

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of )  
 )  
ENTERGY NUCLEAR OPERATIONS, INC. )  
 )  
(Indian Point Nuclear Generating Units 2 and 3) )  
\_\_\_\_\_ )

Docket Nos. 50-247-LR and  
50-286-LR

November 20, 2009

**ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING CLEARWATER'S  
MOTION FOR LEAVE TO ADD NEW WASTE CONFIDENCE CONTENTIONS**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(h)(1), Entergy Nuclear Operations, Inc. ("Entergy"), applicant in the captioned proceeding, submits this Answer to the New Contentions filed by Hudson River Sloop Clearwater, Inc. ("Clearwater") on October 26, 2009.<sup>1</sup> Clearwater asserts, essentially, that because the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") recently voted to temporarily delay issuance of an amended Waste Confidence Rule, the NRC can no longer comply with the National Environmental Policy Act ("NEPA") or the Atomic Energy Act ("AEA") without a thorough analysis of the environmental and safety issues raised by "indefinite on-site storage of the additional spent fuel to be generated."<sup>2</sup> Based on this assertion, Clearwater proffers two new contentions. Clearwater EC-7 alleges that the NRC Staff's NEPA review is inadequate because it provides insufficient analysis of "additional waste storage on site, the alternative methods of accomplishing such storage, and potential alternatives to additional waste storage on the site,

<sup>1</sup> Hudson River Sloop Clearwater Inc.'s Motion for Leave to Add a New Contention Based Upon New Information (Oct. 26, 2009) (corrections filed on Nov. 6, 2009) ("New Contentions"). Although Clearwater captions its filing as a motion, they proffer new contentions and thus, Entergy's Answer is timely pursuant to 10 C.F.R. § 2.309(h)(1).

<sup>2</sup> *Id.* at 16.

including the no-action alternative.”<sup>3</sup> Clearwater SC-1 claims that Entergy’s license renewal application (“LRA”) also is inadequate because it provides an “insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site in the long term” and fails to “establish that any combination of such storage will provide adequate protection of safety over the long term.”<sup>4</sup>

As shown below, Clearwater’s New Contentions must be denied in their entirety for numerous reasons. First, Clearwater has not demonstrated that the alleged “new” information upon which it relies is materially different from information previously available to it.<sup>5</sup> Indeed, Clearwater’s New Contentions are directly premised on the Commission’s decision to simply *delay* issuance of an update to the Waste Confidence Rule and *not* any decision repudiating the existing regulation. Second, despite the acknowledged, long-standing NRC prohibition against attacks on current and proposed regulations,<sup>6</sup> Clearwater’s New Contentions challenge the adequacy of (1) current Waste Confidence Rule set forth in 10 C.F.R. § 51.23; and (2) the Commission’s ongoing rulemaking to update the Waste Confidence Rule. In fact, the Board has already ruled that a similar Waste Confidence claim was “an impermissible challenge to NRC regulations and must be denied” because “the regulations now in force, specifically 10 C.F.R. § 51.23(b), do not permit ‘discussion of *any* environmental impact of spent fuel storage’ at nuclear reactor sites.”<sup>7</sup> Third, Clearwater attempts to raise issues related to the Indian Point Energy Center (“IPEC”) Independent Spent Fuel Storage Installation (“ISFSI”), which are not within the scope of this proceeding, because that facility is

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<sup>3</sup> *Id.* at 15.

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

<sup>5</sup> See 10 C.F.R. § 2.309(f)(2).

<sup>6</sup> See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999) (“It has long been agency policy that Licensing Boards ‘should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.’”) (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)).

