankee PSDAR with the site-specific DCE.²⁰ Among other things, the PSDAR

¹⁵ Transfer Order Notice, 67 Fed. Reg. at 36,270.

¹⁶ Letter from R. Pulsifer to M. Balduzzi, Vermont Yankee Nuclear Power Station - Issuance of Amendment re: Transfer of Ownership and Operating Authority Under Facility Operating License from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Enclosure 1, Amendment No. 208 to License No. DPR-28 at 8 (July 31, 2002), *available at* ADAMS Accession No. ML022100395.

¹⁷ BVY 13-079, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Sept. 23, 2013), *available at* ADAMS Accession No. ML13273A204.

¹⁸ BVY 15-001, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel (Jan. 12, 2015), *available at* ADAMS Accession No. ML15013A426.

¹⁹ BVY 14-085, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Update to Irradiated Fuel Management Program Pursuant to 10 CFR 50.54(bb) (Dec. 19, 2014), *available at* ADAMS Accession No. ML14358A251.

explained that Entergy will utilize the NRC-authorized “SAFSTOR” decommissioning approach under which the facility is placed in a safe and stable condition and maintained in that state to allow levels of radioactivity to decrease through radioactive decay, followed by decontamination and dismantlement.²¹

D. Nuclear Decommissioning Trust LAR

Following the 2002 amendment incorporating Condition 3.J. into the Vermont Yankee License, the NRC amended its regulations to add a new provision at 10 C.F.R. § 50.75(h) governing NDT agreements (“NDT Rulemaking”).²² The new regulations specify requirements very similar to those in Condition 3.J. with one exception. Unlike Condition 3.J., the regulations do not require “30 days prior written notice” for all disbursements from the NDT. In the NDT Rulemaking, the Commission generically determined that, for “licensees who have complied with 10 CFR 50.82(a)(4),” *i.e.*, have submitted a PSDAR, the requirement for a “30-day disbursement notice” “would not add *any* assurances that funding is available and would duplicate notification requirements at § 50.82.”²³ Accordingly, the regulations at 10 C.F.R. §§ 50.75(h)(1) and (2) except withdrawals being made under 10 C.F.R. § 50.82(a)(8) from the 30-day disbursement notice requirement, and specify that “[a]fter decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8), no further notifications need be made to the NRC.”²⁴

²⁰ BVEY 14-078, Letter from C. Wamser, Entergy, to NRC Document Control Desk, Post Shutdown Decommissioning Activities Report (Dec. 19, 2014) (“Vermont Yankee PSDAR”), *available at* ADAMS Accession No. ML14357A110.

²¹ *Id.*, Attachment at 4.

²² Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002).

²³ *Id.* at 78,336 (emphasis added).

²⁴ 10 C.F.R. § 50.75(h)(1)(iv).

The Commission also explicitly stated in the NDT Rulemaking that “licensees will have the option of maintaining their existing license conditions or submitting to the new requirements,”²⁵ and “will be able to decide for themselves whether they prefer to keep or eliminate their specific license conditions.”²⁶ Accordingly, on September 4, 2014, Entergy submitted an LAR 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).²⁷

In accordance with 10 C.F.R. § 50.91(b)(1), Entergy provided a copy of the LAR to the State.²⁸ On April 20, 2015, the State filed a petition to intervene and hearing request proposing four contentions.²⁹ The Atomic Safety and Licensing Board (“ASLB”) granted the petition and admitted two contentions on August 31, 2015.³⁰ On September 22, 2015, Entergy moved to withdraw its LAR, rather than litigate those contentions, noting that it had determined that maintaining the existing license conditions represented a manageable administrative burden and was permitted by the NRC regulations.³¹ The ASLB granted the motion on October 15, 2015, imposing two conditions on withdrawal; one (duplicating the requirement in 10 C.F.R. § 50.91(b)(1)) requiring Entergy to notify the State of any new LAR related to the NDT, and the

²⁵ Decommissioning Trust Provisions, 67 Fed. Reg. at 78,335.

²⁶ *Id.* at 78,339.

²⁷ See 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), available at ADAMS Accession No. ML14254A405.

²⁸ See *id.* at 2.

²⁹ See State of Vermont’s Petition for Leave to Intervene and Hearing Request at 10 (Apr. 20, 2015), available at ADAMS Accession No. ML15111A087.

³⁰ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, LBP-15-24, 82 NRC __ (Aug. 31, 2015) (“LBP-15-24”).

³¹ Entergy’s Motion to Withdraw Its September 4, 2014 License Amendment Request (Sept. 22, 2015), available at ADAMS Accession No. ML15265A583.

other requiring Entergy to “specify in its 30-day notice if the disbursement includes one of the six line items or legal expenses to which Vermont objected in its admitted contention.”³² On October 27, 2015, Entergy submitted a pre-disbursement notification letter to the NRC indicating that it expected to seek reimbursement from the NDT for decommissioning-related costs, including property taxes, emergency planning contractor costs, and insurance, incurred during the month of October 2015.³³ Entergy did not receive any objection from the NRC regarding its planned reimbursement of these or any other decommissioning-related costs.

E. Commingled Funds Exemption

To support its decommissioning plans for Vermont Yankee, Entergy applied for and received exemptions from: (1) 10 C.F.R. § 50.82(a)(8)(i)(A), permitting Entergy to use a portion of the funds from the Vermont Yankee NDT for certain irradiated fuel management activities, consistent with the plans described in the updated IFMP and the PSDAR; and (2) 10 C.F.R. § 50.75(h)(1)(iv), allowing trust fund disbursements for irradiated fuel management activities to be made without prior notice (together, the “Commingled Funds Exemption”).³⁴ Such exemptions are consistent with those approved by the NRC for other recently shutdown plants, including Crystal River Unit 3,³⁵ Kewaunee,³⁶ and San Onofre Units 2 and 3.³⁷

³² LBP-15-28 (slip op. at 14); *see also* Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 71,846 (Nov. 17, 2015).

³³ *See* Bvy 15-053, Letter from C. Wamser to W. Dean, NRC, Pre-Notice of Disbursement from Decommissioning Trust, Vermont Yankee Nuclear Power Station (Oct. 27, 2015), *available at* ADAMS Accession No. ML15307A008. This notice was fully consistent with the second condition imposed by the Board in LBP-15-28.

³⁴ Bvy 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) at 1 (Jan. 6, 2015) (“Exemption Request”), *available at* ADAMS Accession No. ML15013A171; Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992, 35,992-993 (June 23, 2015) (“Exemption Approval”).

³⁵ 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.

III. LEGAL STANDARDS

A. Hearing Requests

The AEA requires a hearing opportunity in any proceeding for:

- “the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control;”
- “the issuance or modification of rules and regulations dealing with the activities of licensees;” or
- “the payment of compensation, an award, or royalties” under certain sections of the AEA.³⁸

Hearings are not required for any other proceeding, or where there is no proceeding at all, because, “as should be obvious, there is no general right to a hearing for a hearing’s sake.”³⁹

And petitioners cannot “create a hearing opportunity merely by claiming that a facility is improperly operating outside its licensing basis,” because “[s]uch claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206, rather than by a request for a hearing under AEA section 189a.”⁴⁰

In those instances for which a hearing is authorized, under 10 C.F.R. § 2.309(f)(1), a hearing request “must set forth with particularity the contentions sought to be raised.” 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

³⁶ 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.

³⁷ 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.

³⁸ AEA § 189(a)(1)(A).

³⁹ *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 282 (2001), *aff’d*, 54 NRC 349 (2001), *reconsid. denied*, 55 NRC 1 (2002).

⁴⁰ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-15-27, 82 NRC __ (slip op. at 9) (Sept. 28, 2015).

hearing.”⁴¹ Hearing requests must be submitted within 60 days of publication of a notice of agency action, or otherwise demonstrate “good cause” by addressing the late filing criteria in NRC regulations.⁴²

Of particular relevance here is the longstanding principle that NRC rules and the basic structure of the Commission’s regulatory process are not subject to attack in any NRC adjudicatory proceeding.⁴³ This includes challenges “that advocate stricter requirements than agency rules impose, or that otherwise seek to litigate a generic determination established by a Commission rulemaking.”⁴⁴ Additionally, the adjudicatory process is not the proper venue for challenges “that merely addresses petitioner’s own view regarding the direction regulatory policy should take.”⁴⁵

B. Commission Appeals

Within 25 days after service of certain decisions by the ASLB, a party may file a petition for review with the Commission.⁴⁶ The Commission also may review ASLB decisions *sua sponte*.⁴⁷ But, *sua sponte* review is rarely exercised, and is only undertaken in extraordinary circumstances.⁴⁸ Moreover, the Commission recently held that it is “improper” for a party to

⁴¹ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁴² See 10 C.F.R. § 2.309(b)-(c).

⁴³ *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), 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”).

⁴⁴ *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).

⁴⁵ *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).

⁴⁶ 10 C.F.R. § 2.341(b)(1).

⁴⁷ 10 C.F.R. § 2.341(a)(2).

