

November 20, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
ENTERGY NUCLEAR OPERATIONS, INC. ) Docket Nos. 50-247/286-LR  
 )  
(Indian Point Nuclear Generating )  
Units 2 and 3) )

NRC STAFF'S ANSWER TO  
HUDSON RIVER SLOOP CLEARWATER, INC.'S MOTION FOR LEAVE  
TO ADD NEW CONTENTIONS BASED UPON NEW INFORMATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby files its answer to "Hudson River Sloop Clearwater, Inc.'s ["Clearwater's"] Motion For Leave To Add New Contentions Based Upon New Information," dated October 26, 2009, as corrected November 6, 2009<sup>1</sup> ("Corrected Petition"). As more fully set forth below, the Staff opposes Clearwater's Corrected Petition because the proffered contentions constitute an impermissible challenge to the Commission's "Waste Confidence" rule, lack adequate legal and factual support, do not meet the Commission's requirements in

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<sup>1</sup> Clearwater transmitted three versions of its motion. The first version of its motion was served October 26, 2009. Two days later, Clearwater e-mailed, but did not formally serve, a replacement page to fix a "slight typographic error in EC-7 on page 14." See E-mail from rgouldesq@gmail.com to hearingdocket@nrc.gov *et al.*, sent October 28, 2009 at 11:41 a.m., and attachment, "Clearwater Pet Corrected p. 14.pdf." On November 6, 2009, Clearwater served a further "corrected version" of its motion, purporting to fix various minor errors throughout. See E-mail from rgouldesq@gmail.com to hearingdocket@nrc.gov, *et al.*, sent November 6, 2009 at 7:20 p.m., transmitting (1) "Clearwater Corrected Petition for New Contentions.pdf," (2) "Clearwater Corrected Petition for New Contentions Redline.pdf," and (3) "COS Clearwater Corrected Petition 11.06.pdf."

10 C.F.R. § 2.309(f)(1), and do not meet the new contention filing requirements of 10 C.F.R. § 2.309(f)(2).

### BACKGROUND

On April 23, 2007, Entergy Nuclear Operations, Inc. (“Entergy” or “Applicant”) filed an application to renew the operating licenses for Indian Point Nuclear Generating Units 2 and 3 (“IP2” and “IP3”), for an additional period of 20 years. As part of its license renewal application (“LRA”), the Applicant submitted an “Environmental Report” (“ER”), as required by 10 C.F.R. §§ 51.53(c) and 54.23. On May 11, 2007, the NRC published a notice of receipt of the Indian Point LRA,<sup>2</sup> and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.<sup>3</sup> The notice of opportunity for hearing required that petitions for leave to intervene and requests for hearing be filed by October 1, 2007;<sup>4</sup> this deadline was later extended to November 30, 2007.<sup>5</sup>

On October 18, 2008, this Board was established to rule on petitions to intervene and requests for hearing, and to preside over any proceeding that may be held with respect to the

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<sup>2</sup> “Entergy Nuclear Operations, Inc.; Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period,” 72 Fed. Reg. 26,850 (May 11, 2007).

<sup>3</sup> “Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period,” 72 Fed. Reg. 42,134 (Aug. 1, 2007).

<sup>4</sup> *Id.*, 72 Fed. Reg. at 42,135.

<sup>5</sup> “Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period: Extension of Time for Filing of Requests for Hearing or Petitions for Leave to Intervene in the License Renewal Proceeding,” 72 Fed. Reg. 55,834 (Oct. 1, 2007). The deadline for filing petitions to intervene was extended to December 10, 2007 for persons whose filing of a petition to intervene was impeded by the NRC’s Agencywide Documents Access and Management System (“ADAMS”). See (1) Commission Order of November 16, 2007, and (2) Licensing Board “Order (Granting an Extension of Time to CRORIP Within Which to File Requests For Hearing),” dated December 5, 2007.

license renewal application.<sup>6</sup> On November 30, 2007, petitions for leave to intervene were filed by various petitioners, including the State of New York ("State" or "New York")<sup>7</sup> and Riverkeeper, Inc. ("Riverkeeper").<sup>8</sup> For its part, on December 10, 2007, Clearwater filed its initial petition to intervene and request for hearing, in which it submitted six environmental contentions.<sup>9</sup> Responses to those petitions and contentions were duly filed by the Applicant and by the Staff.<sup>10</sup>

On July 31, 2008, the Board issued its Memorandum and Order ruling on the petitioners' standing to intervene and the admissibility of their contentions.<sup>11</sup> In this regard, the Board found, *inter alia*, that Clearwater Contentions EC-1 and EC-3<sup>12</sup> were admissible.<sup>13</sup> The Board then consolidated Riverkeeper Contention EC-1 with Riverkeeper Contention EC-3.<sup>14</sup>

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<sup>6</sup> "Establishment of Atomic Safety and Licensing Board," 72 Fed. Reg. 60,394 (Oct. 24, 2007).