<sup>7</sup> Board Order (Ruling on New York State’s New and Amended Contentions) at 16 (June 16, 2009) (unpublished).

separately licensed under 10 C.F.R. Part 72. Finally, by completely ignoring the portions of Entergy's LRA that include aging management programs ("AMPs") for the spent fuel pools, Clearwater fails to raise a genuine dispute on a material issue of law or fact. Accordingly, the New Contentions must be rejected in accordance with 10 C.F.R. § 2.335(a) and for failing to meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1).<sup>8</sup>

## II. BACKGROUND

### A. Background on the Waste Confidence Rule and the Ongoing Rulemaking

As Clearwater recounts in its New Contentions, the NRC's Waste Confidence Rule stems from a 1979 to 1984 rulemaking that generically assessed the safety and environmental issues associated with onsite storage of spent fuel until sufficient offsite disposal or storage becomes available.<sup>9</sup> The Waste Confidence Rule was affirmed with a slight revision in 1990 and again in 1999.<sup>10</sup> The Commission's determination on these issues is *currently* codified in the NRC's Waste Confidence Rule in 10 C.F.R. § 51.23(a), which specifically states:

The Commission has made a generic determination that, if necessary, spent fuel generated in *any reactor* can be stored safely and *without significant environmental impacts* for at least 30 years beyond the licensed life for operation (*which may include the term of a revised or renewed license*) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first

<sup>8</sup> Although Clearwater makes no such request, New York State asks that the Board hold the New Contentions in abeyance pending the conclusion of the Waste Confidence rulemaking, or, in the alternative, refer the issue to the Commission. See Answer of the State of New York to Hudson River Sloop Clearwater, Inc.'s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-Level Radioactive Waste at Indian Point at 16 (Nov. 19, 2009). Other licensing boards have denied similar requests made in virtually the same circumstances because no legal authority exists for holding in abeyance an otherwise inadmissible contention, the denial of a Waste Confidence-related contention does not raise significant and novel legal or policy issues, and referral to the Commission would not materially advance the orderly disposition of the proceeding. See, e.g., *Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-09-26, 70 NRC \_\_\_, slip op. at 47 (Nov. 19, 2009); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC \_\_\_, slip op. at 22 (Aug. 10, 2009).

<sup>9</sup> See New Contentions at 9.

<sup>10</sup> Final Rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation 55 Fed. Reg. 38,472 (Sept. 18, 1990); Status Report on the Review of the Waste Confidence Decision, 64 Fed. Reg. 68,005 (Dec. 6, 1999).

quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of *any reactor* to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.<sup>11</sup>

Based on this generic finding, 10 C.F.R. § 51.23(b) further states:

[N]o discussion of *any environmental impact* of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment, . . . or initial ISFSI license or amendment for which application is made, is required in any . . . environmental impact statement . . . prepared in connection with the issuance or amendment of an operating license for a nuclear power reactor under parts 50 and 54 . . . or the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.<sup>12</sup>

On October 9, 2008, the Commission proposed to update the Waste Confidence Rule to “confirm the Commission’s confidence that spent fuel storage is safe and secure over long periods of time.”<sup>13</sup> After reviewing public comments on the proposed Waste Confidence Rule update, NRC Staff developed a draft final rule that would have amended the existing Waste Confidence Rule by indicating that the Commission expects that sufficient mined geologic repository space will be available for disposal within 50-60 years beyond the licensed operation of any reactor, and that storage is safe and environmentally benign for at least 60 years beyond the licensed life for operation (which may include the term of a renewed license).<sup>14</sup> Recently, the Commission agreed to briefly delay issuance of the updated Waste Confidence Rule to allow additional public comment based on the Obama Administration’s plans to consider alternatives to Yucca Mountain, the U.S. Department

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<sup>11</sup> 10 C.F.R. § 51.23(a) (emphasis added).

<sup>12</sup> *Id.* § 51.23(b) (emphasis added).

<sup>13</sup> Proposed Rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547, 59,549 (Oct. 9, 2008). *See also* Waste Confidence Decision Update; Update and Proposed Revision of Waste Confidence Decision, 73 Fed. Reg. 59,551 (Oct. 9, 2008).