⁴⁸ See, e.g., *Ohio Edison Co., et al.* (Perry Nuclear Power Plant, Unit 1, and Davis-Besse Nuclear Power Station, Unit 1), CLI-91-15, 34 NRC 269 (1991).

request that the Commission exercise its inherent supervisory authority to consider an issue *sua sponte*.⁴⁹

C. NEPA

NEPA requires agencies to take a “hard look” at environmental consequences of major federal actions. By its terms, NEPA imposes procedural rather than substantive constraints upon an agency’s decisionmaking process. The statute requires only that an agency undertake an appropriate assessment of the environmental impacts of its action without mandating that the agency reach any particular result concerning that action.⁵⁰ Furthermore, the U.S. Supreme Court has held that generic analysis is “clearly an appropriate method” of meeting the NRC’s statutory obligations under NEPA.⁵¹ As particularly relevant here, “[t]he Commission has analyzed the major environmental impacts associated with decommissioning in the Generic Environmental Impact Statement (GEIS), NUREG-0586, August 1988, published in conjunction with the Commission’s final decommissioning rule (53 FR 24018; June 27, 1988).”⁵²

Additionally, NRC regulations at 10 C.F.R. § 51.22 provide for categorical exclusion of certain licensing and regulatory actions from the requirement of an environmental review under NEPA. Notably, subject to the satisfaction of certain criteria, regulatory exemptions are among the enumerated categorical exclusions.⁵³

⁴⁹ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-09-6, 69 NRC 128, 138 (2009).

⁵⁰ *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

⁵¹ *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100-01 (1983).

⁵² Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,296 (July 29, 1996).

⁵³ *See* 10 C.F.R. § 51.22(c)(25).

IV. THE PETITION IS PROCEDURALLY DEFICIENT AND SHOULD BE REJECTED

As demonstrated below, the Petition—either considered as a whole or as individual arguments—is procedurally deficient and should be summarily rejected.

A. There Is No Authorized Procedural Basis to Request a Hearing

Section 189(a) of the AEA “does not confer the automatic right of intervention upon anyone.”⁵⁴ The AEA specifies the limited subset of proceedings that allow for a hearing opportunity.⁵⁵ As relevant here, Petitioners do not base their Petition on any active “proceeding.” Petitioners instead request that the Commission convene an entirely *new* proceeding in order to hold a hearing on the various issues cited in the Petition.⁵⁶ But such requests are contrary to law. The Commission has explicitly held that “[i]ntervention is not available when there is no pending ‘proceeding’ of the sort specified in AEA Section 189(a).”⁵⁷ Because Petitioners have not identified a “pending ‘proceeding’ of the sort specified in AEA Section 189(a),” the Petition must be summarily rejected.

Even assuming a new proceeding is convened, the actions requested by Petitioners would not, either individually or collectively, constitute a proceeding for “the granting, suspending, revoking, or amending of any license.”⁵⁸ Notably, none of Petitioners’ demands—retracting an exemption, reviewing or prohibiting withdrawal requests, imposing additional requirements on pre-disbursement notices, finding post-shutdown submissions “deficient,” conducting additional NEPA reviews, or taking other (unspecified but, presumably, enforcement) “actions”—constitute

⁵⁴ *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1448 (D.C. Cir. 1984) (citing *Business and Professional People for the Public Interest v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974)).

⁵⁵ AEA § 189(a)(1)(A).

⁵⁶ Petition at 8-9, 59-60.

⁵⁷ See *State of N.J.* (Department of Law and Public Safety’s Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 292 (1993).

⁵⁸ AEA § 189(a)(1)(A).

a grant, suspension, revocation, or amendment of a license. Petitioners merely claim that these demands raise “license-related” matters.⁵⁹ But this very generalized claim is far too attenuated to invoke hearing rights under Section 189(a) of the AEA.⁶⁰ Despite all of this, even if the Petition had identified a pending “proceeding,” or even if the new global proceeding requested by Petitioners did constitute a proceeding for “the granting, suspending, revoking, or amending of any license,” it would still be untimely by any measure.⁶¹ Accordingly, the Petition should be summarily dismissed.

B. Petitioners’ Request for *Sua Sponte* Review Is Improper and Unsupported

Likely recognizing the lack of any established legal authority or precedent for their Petition, Petitioners also argue that the Commission has general supervisory authority to review adjudicatory issues *sua sponte*.⁶² As noted above, *sua sponte* review is rarely exercised, and is only undertaken in extraordinary circumstances.⁶³ The Commission also has explained that it is “improper” for a party to affirmatively request *sua sponte* review.⁶⁴ Moreover, Petitioners neglect to explain why they have not, themselves, pursued available procedural remedies afforded in 10 C.F.R. Part 2. For example, Petitioners note that ASLB order LBP-15-28 “remain[ed] open to appeal” as of the date the Petition was filed.⁶⁵ Petitioners are correct that

⁵⁹ Petition at 11.

⁶⁰ See *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677-78 (2008).

⁶¹ Entergy submitted the PSDAR and DCE in December 2014; the NDT Exemption Request in January 2015; and the 30-day notice LAR in September 2014. By any calculation in 10 C.F.R. Part 2 (*e.g.*, 60 days per 10 C.F.R. § 2.309) a petition challenging these activities is too late.

⁶² Petition at 9-11.

⁶³ See, *e.g.*, *Perry & Davis-Besse*, CLI-91-15, 34 NRC 269.

⁶⁴ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-09-6, 69 NRC 128, 138 (2009) (concluding that requests for the Commission to use its *sua sponte* authority are “improper” and if it were to accept such requests, “there would be no limit to the arguments parties could present via interlocutory appeal — a result fundamentally at odds with the Commission’s expressed intent to limit such appeals”).

⁶⁵ Petition at 9.

NRC regulations permit parties to file petitions for review of ASLB decisions under 10 C.F.R. § 2.341(b)(1), but Petitioners chose not to file such a petition.⁶⁶ Petitioners cannot simply substitute an improper request for *sua sponte* review as an end-run around the requirements of 10 C.F.R. § 2.341.

Furthermore, Petitioners have not identified a legitimate basis for such *sua sponte* review. On one page, Petitioners argue that they raise “novel” issues;⁶⁷ on the next, they contradict themselves arguing that such matters, including exemptions, are “routine.”⁶⁸ In reality, issues regarding the use of funds from NDTs are well known to the Commission and are not novel.⁶⁹ As discussed in further detail below, Entergy’s actions are fully consistent with industry and Commission precedent and NRC guidance and regulations. Furthermore, 10 C.F.R. Part 2 provides appropriate regulatory processes for each of the issues identified by Petitioners—most of which Petitioners already have availed themselves. Petitioners’ attempt to discredit those processes as somehow inadequate—through redundant arguments currently under review or previously rejected in other established processes—constitutes an inappropriate challenge to NRC regulations,⁷⁰ and certainly not an extraordinary circumstance requiring *sua sponte* review.⁷¹

⁶⁶ To the extent the instant Petition may be considered a petition for review of LBP-15-24, it must be rejected for failure to address any of the considerations in 10 C.F.R. § 2.341(b)(4).

⁶⁷ Petition at 10.

⁶⁸ *Id.* at 11.

⁶⁹ *See, e.g.*, Regulatory Improvements for Decommissioning Power Reactors, 80 Fed. Reg. 72,358, 72,368 (Nov. 19, 2015) (“ANOPR”) (discussing exemptions from NRC regulations on NDT issues).

⁷⁰ 10 C.F.R. § 2.335.

⁷¹ *Cf., e.g., Perry & Davis-Besse*, CLI-91-15, 34 NRC 269.

Additionally, Petitioners claim that certain decommissioning policy matters that have broader industry impacts warrant resolution through adjudication or rulemaking.⁷² But, the Petition neglects to mention that the NRC Staff, as directed by the Commission in December 2014,⁷³ already is engaged in a “high priority” rulemaking on the topic of decommissioning.⁷⁴ In fact, the Commission recently published its “advance notice of proposed rulemaking” on this topic inviting public comment.⁷⁵ Accordingly, Petitioners’ claim—that these complex policy matters are “ripe”⁷⁶ for Commission *sua sponte* review in an adjudicatory-style hearing specific to Vermont Yankee—is entirely baseless. The Petition cites no basis for its demand that the Commission cut short the normal deliberative rulemaking process (including the development of a regulatory basis and the public review and comment process). Petitioners’ established remedy is, therefore, to participate in the rulemaking process.

In summary, *sua sponte* review is rarely exercised, and is only undertaken in extraordinary circumstances. Petitioners point to no such circumstances here, and their Petition, which apparently relies on this general argument as its sole ground for demanding a hearing, should be summarily rejected.

⁷² Petition at 11.

⁷³ SRM-SECY-14-0118, Request by Duke Energy Florida, Inc., for Exemptions from Certain Emergency Planning Requirements at 1 (Dec. 30, 2014), *available at* ADAMS Accession No. ML14364A111 (“The staff should proceed with rulemaking on decommissioning”).

⁷⁴ *See Common Prioritization of Rulemaking Report for Fiscal Year 2016/2017*, NRC, <http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/common-prioritization-rulemaking-rpt-fy2016-2017.html> (last visited Nov. 18, 2015) (listing “Regulatory Improvements for Power Reactors Transitioning to Decommissioning” as a “High” priority rulemaking in the NRC agenda); *see also* SECY-15-0014, Anticipated Schedule and Estimated Resources for a Power Reactor Decommissioning Rulemaking (Jan. 30, 2015), *available at* ADAMS Accession No. ML15082A089.

⁷⁵ ANOPR, 80 Fed. Reg. at 72,368 (discussing exemptions from NRC regulations on NDT issues).