<sup>7</sup> See "New York State Notice of Intention to Participate and Petition to Intervene," filed November 30, 2007.

<sup>8</sup> See "Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant," filed November 30, 2007.

<sup>9</sup> See "Hudson River Sloop Clearwater Inc's Petition to Intervene and Request for Hearing," filed December 10, 2007 ("Original Clearwater Petition").

<sup>10</sup> See "NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) the State of New York, (5) Riverkeeper, Inc., (6) the Town of Cortlandt, and (7) Westchester County," dated January 22, 2008 ("Staff Response to Initial Petitions").

<sup>11</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43 (July 31, 2008).

<sup>12</sup> Clearwater EC-1 alleged that the applicant's ER does not adequately assess new and significant information regarding the environmental impacts of radionuclide leaks from spent fuel pool leaks at Indian Point, and Clearwater EC-3 alleged that the Environmental Justice ("EJ") analysis in the ER does not adequately assess the impacts of Indian Point on the minority, low-income and disabled populations in the surrounding area.

<sup>13</sup> See LBP-08-13, 68 NRC at 193-94 and 199-201.

<sup>14</sup> *Id.* at 191, 219-220.

On December 22, 2008, the NRC issued Draft Supplement 38 to the Generic Environmental Impact Statement ("Draft SEIS"), concerning the Indian Point LRA.<sup>15</sup> On January 14, 2009, the Board granted New York and Riverkeeper a 37-day extension of time, until February 27, 2009, in which to file contentions related to the Draft SEIS.<sup>16</sup> In discussing the contentions which might be filed, the Board "reminded the parties that any new contentions may only deal with new environmental issues raised by the Draft SEIS. Tr. at 767-68. The Board will not entertain contentions based on environmental issues that could have been raised when the original contentions were filed."<sup>17</sup>

On February 27, 2009, the State of New York filed its contentions regarding the Indian Point Draft SEIS,<sup>18</sup> including New York Contention 34 -- in which the State sought to raise an issue concerning impacts to off-site land use resulting from the potential for "long-term or indefinite storage of high level nuclear waste on the Indian Point site." New York DSEIS Contentions at 37. In support of this contention, New York challenged the continued applicability of the Commission's "Waste Confidence" rule, 10 C.F.R. § 51.23, citing the Commission's October 9, 2008 *Federal Register* notice of an update to the Waste Confidence rule and findings. *Id.* at 38-41 and 44-45, *citing* 73 Fed. Reg. 59,551. The Staff opposed the

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<sup>15</sup> NUREG-1437, Supplement 38, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment" (Dec. 2008).

<sup>16</sup> See Transcript of Pre-Hearing Conference (January 14, 2009), at Tr.768-69; "Memorandum and Order (Summarizing Pre-Hearing Conference)," dated February 4, 2009 ("Pre-Hearing Conference Order"), at 2-3.

<sup>17</sup> Pre-Hearing Conference Order at 3; see Tr. 768.

<sup>18</sup> "State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement," dated February 27, 2009 ("New York DSEIS Contentions").

admission of New York Contention 34,<sup>19</sup> noting, in part, that notwithstanding the State's reference to the Commission's proposed amendment of its waste confidence rule, it is clear that the current rule remains in effect and may not be challenged in this proceeding absent the grant of a petition for rule waiver under 10 C.F.R. § 2.335 – which the State had not filed.<sup>20</sup>

On June 16, 2009, the Board rejected New York Contention 34, finding that it was inadmissible for several reasons. In pertinent part, the Board held that New York's proposed contention constituted an impermissible challenge to the Commission's waste confidence rule, stating as follows:

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.

"Order (Ruling on New York State's New and Amended Contentions)," slip op. at 16 (footnotes omitted) (June 16, 2009).