<sup>14</sup> SECY-09-0090, Final Update of the Commission’s Waste Confidence Decision at 3 (June 15, 2009), available at ADAMS Accession No. ML091660274.

of Energy's plan to establish a "blue-ribbon" panel to evaluate these alternatives, and the impact, if any, that these developments may have on the time frame of availability of a geologic repository.<sup>15</sup>

**B. Clearwater's New Waste Confidence Contentions**

On October 26, 2009, Clearwater submitted New Contentions EC-7 and SC-1. Clearwater EC-7 reads as follows:

The environmental analysis carried out to assess the potential impacts of relicensing Indian Point Units 2 and 3 is inadequate because it provides an insufficient analysis of the potential impacts of additional waste storage on site, the alternative methods of accomplishing such storage, and potential alternatives to additional waste storage on the site, including the no-action alternative.<sup>16</sup>

Clearwater SC-1 alleges as follows:

The license renewal application requesting the relicensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site in the long term. In addition, both the applicant and the NRC Staff have failed to establish that any combination of such storage will provide adequate protection of safety over the long term.<sup>17</sup>

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<sup>15</sup> See Chairman Jaczko's Voting Record on SECY-09-0090: Final Update of the Commission's Waste Confidence Decision at 1 (Sept. 17, 2009) ("Chairman Jaczko VR") ("I support the staffs position and general findings for the Waste Confidence decision. . . . That said, . . . I would also support a few changes . . . [that] would need to be renoticed for a short, narrow, public comment period, and the staff should return to the Commission with a recommendation after the comments have been considered."); Commissioner Klein's Voting Record on SECY-09-0090: Final Update of the Commission's Waste Confidence Decision at 1 (Sept. 16, 2009) ("Commissioner Klein VR") ("I support continuation of this rulemaking through a limited re-noticing for the solicitation of comment on how the Commission should take account of . . . recent developments . . . [that] may bear on the proposed draft final estimate of a target date for the availability of a geologic repository."); Commissioner Svinicki's Voting Record on SECY-09-0090: Final Update of the Commission's Waste Confidence Decision at 1 (Sept. 24, 2009) ("Commissioner Svinicki VR") ("This decision and rule should be re-noticed for limited comment by the public on the Administration's recent announcements, and how they may impact the timeframe of availability of a geologic repository."). Commission voting records are publicly available on the NRC's website at <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr>.

<sup>16</sup> New Contentions at 15.

<sup>17</sup> *Id.*

In support of these New Contentions, Clearwater includes a declaration from Dr. Gordon R. Thompson and a report Dr. Thompson prepared in response to the NRC's proposed update to the Waste Confidence Rule.<sup>18</sup>

### III. LEGAL STANDARDS GOVERNING THE ADMISSIBILITY OF NEW AND AMENDED CONTENTIONS

#### A. Timeliness Requirements

Under 10 C.F.R. § 2.309(f)(2), an intervenor may file new environmental contentions “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that *differ significantly* from the data or conclusions in the applicant’s documents.”<sup>19</sup> Otherwise, in the absence of such circumstances, an intervenor may file new contentions “only with leave of the presiding officer” upon a showing that all three of the following criteria are met: (i) the information upon which the amended or new contention is based was *not previously available*; (ii) the information upon which the amended or new contention is based is *materially different than information previously available*; and (iii) the amended or new contention has been *submitted in a timely fashion* based on the availability of the subsequent information.<sup>20</sup>

Thus, new contentions will be admitted only “provided that [the information] is truly new and materially different and provided that the Petitioner acts promptly.”<sup>21</sup> A new contention “is not

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<sup>18</sup> Declaration of Dr. Gordon R. Thompson in Support of Contentions Concerning Waste Storage and Disposal at Indian Point Submitted by Hudson River Sloop Clearwater, Inc. (Oct. 26, 2009) (“Thompson Declaration”); Gordon R. Thompson, Environmental Impacts of Storing Spent Nuclear Fuel and High-Level Waste from Commercial Nuclear Reactors: A Critique of NRC's Waste Confidence Decision and Environmental Impact Determination (Feb. 6, 2009) (“Thompson/TSEP Report”).

<sup>19</sup> 10 C.F.R. § 2.309(f)(2) (emphasis added).

<sup>20</sup> *Id.* § 2.309(f)(2)(i)-(iii) (emphasis added).