⁷⁶ Petition at 10.

C. The Petition Improperly Challenges the NRC’s Well-Established Regulatory Regime on Decommissioning and Commission Procedural Regulations

Petitioners repeatedly allude to the allegedly “disjointed and siloed approach adopted by Entergy in seeking separate approvals,”⁷⁷ and suggest that “Entergy has chosen to present its related requests in a piecemeal fashion.”⁷⁸ However, Petitioners have not identified any request or other process utilized by Entergy that is contrary to NRC regulations. Nor do Petitioners acknowledge that the NRC’s regulatory scheme permits Entergy to seek—and indeed, contemplates that licensees will seek—separate approvals for separate regulatory actions. The PSDAR/DCE, IFMP, Exemption Request, and NDT LAR are each subject to separate NRC regulations, and each was submitted consistent with the respective NRC regulations.⁷⁹ To the extent Petitioners challenge these processes, such challenges constitute impermissible collateral attacks on the NRC’s regulatory authority and process.⁸⁰

Commission regulations at 10 C.F.R. § 2.335 specify that, absent a waiver, “no rule or regulation of the Commission, or any provision thereof . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.” Furthermore, a waiver will only be granted upon a demonstration, through submission of an affidavit, that “application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.”⁸¹

Petitioners make no such waiver request here, nor have they submitted an affidavit in this regard. If Petitioners seek to change the decommissioning process to prohibit what they view as

⁷⁷ *Id.* at 11.

⁷⁸ *Id.* at 14. To the extent Petitioners are asserting that Entergy somehow intended to manipulate the regulatory process, such assertions are unsupported.

⁷⁹ *See, e.g.*, 10 C.F.R. §§ 50.82(a)(4)(i), 50.54(bb), 50.12, 50.90, 50.4.

⁸⁰ *See* 10 C.F.R. § 2.335.

⁸¹ *Id.*

the “disjointed and siloed approach” prescribed in NRC regulations, then their remedy is to submit a rulemaking petition under 10 C.F.R. § 2.802—but they have not done so. Alternatively, they can participate in the ongoing rulemaking process.

On the whole, Petitioners’ amorphous, extra-procedural Petition—submitted outside the bounds of any available path provided in the Commission’s Rules of Practice and Procedure—which requests a hearing (without addressing, much less satisfying, any of the requirements for such a request in 10 C.F.R. § 2.309) constitutes an impermissible attack on 10 C.F.R. Part 2, contrary to 10 C.F.R. § 2.335. Accordingly, the Petition should be summarily dismissed.

V. THE SPECIFIC CHALLENGES RAISED IN THE PETITION ARE PROCEDURALLY AND SUBSTANTIVELY DEFICIENT AND SHOULD BE REJECTED

A. Petitioners’ Challenges Regarding the PSDAR and Use of NDT Funds Fail to Justify Sua Sponte Review of an Ongoing Proceeding, Improperly Attack Commission Regulations, and Lack Substantive Basis

Entergy’s plans for the use of NDT funds are explained in detail in the PSDAR and the DCE, submitted to the NRC on December 19, 2014, pursuant to 10 C.F.R. § 50.82(a)(4). Insofar as the Petition challenges Entergy’s use of NDT funds as specified in the PSDAR and DCE,⁸² 10 C.F.R. § 50.82(a)(4)(ii) explains that the appropriate place to address these matters is in comments on the PSDAR/DCE. The NRC published a request for comment and notice of a public meeting on the Vermont Yankee PSDAR on January 14, 2015.⁸³ And, the State did

⁸² Petition at 8-9, 18-23, 59-60 (challenging use of NDT funds for: a. The \$5 million payment that Entergy is making to the State as part of a Settlement Agreement; b. Emergency preparedness costs; c. Shipments of non-radiological asbestos waste; d. Insurance; e. Property taxes; and f. Replacement of structures during SAFSTOR). With regard to the \$5 million payment mentioned above, pursuant to the terms of a December 2013 Settlement Agreement negotiated by Entergy and the State, Entergy made a one-time \$5 million payment to the Vermont Department of Taxes on April 24, 2015. Entergy did not seek reimbursement from the NDT for this payment.

⁸³ Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station Post-Shutdown Decommissioning Activities Report, 80 Fed. Reg. 1975 (Jan. 14, 2015).

submit comments on March 6, 2015, in response to that request.⁸⁴ The NRC has explained that it “will consider public health and safety comments raised by the public” regarding a PSDAR to guide its exercise of ongoing oversight.⁸⁵ The NRC Staff’s review of the Vermont Yankee PSDAR and DCE is ongoing. Petitioners cite no valid reason to dislodge the PSDAR and DCE from the Staff’s pending review process in favor of an adjudicatory hearing. In fact, this suggestion is a direct attack on NRC regulations at 10 C.F.R. § 50.82, contrary to 10 C.F.R. § 2.335, and should be summarily dismissed.

Furthermore, the arguments in the Petition about use of the NDT funds are simply repeated (in some cases, verbatim) from the State’s March 6, 2015 comments. They raise no issues that are new or “novel,” or of which the Commission is presently unaware. Petitioners’ desire to republish these comments in yet another forum is not the type of extraordinary circumstance that would necessitate the exercise of *sua sponte* review.⁸⁶

Moreover, in the 1996 rulemaking that expanded opportunities for public participation in the decommissioning process, the Commission explicitly rejected the idea of a hearing and intervention opportunity at the PSDAR review stage because “initial decommissioning activities (dismantlement) are not significantly different from routine operational activities . . . [and] do not present significant safety issues for which an NRC decision would be warranted.”⁸⁷ The Commission explained that “[a] more formal public participation process is appropriate at the

⁸⁴ Public Submission for Docket NRC-2015-0004, Comments of the State of Vermont (Mar. 6, 2015) (“Original PSDAR Comments”), *available at* ADAMS Accession No. ML15082A234.

⁸⁵ Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,284.

⁸⁶ These comments have now been submitted to the NRC three times: March 6, 2015 (Original PSDAR Comments); April 20, 2015 (State of Vermont’s Petition for Leave to Intervene and Hearing Request, Exhibit 1 (Apr. 20, 2015), *available at* ADAMS Accession No. ML15111A085); and November 4, 2015 (Petition, Exhibit 2).

⁸⁷ Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,284.

termination stage of decommissioning.”⁸⁸ And, as discussed previously, Petitioners have not obtained, or even requested, a waiver permitting them to challenge these regulations.

Accordingly, challenges in this regard should be summarily dismissed.

In any event, Petitioners’ substantive claims are baseless. Entergy’s use of NDT funds has been entirely consistent with NRC regulations, available guidance, and industry practice. 10 C.F.R. § 50.2 states that:

Decommission means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits-

- (1) Release of the property for unrestricted use and termination of the license; or
- (2) Release of the property under restricted conditions and termination of the license.

NRC regulations at 10 C.F.R. § 50.82(a)(8)(i)(A) identify permissible uses of the decommissioning trust funds as withdrawals for “expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2.” No other regulations specify a more precise definition of activities that constitute “legitimate decommissioning activities.”

NRC guidance documents, however, provide additional clarification on the types of costs that the Staff considers legitimate decommissioning costs.⁸⁹ For example, NUREG/CR-5884 was prepared by the Pacific Northwest Laboratory for the purpose of providing the NRC Staff

⁸⁸ *Id.*

⁸⁹ Although guidance documents “are not legally binding regulations,” the Commission has stated that “[w]here the NRC develops a guidance document to assist in compliance with applicable regulations, it is entitled to special weight.” *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001). *See also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 375 n.26 (2005) (“guidance is at least implicitly endorsed by the Commission and therefore is entitled to correspondingly special weight”) (citations and internal quotation marks omitted); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-15-6, 81 NRC __ (slip op. at 21 & n.86) (Mar. 9, 2015) (declining to “lightly set[] guidance aside” absent “unusual circumstances,” *e.g.*, the guidance is “not directly applicable to the issue at hand”).

with a technical basis for assessing the reasonableness of licensees' decommissioning cost estimates as well as the minimum decommissioning funding formula amounts in 10 C.F.R. § 50.75(c).⁹⁰ NUREG/CR-5884 includes examples of the types of costs that licensees would be expected to incur during the decommissioning period and should therefore be included in decommissioning cost estimates. These include certain costs that Petitioners challenge here,⁹¹ such as property taxes, insurance, and asbestos removal and disposal.⁹² Appendix M of NUREG/CR-5884 includes the Staff's responses to public comments on the draft report, in which the Staff explicitly notes the inclusion of these costs as appropriate decommissioning expenses.⁹³ Property taxes and insurance are also specifically identified in numerous NRC regulatory guides and Commission documents as cost items that licensees should consider in the preparation of their decommissioning cost estimates.⁹⁴ Even the NRC's "Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors," NUREG-1713, lists property taxes and insurance as appropriate decommissioning expenses.⁹⁵ In the absence of any specific

⁹⁰ See NUREG/CR-5884, Revised Analyses of Decommissioning for the Reference Pressurized Water Reactor Power Station at xiii (Nov. 1995), *available at* ADAMS Accession No. ML14008A187.

⁹¹ *E.g.*, Petition at 20.

⁹² See, *e.g.*, NUREG/CR-5884 at 2.4; 3.12; 3.3, tbl.3.1, n.(f); 3.12; 4.8; App. B, B.2 §§ B.9, B.10; B.34.