On October 26, 2009, as corrected November 6, 2009, Clearwater filed its motion for requesting leave to file two new contentions, Clearwater Contentions EC-7 and SC-1, based on

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<sup>19</sup> "NRC Staff's Answer To Amended And New Contentions Filed By The State Of New York And Riverkeeper, Inc., Concerning The Draft Supplemental Environmental Impact Statement" (March 24, 2009).

<sup>20</sup> *Id.* at 25, citing *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17, *reconsideration denied*, CLI-07-13, 65 NRC 211, 214 (2007); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-[16], 68 NRC [361, 416] (Sept. 12, 2008); *Indian Point, LBP-08-13*, 68 NRC at 64, 99, 185-86, and 217; *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition)," slip op. at 2-3.

certain allegedly new information regarding the Waste Confidence rule. In its new contentions, Clearwater asserted as follows:

Contention EC-7

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.

Contention SC-1

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.

Corrected Petition at 15. In support of its late filing of these contentions, Clearwater cited a February 2009 study by its Declarant, Dr. Gordon Thompson,<sup>21</sup> and a September 2009 decision by the Commission disapproving SECY-09-0090.<sup>22</sup>

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<sup>21</sup> Gordon R. Thompson, Institute for Resource and Security Studies, "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>22</sup> See SECY-09-0090, "Final Update of the Commission's Waste Confidence Decision" (June 15, 2009), Encl. 1, *Federal Register Notice* – Final Revision to the Waste Confidence Decision, & Encl. 2, *Federal Register Notice* – Final Rule: amendment to 10 C.F.R. § 51.23(a). Therein, the Commission was asked to consider approval of a draft update and draft final rule for publication in the *Federal Register*. SECY-09-0090 at 4. The Commission disapproved SECY-09-0090, as reflected in a the Commissioners' vote sheets. See Commissioner Klein's Commission Voting Record ("CVR") for SECY-09-0090 (Sept. 16, 2009) (approving in part and disapproving in part) (Clearwater Exh. 2); Commissioner Svinicki's CVR (Sept. 24, 2009) (approving in part and disapproving in part) (Clearwater Exh. 3); and Chairman Jaczko's CVR (Sept. 17, 2009) (approving).

## DISCUSSION

### I. Legal Standards Governing the Admissibility of Contentions.

The legal requirements governing the admissibility of contentions are well established, and are currently set forth in 10 C.F.R. § 2.309. The Staff previously addressed these requirements in its response to the intervenors' original contentions filed in this matter (Staff Response to Initial Petitions, at 15-25), and hereby incorporates that discussion by reference herein. In brief, the regulations required that a contention must satisfy the following timing and basis requirements in order to be admitted:

#### A. Requirements for Timely and Nontimely Filings

To be timely the request and/or petition must be filed pursuant to the time specified in the Federal Register or as provided by the Board. 10 C.F.R. § 2.309(b)(3)(i). Nontimely filings will not be entertained absent a favorable ruling by the Board based upon a balancing of the eight factors of §§ 2.309(c)(1)(i) through (c)(1)(viii). See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 575 (2006). The petitioner must address the following eight factors in its untimely filing:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/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 requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i) - (viii) and (2).<sup>23</sup>

B. General Requirements for Contentions

The Commission has established general requirements for contentions, as set forth in

10 C.F.R. § 2.309(f)(1). As stated therein, contentions must meet the following requirements:

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, . . . ;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific

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<sup>23</sup> Clearwater is an admitted party to this proceeding, and has previously demonstrated its standing to intervene.

portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; . . . .

10 C.F.R. § 2.309(f)(1)(i) – (vi).<sup>24</sup> Further, the Commission has stated that "the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action, not the nature of the NRC Staff's review." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-08-17, 68 NRC 231, 237 (2008), *citing Pa'ina Hawaii, LLC*, CLI-08-3, 67 NRC 151, 168 n.73 (2008).

C. Contentions Must Be Based on Available Information

Further, as set forth in 10 C.F.R. § 2.309(f)(2), petitioners must base their contentions on existing documents and information, including the applicant's safety and environmental documents:

Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. . . .

10 C.F.R. § 2.309(f)(2). This requirement places an "ironclad obligation" on petitioners to examine available information with sufficient care to enable them to uncover any information that could serve as the foundation of a contention. See *Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

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<sup>24</sup> 10 C.F.R. § 2.309(f)(1)(vii) applies to a proceeding under 10 C.F.R. § 52.103(b), and is inapplicable to a license renewal proceeding.