<sup>21</sup> *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573, 579 (2006) (rejecting petitioner’s attempt to “stretch the timeliness clock” because its new contentions were based on information that was previously available and petitioners failed to identify precisely what information was “new” and “different”).

an occasion to raise additional arguments that could have been raised previously.”<sup>22</sup> Accordingly, this Board itself has made clear that it “will not entertain contentions based on environmental issues that *could have been raised* when the original contentions were filed.”<sup>23</sup>

If an intervenor cannot satisfy the requirements of 10 C.F.R. § 2.309(f)(2), then a contention is considered “nontimely,” and the intervenor must demonstrate that it satisfies the eight-factor balancing test in 10 C.F.R. § 2.309(c)(1)(i)-(viii).<sup>24</sup> The first factor identified in that regulation, whether “good cause” exists for the failure to file on time, is entitled to the most weight.<sup>25</sup> Without good cause, a “petitioner’s demonstration on the other factors must be particularly strong.”<sup>26</sup>

## **B. Substantive Admissibility Requirements**

In addition to the late-filing criteria identified above, a proposed new contention must meet *all* of the substantive admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1). Failure to do so is grounds for the dismissal of a proposed new or amended contention.<sup>27</sup> Entergy’s Answer to

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<sup>22</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385-86).

<sup>23</sup> Memorandum and Order (Summarizing Pre-Hearing Conference) at 3 (Feb. 4, 2009) (unpublished) (emphasis added).

<sup>24</sup> See 10 C.F.R. § 2.309(c)(2) (“The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.”). These factors include: (i) good cause, if any, for the failure to file on time; (ii) the nature of the petitioner’s right under the Atomic Energy Act to be made a party to the proceeding; (iii) the nature and extent of the petitioner’s property, financial or other interest in the proceeding; (iv) the possible effect of any order that may be entered in the proceeding on the petitioner’s interest; (v) the availability of other means whereby the petitioner’s interest will be protected; (vi) the extent to which the petitioner’s interests will be represented by existing parties; (vii) the extent to which the petitioner’s participation will broaden the issues or delay the proceeding; and (viii) the extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record. See *id.* § 2.309(c)(1).

<sup>25</sup> See *State of New Jersey* (Department of Law & Public Safety’s Requests Dated Oct. 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993).

<sup>26</sup> *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)).

<sup>27</sup> See *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

Clearwater's original proposed contentions contains an extensive discussion of the NRC's contention admissibility standards and we do not repeat those standards here.<sup>28</sup>

**IV. CLEARWATER'S NEW CONTENTIONS ARE INADMISSIBLE  
BECAUSE THEY DO NOT MEET THE NRC'S  
CONTENTION TIMELINESS AND ADMISSIBILITY CRITERIA**

**A. Clearwater's New Contentions Do Not Meet the Timeliness Standards Set Forth in 10 C.F.R. § 2.309(f)(2) or (c)(1)**

Although Clearwater is permitted, with leave of the Board, to file new contentions based on recent developments other than the Staff's issuance of an environmental impact statement, Clearwater fails to meet the mandatory requirements for such new contentions as defined in 10 C.F.R. § 2.309(f)(2)(i)-(iii). Significantly, the only purportedly "new" information that Clearwater points to is the publication of the Commission's voting records on the draft final update to the Waste Confidence Rule.<sup>29</sup> However, as explained above, the Commission's voting records merely reveal a *delay* in issuance of an update to the Waste Confidence Rule—an update proposed over one year ago—to allow for an additional, brief round of public comments. As the Licensing Board in the *Levy County* combined license proceeding recently explained, an NRC decision to request rulemaking comments does *not* constitute new information that satisfies the "previously unavailable" requirement in 10 C.F.R. § 2.309(f)(2)(i).<sup>30</sup>

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<sup>28</sup> See Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater, Inc.'s Petition to Intervene and Request for Hearing at 11-18, 24-30 (Jan. 22, 2008).