⁹³ See, *e.g.*, *id.*, App. M. at M.21-22, M.45, M.49 (noting that "cascading costs for asbestos removal and disposal" were added to the modeled decommissioning cost estimate), M.54 (acknowledging that asbestos removal is an attendant and essential part of decommissioning and noting that such costs "have been incorporated into the total decommissioning cost estimate"), M.61, M.105 ("[property taxes] are also costs to the owner throughout decommissioning period(s), and should be included in the cost").

⁹⁴ See, *e.g.*, Regulatory Guide 1.202, "Standard Format and Content of Decommissioning Cost Estimates for Nuclear Power Reactors" at 9 (Feb. 2005), *available at* ADAMS Accession No. ML050230008; Regulatory Guide 1.159, Rev. 2, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" at 11 (Oct. 2011), *available at* ADAMS Accession No. ML112160012. Additionally, a 2013 SECY paper concluded that property taxes must be included in decommissioning cost estimates and are recognizable as decommissioning expenses. SECY-13-0066, "Staff Findings on the Table of Minimum Amounts Required to Demonstrate Decommissioning Funding Assurance" at 7 (June 20, 2013), *available at* ADAMS Accession No. ML13127A234.

⁹⁵ NUREG-1713, Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors at 6 tbl.1, 29 tbl.13, 30 tbl.14 (Dec. 2004), *available at* ADAMS Accession No. ML043510113.

language in the regulations or regulatory guidance to the contrary, Entergy’s reliance on this directly relevant Staff guidance is fully justified.

Indeed, Petitioners themselves acknowledge that NRC guidance “lists property taxes and ‘nuclear liability insurance’ as part of a decommissioning cost estimate.”⁹⁶ But, Petitioners then imply that these costs are listed in only one NRC guidance document, and make the unsupported claim that they are “erroneous[.]” and a “mistake.”⁹⁷ As demonstrated by the numerous repeated references to these items throughout multiple NRC guidance documents, Petitioners’ characterization is clearly contrary to the record. Moreover, Entergy’s intended uses of the NDT funds for expenses such as property taxes, insurance, and asbestos remediation were included in its 2008 preliminary DCE, submitted under 10 C.F.R. § 50.75(f)(3),⁹⁸ approved by the NRC in 2009,⁹⁹ and are entirely consistent with industry practice.¹⁰⁰

⁹⁶ Petition at 21.

⁹⁷ *Id.* Alternatively, to the extent Petitioners are demanding a public proceeding to revise NRC guidance documents, neither the NRC’s Rules of Practice and Procedure nor the Administrative Procedure Act contemplate such a proceeding. *See* 5 U.S.C. § 553(b)(A); 10 C.F.R. Part 2.

⁹⁸ BVY-08-010, Letter from T. Sullivan to NRC Document Control Desk, Report Pursuant to 10 CFR 50.75(f)(3), Attach. 1, App. C-D tbls. C-1 & D-1 (Feb. 6, 2008), *available at* ADAMS Accession No. ML080430658 (listing property taxes, insurance, and/or asbestos remediation on nearly every page of the estimates).

⁹⁹ Letter from J. Kim to Site Vice President, Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station, Vermont Yankee Nuclear Power Station - Safety Evaluation re: Spent Fuel Management Program and Preliminary Decommissioning Cost Estimate (TAC Nos. MD8035 and MD8051) (Feb. 3, 2009), *available at* ADAMS Accession No. ML083390193.

¹⁰⁰ Other licensees also have submitted preliminary DCEs which include property taxes, insurance, asbestos remediation, bituminous roof replacement, and emergency planning fees, and these have been approved by the NRC. *See, e.g.*, Letter from J. Benjamin, AmerGen Energy Co. LLC to NRC Document Control Desk, Oyster Creek Generating Station, Submittal of Preliminary Decommissioning Cost Estimate (Apr. 14, 2004), *available at* ADAMS Accession No. ML041130434; Letter from P. Tam, NRC to C. Crane, AmerGen Energy Co. LLC, Oyster Creek Nuclear Generating Station (OCNGS) Safety Evaluation re: Preliminary Decommissioning Cost Estimate and Spent Fuel Management Program (TAC Nos. MC2996 and MC4994) (Mar. 25, 2005), *available at* ADAMS Accession No. ML050550242; Letter from J.A. Price, Dominion Energy Kewaunee, Inc. to NRC Document Control Desk, Kewaunee Power Station, Report Pursuant to 10 CFR 50.75(f)(3) (Dec. 18, 2008), *available at* ADAMS Accession No. ML090300120; Decommissioning Cost Estimate Study of the Kewaunee Nuclear Power Plant (Nov. 25, 2008), *available at* ADAMS Accession No. ML090300484; Letter from K. Feintuch, NRC to D. Heacock, Dominion Energy Kewaunee, Inc., Kewaunee Power Station - Irradiated Fuel Management Program and Preliminary Decommissioning Cost Estimate (TAC Nos. ME0253 and ME0275) (Sept. 28, 2009), *available at* ADAMS Accession No. ML092321079.

Further, Petitioners' assertions about the inappropriateness of Entergy's use of NDT funds for property taxes, insurance, emergency planning, spent fuel management, and "cascading costs" such as asbestos disposal, ring especially hollow, given that petitioner VYNPC collected funds from its sponsors' ratepayers to fund the Vermont Yankee NDT with the full expectation that these costs would eventually be reimbursed from the NDT. Indeed, these costs that Petitioners now challenge were included in the decommissioning cost estimate that provided the basis for VYNPC's decommissioning cost collections and funding of the NDT.¹⁰¹

In summary, Petitioners' arguments regarding Entergy's use of the NDT directly attack Commission regulations without a waiver to do so; fail to demonstrate that Entergy's actions are inconsistent with industry practice or available NRC guidance; fail to demonstrate the type of extraordinary circumstance that would necessitate the exercise of *sua sponte* review; and otherwise identify no good cause to dislodge the ongoing PSDAR review from its current process. Accordingly, the Petition should be summarily rejected.

¹⁰¹ In June 1994, petitioner VYNPC filed a wholesale rate application with the Federal Energy Regulatory Commission ("FERC") seeking to, among other things, increase its authorized schedule of decommissioning charges based on an updated decommissioning cost estimate. FERC Docket No. ER94-1370-000, Vermont Yankee Nuclear Power Corporation, Amendment to FPC Rate Schedule No. 1 (June 15, 1994), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10515775> (* page numbers refer to page numbers in the electronic file). The application was supported by a Stipulation and Agreement among a number of parties, including GMPC and the Vermont Department of Public Service (*i.e.*, the State). *Id.* at *19-*35. The decommissioning funds that VYNPC collected from ratepayers from 1995 to 2002 were collected and deposited into the NDT for the express purpose of funding the decommissioning costs identified in the updated cost estimate, which specifically identified and included the very items which Petitioners now challenge, including property taxes (*id.* at *173, *190, *194, *196), insurance (*id.* at *173, *190, *194, *196), emergency planning fees (*id.* at *191, *195, *196), spent fuel management costs (*id.* at *191, *192; *see also id.* at *119 ("The estimate considers that spent fuel will be transferred to a dry storage facility built on site.")), and non-radiological decontamination costs (*id.* at *158 ("It should be noted, however, that this accounting of costs includes not only those costs directly attributable to 'decommissioning' as defined by the NRC, but those clean 'cascading' costs necessary to be expended in order to execute the decontamination processes.")). FERC approved the requested rate schedule on September 2, 1994. Letter from Secretary, Federal Energy Regulatory Commission, to K. Jaffe, Docket No. ER94-1370-000 (Sept. 2, 1994), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10530816>.

B. Petitioners' Challenges Regarding the Master Trust Agreement Are Procedurally and Jurisdictionally Improper, Improperly Attack Commission Regulations, Fail to Justify *Sua Sponte* Review, and Lack Substantive Basis

The Master Trust Agreement (“MTA”) is a contract between Entergy and Mellon Bank for the purposes of accumulating and holding funds for decommissioning in trust.¹⁰² Petitioners argue that the MTA “places important limitations on disbursements from the [NDT].”¹⁰³ More specifically, Petitioners contend that the MTA: (1) “establishes a specific sequence that requires *completion* of all radiological decontamination and decommissioning activities before any other disbursements from the [NDT],” and (2) dictates that the NDT “can be used only for expenses for which DOE is not responsible” (collectively, “Alleged Contractual Restrictions”).¹⁰⁴ Petitioners argue that “Entergy’s planned uses” of the NDT would allegedly violate certain terms of the MTA and are thus “prohibited by Entergy’s operating license and by NRC regulations,” and would “violate rulings and regulations of the Public Service Board and FERC.”¹⁰⁵ However, as explained below, Petitioners’ challenges are factually unsupported, procedurally improper, jurisdictionally improper, improperly challenge Commission regulations, and fail to demonstrate any extraordinary circumstance appropriate for Commission *sua sponte* review, and therefore should be summarily dismissed.

As an initial matter, Entergy remains committed to full compliance with its legal obligations under the MTA, relevant PSB Orders, and all other state and Federal laws. Indeed, Entergy already has detailed its compliance with the substantive terms of the MTA in its

¹⁰² MTA at 1,5.

¹⁰³ Petition at 26.

¹⁰⁴ *Id.* at 27, 28 (emphasis in original).