<sup>29</sup> New Contentions at 2-4, 11, 34. Further, Clearwater does not claim that anything in the Thompson Declaration or the Thompson/TSEP Report qualifies as "new" information or information that was "previously unavailable." Nor could they, as other licensing boards have found that a similar Dr. Thompson declaration attaching this *same* report does not contain significant new factual information. See *Progress Energy Fla., Inc.* (Combined License Application for Levy County Nuclear Power Plants, Units 1 & 2), LBP-09-10, 70 NRC \_\_\_, slip op. at 102 (July 8, 2009) ("Indeed, Dr. Thompson's Declaration (which deals with the risks associated with the high density storage and racking of spent nuclear fuel in pools), covers information and grounds that a 2006 licensing board characterized as 'well trod.'").

<sup>30</sup> *Levy County*, LBP-09-10, 70 NRC \_\_\_, slip op. at 102 (rejecting "the suggestion that the NRC's . . . rulemaking notices *themselves* constitute new information that satisfies the 'previously unavailable' criterion of 10 C.F.R. § 2.309(f)(2)(i) [because] NRC's call for comments on proposed actions is a normal rulemaking activity that may or may not ever materialize into a new final agency action or new final rule"). Also, while not cited by Clearwater as new information, the Obama Administration's plan to create a blue-ribbon panel to evaluate alternatives to Yucca Mountain was announced in June 2009. See, e.g., Letter from Steven Chu, Secretary of Energy, to Joe Barton, House



Clearwater also fails to explain why the information contained in the Commission's voting records is *materially different* from information previously available. As when Clearwater submitted its original Petition to Intervene in December 2007, the Waste Confidence Rule remains the law and litigation on the environmental impacts of spent fuel storage impacts after the operations is prohibited by 10 C.F.R. § 2.335(a). Indeed, Commissioner Svinicki's voting sheet clearly states that the Commission's decision "should not be interpreted as casting doubt on the Commission's prior and existing findings of waste confidence."<sup>31</sup> Accordingly, Clearwater also fails to comply with 10 C.F.R. § 2.309(f)(2)(ii).

Because Clearwater has not satisfied the criteria in 10 C.F.R. § 2.309(f)(2), it must satisfy the test set forth in 10 C.F.R. § 2.309(c)(1). Importantly, the most important factor, "good cause" (10 C.F.R. § 2.309(c)(1)(i)) weighs against admission of the New Contentions for the same reasons they fail to satisfy 10 C.F.R. § 2.309(f)(2).<sup>32</sup> Nor has Clearwater made a "compelling showing" as to remaining factors under 10 C.F.R. § 2.309(c)(1) to outweigh the lack of good cause.<sup>33</sup> In fact, 10 C.F.R. § 2.309(c)(1)(v)-(vi) weigh against admission of the New Contentions because most of the same issues raised in the New Contentions are being addressed in the ongoing Waste Confidence rulemaking, which Clearwater can participate in to protect its interests. Accordingly, a balancing of the factors in 10 C.F.R. § 2.309(c)(1) weighs against admission of the New Contentions.

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Committee on Energy and Commerce (June 1, 2009), *available at* <http://republicans.energycommerce.house.gov/Media/file/Letters/R-060109-DOE-Yucca%20Alternatives.pdf>.

<sup>31</sup> Commissioner Svinicki VR at 3.

<sup>32</sup> See *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163 (2005) (finding that the requirements for a good cause showing under 10 C.F.R. § 2.309(c)(1)(i) "are analogous to the requirements of Sections 2.309(f)(2)(i) (information not previously available) and (f)(2)(iii) (submitted in a timely fashion)").

<sup>33</sup> See *Commonwealth Edison Co.* (Braidwood Nuclear Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

**B. Clearwater's New Contentions Do Not Meet the Admissibility Standards Set Forth in 10 C.F.R. § 2.309(f)(1)**

As shown below, because Clearwater's New Contentions do not meet each of the admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1), they must be rejected, irrespective of their non-timeliness.