¹⁰⁵ *Id.* at 25.

February 9, 2015 letter to the State.¹⁰⁶ Petitioners’ claims are procedurally improper because, to the extent they allege violations of NRC regulatory requirements, the appropriate procedure is to file a petition under 10 C.F.R. § 2.206.¹⁰⁷ Nonetheless, Petitioners’ arguments must be rejected for multiple additional reasons.

First, Petitioners’ general arguments regarding the MTA and Entergy’s planned use of NDT funds for what it alleges are “non-decommissioning expenses”¹⁰⁸ are simply repeated from numerous other forums¹⁰⁹ and elsewhere in the Petition.¹¹⁰ As discussed throughout this Answer, Entergy’s planned expenditures are consistent with NRC regulations, precedent, practice, and guidance,¹¹¹ and the NRC has found that there will be *no adverse impact* on Entergy’s ability to decommission Vermont Yankee in accordance with NRC’s regulations.¹¹²

Moreover, Petitioners’ arguments are unsupported and contradictory. For example:

- On one page, Petitioners claim the MTA categorically “prohibits use of the [NDT] for non-decommissioning expenses” and that amendment of the MTA is the “sole” means of avoiding the prohibition; on another page, Petitioners acknowledge that the MTA “allows use of the [NDT] for two non-decommissioning expenses”;¹¹³
- Petitioners argue that the “exclusive purpose” section of the MTA, stating funds are to be used for expenses “related to” decommissioning, prohibits the use of funds for

¹⁰⁶ Letter from T.M. Twomey to K. Landis-Marinello and C. Recchia, Pre-Notice of Disbursement from Entergy Nuclear Vermont Yankee Decommissioning Trust (Feb. 9, 2015) (“Feb. 9 Letter”), *available at* ADAMS Accession No. ML15058A801.

¹⁰⁷ To the extent Petitioners complain of future uses of the NDT, their challenge is premature. *See, e.g.*, Petition at 25-26 (citing the regulations and license condition permitting Entergy, if necessary, to amend the MTA).

¹⁰⁸ *E.g., id.* at 25.

¹⁰⁹ *E.g., id.*, Attach. 2 at 27-39 (the State’s arguments on this topic were submitted in its March 6, 2015 comments on the PSDAR, which the NRC Staff is currently reviewing).

¹¹⁰ *E.g., id.* at 18-23, 31-36.

¹¹¹ *See, e.g., supra* Part V.A; *infra* Part V.C.

¹¹² *See, e.g.*, Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Exemption; Issuance, 80 Fed. Reg. 35,992, 35,993 (June 23, 2015) (noting the NRC conclusion that the Commingled Funds Exemption “will not adversely impact [Entergy’s] ability to complete radiological decommissioning within 60 years and terminate the [Vermont Yankee] license.”).

¹¹³ Petition at 3, 25.

non-decommissioning activities; however, Petitioners admit the MTA, “allows use of the [NDT] for two non-decommissioning expenses” and “includes ‘non-DOE spent fuel storage’ expenses incurred during ‘pre-shutdown activities’”;¹¹⁴ and

- Petitioners claim PSB orders read the MTA to prohibit use of NDT funds for “non-decommissioning expenses”; however, the PSB Docket 7082 order partially based its “certificate of public good” finding on the basis that Entergy would “obtain access to decommissioning funds” to cover long-term spent fuel storage costs.¹¹⁵

For these and other reasons, including those discussed in Entergy’s February 9, 2015 letter to the State,¹¹⁶ Petitioners’ repetitive arguments regarding use of the Vermont Yankee NDT for alleged “non-decommissioning expenses” are unsupported and contradictory, and fail to identify any extraordinary circumstance that would necessitate the exercise of *sua sponte* review.

Second, Petitioners assert that postulated breaches of the Alleged Contractual Restrictions “are prohibited by Entergy’s operating license and by NRC regulations.”¹¹⁷

Petitioners appear to offer three bases for this assertion:

- 10 C.F.R. §§ 50.75(f)(1) and (2) “require Entergy to comply with the [MTA]”;¹¹⁸
- License Condition 3.J and 10 C.F.R. § 50.75(h)(1)(iii) require written notification to the NRC for material amendments of the MTA;¹¹⁹ and
- The 2002 License Transfer Order required that the MTA “be in a form acceptable to the NRC.”¹²⁰

¹¹⁴ *Id.*, Attach. 1 § 2.01; *id.* at 3, 26-27, 27 n.14.

¹¹⁵ *Id.* at 25; Order, Docket No. 7082, at 37 (Vt. Pub. Svc. Bd. Apr. 26, 2006), *available at* <http://www.state.vt.us/psb/orders/2006/files/7082fnl.pdf>.

¹¹⁶ *See generally* Feb. 9 Letter (further explaining why the State’s interpretation of the MTA is flawed). In particular, as discussed in that letter, Section 4.06 of the MTA expressly confirms that disbursements from the NDT are permitted during the period of “Decommissioning,” as that term is defined in Section 1.01(j) of the MTA for “Decommissioning costs *including* costs for decommissioning, *spent fuel storage* and site restoration.” *Id.* at 3 (quoting MTA § 4.06 (emphasis added)).

¹¹⁷ Petition at 25.

¹¹⁸ *Id.* at 24.

¹¹⁹ *Id.* at 26.

¹²⁰ *Id.* at 23-24.

However, Petitioners misconstrue these regulatory requirements, none of which transforms the Alleged Contractual Restrictions into regulatory requirements subject to Commission authority. Accordingly, Petitioners' assertion is baseless and unsupported.

Commission regulations at 10 C.F.R. § 50.75(h)(1)(iii) and License Condition 3.J. require Entergy to provide the NRC with 30 days advance notice of any material amendment to the MTA, and 10 C.F.R. §§ 50.75(f)(1) and (2) merely require power reactor licensees to submit periodic decommissioning funding status reports to the NRC. The Alleged Contractual Restrictions are not imposed or even contemplated by these or any other NRC regulations or license conditions. Petitioners' claims regarding the 2002 License Transfer Order (requiring that the MTA "be in a form acceptable to the NRC") are likewise unsupported; they also constitute an impermissible attack on Commission regulations. In its 2002 NDT Rulemaking, the Commission codified the "form acceptable to the NRC" into 10 C.F.R. §§ 50.75(e) and 50.75(h). As the Commission explained:

The changes in § 50.75(e) specify that the trust should be an external trust fund in the United States, established under a written agreement and with an entity that is a State or Federal government agency or an entity whose operations are regulated by a State or Federal agency. Paragraph 50.75(h) discusses the terms and conditions that the NRC believes are necessary to ensure that funds in the trusts will be available for their intended purpose.¹²¹

The Alleged Contractual Restrictions are not among the terms and conditions codified at 10 C.F.R. §§ 50.75(e) or (h). Accordingly, Petitioners' argument that the MTA is only in a "form acceptable to the NRC" if the Alleged Contractual Restrictions are read as regulatory requirements is both unsupported and an impermissible attack on Commission regulations at 10 C.F.R. §§ 50.75(e) and (h), contrary to 10 C.F.R. § 2.335.

¹²¹ Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,333 (Dec. 24, 2002).

In sum, Petitioners' assertions regarding the operation of License Condition 3.J., the 2002 License Transfer Order, and 10 C.F.R. §§ 50.75(f)(1), (f)(2), and (h)(1)(iii) are unsupported, impermissibly attack Commission regulations, or both, and fail to demonstrate that postulated breaches of the Alleged Contractual Restrictions "are prohibited by Entergy's operating license and by NRC regulations," and therefore lack substantive basis.

Third, Petitioners assert that postulated breaches of the Alleged Contractual Restrictions would "violate rulings and regulations of the [PSB] and FERC," absent approval from those agencies,¹²² including an obligation regarding the disposition of "any potential future excess decommissioning funds."¹²³ Petitioners appear to argue that the NRC should adjudicate these claims.¹²⁴ Petitioners cite to the "primary jurisdiction" theory in *Pennington*, a case from the Seventh Circuit.¹²⁵ However, the Commission has long held that it "will not be drawn into" contractual disputes, "absent a concern for the public health and safety or the common defense and security, except to carry out its responsibilities to act to enforce its licenses, orders and regulations."¹²⁶ Accordingly, to the extent Petitioners demand the NRC adjudicate FERC and PSB legal requirements, they misconstrue *Pennington* and their challenges are jurisdictionally improper.

As noted by the *Pennington* court, the "primary jurisdiction" theory requires that the issue "have been placed within the special competence" of the agency pursuant to a regulatory

¹²² *E.g.*, Petition at 25, 30.

¹²³ *Id.* at 24-25.

¹²⁴ *Id.* at 25 (arguing that NRC "should require Entergy to provide proof that obligations imposed on it by State and other federal agencies will not be violated").

¹²⁵ *Id.* at 7 (citing *Pennington v. ZionSolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014)).