**1. Clearwater EC-7 Does Not Meet the Contention Admissibility Standards Set Forth in 10 C.F.R. § 2.309(f)(1)**

**a. *Clearwater EC-7 Admittedly Challenges the NRC's Generic Findings Codified in the Existing Waste Confidence Rule, Contrary to 10 C.F.R. § 2.335(a)***

Clearwater EC-7 claims that NRC's NEPA review is inadequate because it does not evaluate the impacts of storing additional waste onsite or potential alternative storage methods.<sup>34</sup> This constitutes a direct challenge to a current NRC regulation, and is inadmissible. As stated above, the Commission has unequivocally stated that "no discussion of *any environmental impacts*" from spent fuel storage "for the period *following the term of the reactor operating license*" is required in "*any*" environmental impact statement.<sup>35</sup> In fact, Clearwater concedes that the Waste Confidence Rule does "not contemplate the assessments that Clearwater contends is missing."<sup>36</sup> Despite the plain language of the current and *still-controlling* Waste Confidence Rule, Clearwater nevertheless claims that Entergy or the NRC Staff should have performed a site specific assessment of the environmental impacts of spent fuel storage *after* the period of extended operation.<sup>37</sup> It is well established that, absent a waiver, no rule or regulation of the Commission is subject to attack by way of discovery,

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<sup>34</sup> New Contentions at 15.

<sup>35</sup> 10 C.F.R. § 51.23(b) (emphasis added).

<sup>36</sup> New Contentions at 35.

<sup>37</sup> *Id.* at 17. The Commission has explained that the Waste Confidence Rule "applies only to the storage of spent fuel *after* a reactor ceases operation." *Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4)*, CLI-01-17, 54 NRC 3, 23 n.14 (2001). Nonetheless, to the extent that Clearwater challenges the environmental impacts of spent fuel storage *during* the license renewal term for IP2 and IP3, such challenges are barred by 10 C.F.R. Part 51 and its underlying Generic Environmental Impact Statement. *See id.* at 22-23.

proof, argument, or other means in any adjudicatory proceeding.<sup>38</sup> Here, Clearwater makes no attempt to satisfy the requirements for waiver.

Clearwater's reliance on developments in the ongoing Waste Confidence rulemaking is similar to New York State's earlier attempt to rely on the proposed Waste Confidence Rule update in support of proposed NYS-34. The Board correctly rejected NYS-34 and explained:

At this point, the Commission has not made a final determination vis-à-vis the waste confidence rule. Therefore, it is premature to use these publications as the bases for a new contention, as the regulations now in force, specifically 10 C.F.R. § 51.23(b), do not permit "discussion of *any* environmental impact of spent fuel storage" at nuclear reactor sites. Accordingly, NYS-34 is an impermissible challenge to NRC regulations and must be denied.<sup>39</sup>

This same rationale applies here with respect to Clearwater EC-7. Therefore, consistent with agency precedent and the prior decisions of this Board, Clearwater EC-7 must be rejected in accordance with 10 C.F.R. § 2.335(a).

***b. Clearwater EC-7 Attempts to Litigate Subjects of the Ongoing Waste Confidence Rulemaking, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)***

Clearwater EC-7 also must be rejected because it relies extensively on developments that are part of the ongoing Waste Confidence rulemaking. Commission precedent clearly dictates that the subject of an ongoing rulemaking is outside the scope of an adjudication and, thus, does not provide the basis for a litigable contention.<sup>40</sup> If Clearwater disagrees with the Commission's plans to revise the Waste Confidence Rule, then its remedy is to submit comments on the proposed update to that regulation.<sup>41</sup> Should Clearwater object to the Commission's resolution of its comments, then it may

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<sup>38</sup> 10 C.F.R. § 2.335(a).

<sup>39</sup> Board Order (Ruling on New York State's New and Amended Contentions) at 16 (citing 10 C.F.R. § 2.335(a)).

<sup>40</sup> See *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Douglas Point Nuclear*, ALAB-218, 8 AEC at 85); see also *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), LBP-08-21, slip op. at 40 n.36 (Oct. 30, 2008).