¹²⁶ *CBS Corporation* (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 234 (2007).

scheme.¹²⁷ Conversely, Petitioners demand NRC adjudication of purported requirements from the FERC and PSB regulatory schemes, for which the NRC has no “special competence.” Additionally, long-standing NRC precedent explains that the NRC will not “stay its hand” based on a claim that a party cannot conduct the NRC-authorized activity because a provision in a private contract allegedly requires approval from a separate regulatory agency.¹²⁸ Moreover, to the extent Petitioners ask the NRC to opine on the “return of excess funds to ratepayers,”¹²⁹ the Commission has explicitly held that:

The question of who receives [any money remaining in the Trust Fund after completion of decommissioning] . . . is a rate question well outside the Commission’s jurisdiction. (The proper forum for such an argument is the Federal Energy Regulatory Commission and/or [the state] Board of Public Utilities.)¹³⁰

In summary, Petitioners’ challenges are factually unsupported, procedurally improper, jurisdictionally improper, improperly challenge Commission regulations, fail to justify *sua sponte* review, and should be summarily dismissed.

C. Petitioners’ Challenges Regarding the Commingled Funds Exemption Are Procedurally Impermissible, Untimely, Fail to Demonstrate a “Clear and Material Error,” Fail to Identify a Hearing Opportunity Under the AEA, Fail to Justify *Sua Sponte* Review of an Ongoing Proceeding, and Lack Substantive Basis

As noted above, Entergy applied for and received, among other things, an exemption from 10 C.F.R. § 50.82(a)(8)(i)(A), permitting use of a portion of the funds from the Vermont Yankee NDT for the management of irradiated fuel. The Staff, acting on behalf of the Commission, determined that Entergy’s Commingled Funds Exemption requests, submitted to

¹²⁷ *Pennington*, 742 F.3d at 719-20.

¹²⁸ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977) (quoting *So. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974)) (declining to suspend a construction permit based on petitioners’ claim that a private contract required state regulatory approval prior to construction).

¹²⁹ Petition at 24.

¹³⁰ *GPU Nuclear, Inc., et al.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210-11 (2000).

the NRC on January 6, 2015, were “authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security,” and satisfy all criteria under 10 C.F.R. § 50.12(a).¹³¹ More specifically, the NRC concluded that, “[b]ased on the site-specific cost estimate and the cash flow analysis, use of a portion of the Trust for irradiated fuel management will not adversely impact [Entergy’s] ability to complete radiological decommissioning within 60 years and terminate the [Vermont Yankee] license.”¹³²

Notably, there is nothing unusual about the Commingled Funds Exemption requested by Entergy. Such exemptions are consistent with those requested by other recently shutdown plants, such as Crystal River,¹³³ Kewaunee,¹³⁴ and San Onofre.¹³⁵ Petitioners concede as much in their Petition,¹³⁶ and go as far as to describe such exemptions as “routine.”¹³⁷ Despite this precedent, the Petition asks the Commission to “reverse” the issuance of this (supposedly, “routine”) exemption.¹³⁸ Such a request to the Commission is procedurally impermissible as 10 C.F.R. Part 2 does not provide any opportunity for this request. Nonetheless, even if, for the sake of argument, this request were assumed to be a “Petition for Reconsideration” under 10 C.F.R. § 2.345, it is defective. Section 2.345(a)(1) requires such petitions to be filed “within ten

¹³¹ Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Exemption; Issuance, 80 Fed. Reg. 35,992, 35,994-995 (June 23, 2015).

¹³² *Id.* at 35,993.

¹³³ 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.

¹³⁴ 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.

¹³⁵ 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.

¹³⁶ Petition at 32.

¹³⁷ *Id.* at 11.

¹³⁸ *Id.* at 8, 59.

(10) days after the date of the decision.” Accordingly, any petition for reconsideration of the Commingled Funds Exemption was due no later than ten days after its issuance—June 29, 2015 (accounting for the weekend). Thus, Petitioners’ November 4, 2015 Petition, to the extent it is requesting reconsideration of the exemption issuance, is untimely by over four months, and should be rejected.

Additionally, 10 C.F.R. § 2.345(b) requires petitioners to “demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid.” Petitioners, here, make no mention of the required demonstration. Thus, even if the Petition was timely, Petitioners have not satisfied their burden to demonstrate “clear and material error,” and the request to reconsider the exemption issuance should be denied.

Also, on August 13, 2015, the same Petitioners filed a petition for review related to the Commingled Funds Exemption issuance with the D.C. Circuit.¹³⁹ Petitioners’ appeal remains pending before the D.C. Circuit. Accordingly, the Petition is duplicative of the appellate review proceeding, initiated by Petitioners, on the very same exemption. Such repetitive filings are legally improper, waste limited Commission resources and weigh heavily against any *sua sponte* review in this matter.

Again, neither the original Exemption Request, nor Petitioners’ untimely, unsubstantiated, and duplicative petition for reconsideration of the exemption issuance, affords a right to a hearing under the AEA. Petitioners previously requested a hearing on the exemption by arguing it was part of the LAR proceeding,¹⁴⁰ but the ASLB appropriately rejected that

¹³⁹ See *Vermont v. NRC*, No. 15-1279 (D.C. Cir.).

¹⁴⁰ State of Vermont’s Petition for Leave to Intervene and Hearing Request at 20-26 (Apr. 20, 2015).

attempt.¹⁴¹ In any event, that LAR has since been withdrawn,¹⁴² and the proceeding terminated.¹⁴³ Thus, Petitioners' third¹⁴⁴ demand for a hearing on the exemption, once again, fails to identify an existing proceeding for the "granting, suspending, revoking, or amending of any license," contrary to the requirements of the AEA, and should be summarily rejected.

Nonetheless, Petitioners substantively argue that this "routine" exemption should not have been granted because, allegedly, Entergy has not appropriately accounted for potential costs related to the discovery of low levels of strontium-90,¹⁴⁵ and the costs of spent fuel management.¹⁴⁶ However, Petitioners' assertions that Entergy significantly has underestimated the cost of decommissioning are highly speculative, lack a basis in fact, and fail to satisfy the stringent "clear and material error" standard—a required demonstration for a petition for reconsideration—under 10 C.F.R. § 2.345.

Petitioners assert that the DCE fails to consider low levels of strontium-90 recently discovered via groundwater monitoring, which they claim could lead to "enormous escalations in decommissioning costs."¹⁴⁷ However, the level of strontium-90 is well below the drinking water

¹⁴¹ LBP-15-24 (slip op. at 45).

¹⁴² Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 71,846 (Nov. 17, 2015).

¹⁴³ LBP-15-28 (slip op. at 14).

¹⁴⁴ Petitioners also submitted a separate request to the NRC seeking "public participation" in the exemption proceeding, noting that the Commission had not yet granted it a hearing on this matter, nor any opportunity for public comment. Letter from W. Griffin et al., to W. Dean, Docket No. 50-271; Request for Public Participation on Entergy's January 6, 2015 Exemption Request (June 5, 2015), *available at* ADAMS Accession No. ML15261A017. On June 16, 2015, the NRC notified Petitioners of its decision to decline that request. Letter from W. Dean to W. Griffin et al., Vermont Yankee Nuclear Power Station – Request for Public Participation on Entergy's January 6, 2015, Decommissioning Trust Fund Exemption Request (June 16, 2015), *available at* ADAMS Accession No. ML15162B001. To the extent the Petition can be read to request reconsideration of the NRC's decision in its June 16, 2015 letter, this, too, is untimely and unsubstantiated under the requirements of 10 C.F.R. § 2.345.

¹⁴⁵ Petition at 36-40.

¹⁴⁶ *Id.* at 41-47.

¹⁴⁷ *Id.* at 38.

standards set by the Environmental Protection Agency, and the State itself has noted that “[t]he water is not available for consumption, the levels detected are well below the EPA’s safe drinking water threshold, and there is no immediate risk to health.”¹⁴⁸ The State further conceded that strontium-90 “is found in low levels all around the world” and that “the specific source of the [strontium-90] is unclear.”¹⁴⁹ Petitioners offer nothing beyond gross conjecture to explain how the detection of very low levels of strontium-90—the source of which remains “unclear”—demonstrates the “enormous escalations in decommissioning costs” they contemplate. Contrary to the requirements of 10 C.F.R. § 2.345, such bare speculation falls far short of demonstrating “clear and material error.”

Petitioners also assert that “NRC Staff’s grant of an exemption to use decommissioning funds for spent fuel management . . . was arbitrary and an abuse of discretion” because Entergy’s spent fuel management plan did not consider the possibility of indefinite spent fuel storage.¹⁵⁰ Petitioners speculate that a failure by DOE to pick up spent fuel at Vermont Yankee by 2052 would lead to higher than expected spent fuel management costs that would deplete the NDT such that it would “not have the funding necessary to complete radiological decommissioning.”¹⁵¹ However, this alarmist claim¹⁵² distorts the scope of the exemption and disregards the entirety of the Commission’s robust decommissioning oversight regime.

¹⁴⁸ Vermont Department of Health Communications Office, *Strontium-90 Detected in Ground Water Monitoring Wells at Vermont Yankee* (Feb. 9, 2015), available at http://healthvermont.gov/news/2015/020915_vy_strontium90.aspx.

¹⁴⁹ *Id.*

¹⁵⁰ Petition at 35; *see also id.* at 41-47.

¹⁵¹ *Id.* at 46.

¹⁵² Due to the U.S. Government’s failure to develop a permanent repository for the disposal of spent fuel, Entergy—like all similarly situated utilities—had to make reasonable assumptions regarding future DOE performance. As the Government still retains the legal obligation to accept Entergy’s spent fuel, an assumption of indefinite storage is unreasonable at this time. As DOE’s plans and schedules for accepting spent fuel from Vermont Yankee (and other nuclear plants) develop, Entergy will update its spent fuel management strategy accordingly.

Nothing in the Commingled Funds Exemption permits Entergy to deplete the NDT to the exclusion of radiological decommissioning. The exemption merely permits the use of NDT funds for certain spent fuel management expenses *subject to* all other regulatory requirements and license conditions applicable to Vermont Yankee. Entergy's use of the NDT is still subject to a prohibition against the use of NDT funds where the expenditure would "reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise."¹⁵³ Petitioners' speculation disregards the scope of the exemption and the remaining applicability of the NRC regulatory regime, and is entirely devoid of a factual basis.

In sum, Petitioners' challenge to the issuance of the Commingled Funds Exemption is untimely, fails to demonstrate a "clear and material error," fails to identify a hearing opportunity under the AEA, is duplicative of their filing before the D.C. Circuit, and fails to otherwise identify any extraordinary circumstance warranting *sua sponte* review. Accordingly, the Petition must be summarily rejected.

D. Petitioners' Challenges Regarding Entergy's Pre-Disbursement Notifications Fail to Justify Sua Sponte Review of LBP-15-28, Fail to Otherwise Satisfy the Procedural Requirements for a Petition for Review, Are Procedurally Improper, and Lack Substantive Basis

As previously noted, Vermont Yankee License Condition 3.J. requires the trustee of the Vermont Yankee NDT to give the NRC "30 days prior written notice of payment" ("pre-disbursement notifications") for disbursements from the NDT. Entergy submitted,¹⁵⁴ and later requested withdrawal of,¹⁵⁵ an LAR seeking to delete this condition and, instead, be governed by

¹⁵³ 10 C.F.R. § 50.82(a)(8)(i)(B).

¹⁵⁴ 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), *available at* ADAMS Accession No. ML14254A405.

¹⁵⁵ Entergy Motion to Withdraw Its September 4, 2014 License Amendment Request (Sept. 22, 2015).

the requirements of 10 C.F.R. § 50.75(h) regarding NDTs. The State requested imposition of sweeping conditions on the withdrawal.¹⁵⁶ In LBP-15-28, the ASLB approved Entergy’s request to withdraw the LAR, and imposed a limited condition requiring Entergy to provide certain additional details in its pre-disbursement notifications. As relevant here, the condition requires Entergy to “specify in its 30-day notice if the disbursement includes one of the six line items or legal expenses to which Vermont objected in its admitted contention.”¹⁵⁷

Petitioners argue that “the Commission should require Entergy to provide detailed information supporting *all* proposed withdrawals from the Decommissioning fund, not just those in the six categories that were the subject of the license amendment proceeding,” and should “order Entergy to provide additional information for both past and future withdrawals.”¹⁵⁸ The ASLB, however, rejected such a broad condition.¹⁵⁹ Therefore, these arguments effectively challenge the ASLB decision in LBP-15-28, and should have been raised in a petition for review under 10 C.F.R. § 2.341—but Petitioners elected not to file such a petition.

Even if the Commission were to very generously view the instant Petition as a petition for review of LBP-15-28, the Petition fails to provide information required by § 2.341(b)(2), and fails to identify a “material question” as required by § 2.341(b)(4). Accordingly, this challenge

¹⁵⁶ *E.g.*, State of Vermont’s Response to Entergy’s Motion to Withdraw at 3 (Oct. 2, 2015) (requesting a condition requiring Entergy to provide the State “all supporting documentation” for all past and future disbursements from the NDT).

¹⁵⁷ LBP-15-28 (slip op. at 14). As recited by the Board in its decision, “[t]hose six line items are ‘(1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of non-radiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof.’” *Id.* (slip op. at 11). Item 6, as stated in the initial petition to intervene, was actually “Replacement of structures during SAFSTOR.” State of Vermont’s Petition for Leave to Intervene and Hearing Request at 10 (Apr. 20, 2015), *available at* ADAMS Accession No. ML15111A087. The Board’s reference to “dry cask storage” in Item 6 appears to be an error from LBP-15-24 that propagated into LBP-15-28.

¹⁵⁸ Petition at 49.

¹⁵⁹ LBP-15-28 (slip op. at 11).

is procedurally deficient, lacks substantive basis, fails to justify Commission *sua sponte* review, and must be summarily rejected.

As an initial matter, Entergy notes that it is fully complying with its license conditions, NRC regulations, and conditions imposed by the ASLB in LBP-15-28. To the extent the Petition can be read to allege otherwise, Petitioners' recourse (as noted in LBP-15-28)¹⁶⁰ is to file a petition for enforcement under 10 C.F.R. § 2.206. Notably, the content of Entergy's pre-disbursement notifications is consistent with those submitted by other licensees with similar license conditions.¹⁶¹ To the extent Petitioners are opining about what Commission policy "should" require in such notifications, the appropriate procedural mechanism is a petition for rulemaking under 10 C.F.R. § 2.802.

As to Petitioners' challenge to LBP-15-28, contrary to 10 C.F.R. § 2.341(b)(2)(ii)-(iii), the Petition does not offer "record citation" to where the challenged matter was discussed before the ASLB, or an explanation as to why the ASLB's decision was "erroneous." Accordingly, as a procedural matter, the Petition must be rejected. Petitioners also fail to identify, much less demonstrate the existence of, a "substantial question" under § 2.341(b)(4).¹⁶²

Further, in the NDT Rulemaking in late 2002, following the amendment incorporating Condition 3.J. into the Vermont Yankee License, the NRC amended its regulations to add a new

¹⁶⁰ *Id.* (slip op. at 12).

¹⁶¹ *See, e.g.*, Letter from J. Japalucci and G. Van Noordennen to W. Dean, Zion Nuclear Power Station, Units 1 and 2, Pre-Notice of Disbursement from Decommissioning Trust (May 7, 2015), available at ADAMS Accession No. ML15132A655.

¹⁶² The considerations in § 2.341(b)(4) are: (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) A substantial and important question of law, policy, or discretion has been raised; (iv) The conduct of the proceeding involved a prejudicial procedural error; or (v) Any other consideration which the Commission may deem to be in the public interest.

provision at 10 C.F.R. § 50.75(h) governing NDT agreements.¹⁶³ The updated regulations specify requirements very similar to those in Condition 3.J. with one exception—the regulations do not require “30 days prior written notice” for all disbursements from the NDT. The Commission generically determined that, for “licensees who have complied with 10 CFR 50.82(a)(4),” *i.e.*, have submitted a 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.”¹⁶⁴ Therefore, absent Vermont Yankee’s license conditions, NRC regulations would not even require the pre-disbursement notifications, much less the level of detail demanded by Petitioners.

Therefore, the Petition fails to identify a “substantial question” suitable for Commission review. Nor do Petitioners identify any other extraordinary circumstance suitable for *sua sponte* review.

Accordingly, this challenge is procedurally deficient, lacks substantive basis, fails to justify Commission *sua sponte* review, and must be summarily rejected.

E. Petitioners’ Challenges Regarding NEPA Impermissibly Attack Commission Regulations, Fail to Identify a Hearing Opportunity Under the AEA, Fail to Justify Sua Sponte Review, and Lack Substantive Basis

As a general matter, “[t]he Commission has analyzed the major environmental impacts associated with decommissioning in the Generic Environmental Impact Statement (GEIS), NUREG-0586, August 1988, published in conjunction with the Commission’s final

¹⁶³ Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002). After submission of a DCE, licensees must submit annual status reports to the NRC showing, among other things, decommissioning expenditures. *See* 10 C.F.R. § 50.82(a)(8)(v).

¹⁶⁴ Decommissioning Trust Provisions, 67 Fed. Reg. at 78,336 (emphasis added). *Cf.* Petition at 48 (arguing the exact opposite—that such notifications are “necessary to protect against encroachments on the Decommissioning Fund”).

decommissioning rule (53 FR 24018; June 27, 1988).”¹⁶⁵ NUREG-0586 (“Decommissioning GEIS”) was updated in 2002 to address “over 200 facility-years’ worth of additional decommissioning experience.”¹⁶⁶ On a site-specific basis, the Commission elected to require decommissioning licensees to submit, with the PSDAR, an assessment of whether its proposed activities are “bounded” by existing analyses of environmental impacts.¹⁶⁷ As noted in NRC guidance:

The NRC staff will use the PSDAR, and any written notification of changes required of a licensee, to schedule inspections and provide regulatory oversight of decommissioning activities. Licensees must also notify the NRC of changes that would significantly increase the decommissioning costs and send a copy of this notification to the affected States.¹⁶⁸

Petitioners argue that “Entergy’s planned decommissioning activities” including NDT “withdrawals for purposes other than radiological decommissioning” require a “proper NEPA analysis.”¹⁶⁹ Petitioners further assert that these are “‘major federal actions’ within the meaning of NEPA,”¹⁷⁰ and that the NRC is improperly segmenting these reviews.¹⁷¹ However, Petitioners’ assertions simply disregard the relevant facts and are entirely baseless. Moreover, Petitioners’ arguments impermissibly challenge Commission regulations regarding categorical

¹⁶⁵ Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,296.