<sup>41</sup> See Chairman Jaczko VR at 1; Commissioner Klein VR at 1; Commissioner Svinicki VR at 1.

seek appropriate relief outside of this adjudicatory proceeding.<sup>42</sup> But Clearwater may not seek adjudication of issues being addressed by the Commission as part of the ongoing Waste Confidence rulemaking here.<sup>43</sup> Therefore, Clearwater EC-7 must be rejected because it raises matters that are the subject of an ongoing rulemaking, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

**2. Clearwater SC-1 Does Not Meet the Contention Admissibility Standards Set Forth in 10 C.F.R. § 2.309(f)(1)**

**a. *Clearwater SC-1 Does Not Specifically State the Issue of Law or Fact to Be Raised and Fails to Explain the Basis for the Contention, Contrary to 10 C.F.R. § 2.309(f)(1)(i) and (ii)***

Clearwater SC-1 claims that there is an “insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site in the long term”<sup>44</sup> However, other than a few vague references to aging of dry casks and spent fuel pools, Clearwater fails to identify the issues of law or fact to be raised in this proceeding.<sup>45</sup> Nor has Clearwater provided any basis for any safety concerns—either by way of references to Entergy’s LRA or to any potentially applicable regulations—that are sufficient to warrant admission of an issue for hearing. Rather, without any further analysis or expert support, Clearwater simply states that an aging management plan is necessary because the spent fuel casks and pools are long-lived, passive components. It is fundamental that an “admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].”<sup>46</sup> Therefore,

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<sup>42</sup> See, e.g., 10 C.F.R. §§ 2.206, 2.802.

<sup>43</sup> See *Minn. v. NRC*, 602 F.2d 412, 419 (D.C. Cir. 1979) (upholding denial of requests for adjudicatory hearings because NRC was addressing Waste Confidence concerns in an ongoing rulemaking).

<sup>44</sup> New Contentions at 15.

<sup>45</sup> See *id.* at 30 (“because the casks and pools in which some of the spent fuel is already stored . . . are long lived passive components that the licensee cannot assume will be moved within 30 years after power generation ceases, the applicant must provide an adequate aging management plan”), 35 (“the safety contention raises issues about the aging of long-lived passive components, which are at the heart of the relicensing safety review”), 36 (“Entergy has . . . failed to put forward any aging management plan for the spent fuel storage casks”).

<sup>46</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 359-60 (2001).

Clearwater's unsupported, bare-bones assertions regarding the aging management of dry casks and spent fuel pools should be denied for not providing a specific statement of the issue of law or fact to be controverted, and for failing to provide any explanation of the basis of the matters they seek to raise, contrary to 10 C.F.R. § 2.309(f)(1)(i) and (ii).

***b. Clearwater SC-1 Raises Issues That Are Beyond the Scope of this Proceeding, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)***

Clearwater's allegation that the LRA contains an "insufficient analysis of the aging management of the *dry casks*"<sup>47</sup> raises issues outside the scope of a license renewal proceeding under 10 C.F.R. Part 54, because the IPEC dry storage casks are part of the ISFSI facility which is distinct from—and licensed separately from—IP2 and IP3.<sup>48</sup> ISFSIs are licensed and regulated under 10 C.F.R. Part 72 of the NRC's regulations, which provides for two types of ISFSI licenses, site specific licenses and general licenses.<sup>49</sup> The IPEC ISFSI operates pursuant to a general license under 10 C.F.R. § 72.210.<sup>50</sup> Importantly, Part 72 contains its own license renewal provisions for ISFSIs separate and distinct from Part 54.<sup>51</sup> Based on this distinct licensing process, the Commission has ruled that issues related to ISFSIs are outside the scope of Part 54 power reactor license renewal proceedings.<sup>52</sup> Specifically, in the *Palisades* license renewal proceeding, the Commission addressed this issue directly:

[T]he dry cask storage facility, or independent spent fuel storage installation ("ISFSI"), is licensed separately from the reactor. The current proceeding concerns the renewal of the reactor operating

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<sup>47</sup> New Contentions at 15 (emphasis added).

<sup>48</sup> See 10 C.F.R. § 72.210.

<sup>49</sup> Compare 10 C.F.R. § 72.40 (providing for site specific ISFSI licenses), with *id.* § 72.210 (providing for general licenses for ISFSI located at nuclear power plants using NRC-approved casks).

<sup>50</sup> See Letter from J.E. Pollock, Entergy, to NRC Document Control Desk (Feb. 5, 2008), available at ADAMS Accession No. ML080440312.

<sup>51</sup> See 10 C.F.R. §§ 72.42(b) (license renewal for site-specific licenses), 72.212(a)(3) (extension of general licenses).

<sup>52</sup> See *Nuclear Mgmt. Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 733 (2006); *Oconee*, CLI-99-11; 49 NRC at 344 n.4.

license pursuant to 10 C.F.R. Parts 51 and 54, and not the ISFSI, which is licensed pursuant to 10 C.F.R. Part 72. Issues involving the ISFSI are, quite simply, separate licensing matters.<sup>53</sup>

Thus, because the IPEC ISFSI is licensed pursuant to 10 C.F.R. § 72.212 (as was the ISFSI in the *Palisades* proceeding), such matters are beyond the scope of this proceeding. Accordingly, Clearwater's challenge to the aging management of the spent fuel storage casks are not within the scope of the proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

**c. *Clearwater SC-1 Raises No Genuine Dispute Regarding Entergy's Spent Fuel Pool Aging Management Programs, Contrary to 10 C.F.R. § 2.309(f)(1)(vi)***

Clearwater SC-1 also alleges that the LRA contains an "insufficient analysis of the aging management of the . . . *spent fuel pools*."<sup>54</sup> In order to raise such a challenge, the Commission has stated that a petitioner must "read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.<sup>55</sup> Thus, a contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.<sup>56</sup>

SC-1 is inadmissible because the LRA *contains* AMPs related to the spent fuel pools. Specifically, Entergy's LRA includes AMPs for spent fuel pool structural components, including liner plates and gates;<sup>57</sup> concrete structures, including floor slabs, interior walls, and ceilings;<sup>58</sup> spent

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<sup>53</sup> *Palisades*, CLI-06-17, 63 NRC at 733.

<sup>54</sup> New Contentions at 15 (emphasis added).

<sup>55</sup> Final Rule, Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Millstone*, CLI-01-24, 54 NRC at 358.

<sup>56</sup> See *Oconee*, CLI-99-11, 49 NRC at 342.

<sup>57</sup> LRA at Table 3.5.2-3.

<sup>58</sup> *Id.*

fuel storage racks;<sup>59</sup> and neutron absorbers.<sup>60</sup> By failing to challenge or even reference any of these AMPs, Clearwater fails to directly controvert the LRA.

Clearwater SC-1 is similar to the Town of Cortlandt's earlier attempt to challenge AMPs for spent fuel pools. The Board correctly rejected this proposed contention and explained:

Cortlandt contends that Entergy has not submitted an AMP which provides reasonable assurance that SSCs associated with the storage, control, and maintenance of spent fuel will remain capable of fulfilling their intended functions during the proposed extended period of operation. However, Cortlandt offers no analysis of the AMPs included in the LRA, nor does it explain in any way how those plans are deficient. . . . The LRA, however, does include AMPs for spent fuel structural components, and Cortlandt does not discuss or even identify any alleged deficiency with these plans.

.....

. . . . In this proceeding, Cortlandt must identify specific deficiencies in the AMP in order to secure a hearing on the issue.<sup>61</sup>

Similarly, Clearwater fails to identify any specific deficiencies in the AMPs, and thus fails to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

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

<sup>60</sup> *Id.* at Tables 3.3.2-1-IP2, 3.3.2-1-IP3.

<sup>61</sup> *Indian Point*, LBP-08-13, 68 NRC at 211-12.

V. CONCLUSION

For the reasons set forth above, Clearwater's New Contentions fail to meet the requirements of 10 C.F.R. § 2.309(c), (f)(1), and (f)(2). Therefore, the New Contentions should be denied and the Motion for Leave should be rejected.

Respectfully submitted,



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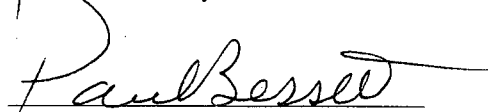
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