¹⁶⁶ Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities: Regarding the Decommissioning of Nuclear Power Reactors (NUREG-0586, Supplement 1, Volume 1: Main Report, Appendices A through M) at 1-2 (Nov. 2002), *available at* ADAMS Accession Nos. ML023470304 & ML023470323; *see also* Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities: Regarding the Decommissioning of Nuclear Power Reactors (NUREG-0586, Supplement 1, Volume 2: Appendices N, O and P), *available at* ADAMS Accession Nos. ML023500187, ML023500211, & ML023500223 (collectively, “Decommissioning GEIS”).

¹⁶⁷ Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,279.

¹⁶⁸ Regulatory Guide 1.184, Rev. 1, Decommissioning of Nuclear Power Reactors at 12 (Oct. 2013), *available at* ADAMS Accession No. ML13144A840.

¹⁶⁹ Petition at 50.

¹⁷⁰ *Id.* at 52.

¹⁷¹ *Id.* at 54.

exclusions and decommissioning without a waiver to do so. Accordingly, these challenges should be summarily dismissed.

The Decommissioning GEIS covers the decommissioning process from start to finish, without segmentation, as demanded by Petitioners, and the U.S. Supreme Court has held that generic analysis is “clearly an appropriate method” of meeting the NRC’s statutory obligations under NEPA.¹⁷² In addition, the scope of the Decommissioning GEIS is not limited to radiological decommissioning.¹⁷³ Remarkably, the Petition does not cite or even reference the Decommissioning GEIS. Accordingly, as Petitioners have chosen to disregard, rather than dispute, the content of the Decommissioning GEIS, they have failed to raise a legitimate challenge to the NRC’s consideration of the environmental impacts of decommissioning.

Furthermore, Petitioners’ argument that PSDAR review is a major federal action requiring a separate environmental review and hearing opportunity improperly challenges Commission regulations.¹⁷⁴ Prior to the 1996 decommissioning rulemaking, Commission regulations *did* require an environmental review and a hearing opportunity at the PSDAR stage.¹⁷⁵ But the Commission made a purposeful decision to change that process in the 1996 amendments to its decommissioning regulations at 10 C.F.R. §§ 50.75 and 50.82.¹⁷⁶ The Commission explicitly addressed the very arguments Petitioners raise here.¹⁷⁷ In the 1996 rulemaking proceeding, commenters argued that “NRC should define decommissioning as a

¹⁷² *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100-01 (1983).

¹⁷³ Decommissioning GEIS at 1-4 to 1-6.

¹⁷⁴ Petition at 52.

¹⁷⁵ *See* Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,278.

¹⁷⁶ *Id.* at 39,284 (concluding that “[t]he degree of regulatory oversight required for a nuclear power reactor during its decommissioning stage is considerably less than that required for the facility during its operating stage” because “the activities performed by the licensee during decommissioning do not have a significant potential to impact public health and safety”).

¹⁷⁷ *E.g.*, Petition at 52.

major federal action requiring an EA or EIS.”¹⁷⁸ The Commission rejected those comments because the regulations require decommissioning activities to be “bounded by the impacts evaluated by previous applicable GEISs as well as any site-specific EIS.”¹⁷⁹ In fact, “the final rule prohibits major decommissioning activities that could result in significant environmental impacts not previously reviewed.”¹⁸⁰ In other words, the Commission has concluded that decommissioning is not a separate “major federal action” because decommissioning activities are limited to those already evaluated as part of a broader “major federal action.”¹⁸¹

The Petition is therefore an impermissible collateral attack on Commission regulations at 10 C.F.R. §§ 50.75 and 50.82. Petitioners have neither requested nor received a waiver to do so. Accordingly, this impermissible challenge must be summarily dismissed pursuant to 10 C.F.R. § 2.335.

Petitioners also assert that “exemption requests . . . constitute ‘major federal actions’ within the meaning of NEPA,” and allege the NRC has not satisfied its NEPA obligations as to the Commingled Funds Exemption.¹⁸² As explained above, to the extent the Petition can be viewed as a petition for reconsideration, it is: untimely, fails to identify a hearing opportunity under the AEA, and is duplicative of a proceeding before the D.C. Circuit. With regard to Petitioners’ NEPA arguments, they also fail to demonstrate a “clear and material error,” or otherwise identify any extraordinary circumstance warranting *sua sponte* review.

¹⁷⁸ Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. at 39,283.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *See also* Decommissioning GEIS at N-5 (noting “the agency’s determination that decommissioning is not a [major federal] action”).

¹⁸² Petition at 52, 56-58.

Petitioners cite a litany of NEPA case law, most of which is entirely irrelevant to the facts at issue in the Petition. For example, Petitioners cite *Brodsky* to suggest that the NRC cannot “grant an exemption without the public comment and participation process that NEPA requires.”¹⁸³ But the NEPA process at issue in *Brodsky* involved an Environmental Assessment and Finding of No Significant Impact.¹⁸⁴ Here, the Commingled Funds Exemption was subject to a categorical exclusion under NRC regulations. Accordingly, *Brodsky* is neither relevant nor instructive on the NRC’s NEPA obligations regarding the Commingled Funds Exemption.

Petitioners also cite *Jones* and *Alaska Ctr.* for the proposition that, in granting an exemption, the NRC cannot “avoid” its NEPA responsibilities “by merely asserting” that an activity will not affect the environment, and that it has a duty to “provide a reasoned explanation.”¹⁸⁵ Petitioners then claim that “Staff failed to provide such an explanation to support” approval of the Commingled Funds Exemption, arguing that it merely used a “checklist approach,” and that its “analysis consisted merely of a recitation of the factors in” the categorical exclusion regulation.¹⁸⁶ But these assertions again ignore facts. The Staff analyzed the request against a categorical exclusion specified in NRC regulations. And, far from merely providing a “recitation of the factors” in 10 C.F.R. § 51.22(c)(25), the Staff’s analysis—as summarized in the table below—demonstrably provided a “reasoned explanation” for each and every criterion.

10 C.F.R. § 51.22(c)(25)	Staff Analysis (80 Fed. Reg. at 35,994)
(i) There is no significant hazards consideration;	The Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, has determined that approval of the exemption request involves no significant hazards consideration because allowing the licensee to use withdrawals from the Trust, in accordance with the updated

¹⁸³ *Id.* at 51 (citing *Brodsky v. NRC*, 704 F.3d 113, 124 (2d Cir. 2013)).

¹⁸⁴ *Brodsky*, 704 F.3d at 117.

¹⁸⁵ Petition at 56 (citing *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986); *Alaska Ctr. for the Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999)).

¹⁸⁶ *Id.* at 57.

	Irradiated Fuel Management Plan and PSDAR, without prior notification to the NRC at the permanently shutdown and defueled VY power reactor, does not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.
(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;	The exempted decommissioning trust fund regulations are unrelated to any operational restriction. Accordingly, there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and no significant increase in individual or cumulative public or occupational radiation exposure.
(iv) There is no significant construction impact;	The exempted regulation is not associated with construction, so there is no significant construction impact.
(v) There is no significant increase in the potential for or consequences from radiological accidents; and	The exempted regulation does not concern the source term (i.e., potential amount of radiation in an accident), nor mitigation. Thus, there is no significant increase in the potential for or consequences from radiological accidents
(vi) The requirements from which an exemption is sought involve: (A) Recordkeeping requirements; (B) Reporting requirements; ... (I) Other requirements of an administrative, managerial, or organizational nature.	The requirements for using decommissioning trust funds for decommissioning activities and for providing prior written notice for other withdrawals from which the exemption is sought involve recordkeeping requirements, reporting requirements, or other requirements of an administrative, managerial, or organizational nature.

Petitioners also claim that the Commission, contrary to NEPA requirements, “failed to analyze cumulative impacts” in granting the Commingled Funds Exemption.¹⁸⁷ This, too, is unsupported. The Commission cannot declare a category of actions subject to categorical exclusion—in other words, codify a category in 10 C.F.R. § 51.22(c)—unless and until it “first find[s] that the category of actions does not individually or *cumulatively* have a significant effect on the human environment.”¹⁸⁸ Petitioners’ assertions that the NRC has not considered cumulative impacts for categorical exclusions under 10 C.F.R. § 51.22(c) is simply without a basis in fact.

¹⁸⁷ *Id.*

¹⁸⁸ 10 C.F.R. § 51.22(a) (emphasis added).

In summary, the NRC has fulfilled its obligations under NEPA as to the NRC decommissioning regime, generally, and the Vermont Yankee PSDAR review and Commingled Funds Exemption, specifically. Petitioners' unsupported claims to the contrary lack substantive basis, impermissibly challenge the Commission's categorical exclusion rule and decommissioning rule without a waiver, and otherwise fail to identify any extraordinary circumstance warranting *sua sponte* review. Accordingly, the Commission should summarily dismiss the Petition.

VI. CONCLUSION

As demonstrated above, the Petition is deficient for numerous procedural reasons and should be rejected for failure to satisfy *any* criteria set forth in the Commission's Rules of Practice and Procedure in 10 C.F.R. Part 2. The Petition also fails to sufficiently challenge any of Entergy's decommissioning-related activities, which are fully consistent with NRC regulations, guidance, and precedent. For these many reasons, the Petition should be summarily rejected.

Respectfully submitted,

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

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Dated in Washington, DC
this 7th day of December 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC)	Docket No. 50-271
AND ENTERGY NUCLEAR OPERATIONS, INC.)	
(Vermont Yankee Nuclear Power Station))	December 7, 2015
)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Entergy’s Answer Opposing November 4, 2015 Petition Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty

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