D. Contentions Must Be Timely Filed.

As further set forth in 10 C.F.R. § 2.309(f)(2), following the initial deadline for filing contentions, any supplemental or amended contentions must be timely filed. In this regard, 10 C.F.R. § 2.309(f)(2) states:

The petitioner may amend [its] contentions or file new 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. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--

(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.

10 C.F.R. § 2.309(f)(2).<sup>25</sup> In delineating this requirement, the Commission further stated that, for all new or amended contentions other than those based on the NRC's environmental documents:

[T]he rule makes clear that the criteria in § 2.309(f)(2)(i) through (iii) must be satisfied for admission. Include[d] in these standards is the requirement that it be shown that the new or amended contention has been submitted in a timely fashion based on the timing of availability of the subsequent information. See

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<sup>25</sup> There is a clear analogy between the requirement that data or conclusions must "differ significantly," as required by 10 C.F.R. § 2.309(f)(2), and the requirement that information must be "materially different," as required by § 2.309(f)(2)(ii). *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163, *aff'd on other grounds*, CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006). To be materially different under 2.309(f)(2)(ii), the proffered contention must pose matters material to the outcome of the proceeding. See *id.*

§ 2.309(f)(2)(iii). . . . This requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention becomes available.

Statement of Consideration, "Final Rule, Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

In discussing the Commission's rules establishing a framework for considering contentions filed after the initial petition was due, it has been held that when new contentions are based on breaking new developments or information, they are to be treated as "new or amended" under 10 C.F.R. § 2.309(f)(2)(i)-(iii). *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007), *citing AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 395-96 & n.3 (2006); *Energry Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 & n.21 (2005)). Where the information underlying a late-filed contention is not new, the stricter standards pertaining to non-timely filings, set forth in 10 C.F.R. § 2.309(c)(1)(i)-(viii) apply. *Shaw Areva Mox Services*, 66 NRC at 210 n.95.<sup>26</sup>

A newly-created document that is a compilation or repackaging of previously-existing information is not equivalent to, and does not provide, information that is "materially different" under 10 C.F.R. § 2.309(f)(2)(ii). *See Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), "Memorandum and Order (Ruling on Request to Admit New Contention),"

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<sup>26</sup> Information is not new merely because the petitioner was not previously aware of it. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009). A petitioner "must show that the information on which the contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it." *Id.*, emphasis in original (discussing 10 C.F.R. § 2.309(c) and the need to establish good cause for late filing).

(unpublished), slip op. at 8 (Apr. 29, 2009).<sup>27</sup>

Finally, when new materially-different information is available, a proffered contention must be submitted in a timely manner. 10 C.F.R. § 2.309(f)(2)(iii). A specific time deadline is not given in the NRC's regulations, but, under the well-established standards for late-filed contentions, filing within 30 days of the new information is usually sufficient to meet 10 C.F.R. § 2.309(f)(2)(iii).<sup>28</sup>

II. Clearwater's New Contentions Are Inadmissible.

A. Clearwater's Proffered Environmental Contention is Inadmissible

1. Contention EC-7

In its Contention EC-7, Clearwater asserts:

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.

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<sup>27</sup> In *Bellefonte*, the Board rejected, as not "materially different", the Thompson/TSEP Report -- which has also been filed by Clearwater in support of its new Contentions EC-7 and SC-1 in this proceeding. See Declaration of Dr. Gordon R. Thompson, filed as Exhibit 1 to Corrected Petition, at 2, ¶¶ II-1 – II-2, and attached Thompson/TSEP Report. In *Bellefonte*, addressing the Thompson/TSEP Report, the Board stated:

[I]t seems apparent that the comments/analysis upon which Joint Intervenors rely is essentially an amalgam of information previously submitted in other forums and contexts that primarily focuses on purported impacts of spent-fuel pool fires. To whatever degree the information as it is now packaged may be pertinent and persuasive as waste confidence decision/rulemaking comments, its status as "materially different" for the purpose of interposing timely a new contention in this proceeding is problematic.

*Bellefonte*, *supra*, slip op. at 8 .

<sup>28</sup> See generally, *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (May 25, 2006).

Corrected Petition at 15. In support of this contention, Clearwater asserts that, based on the discussions in the Commissioners' voting records for SECY-09-0090, the Commission cannot predict that a waste repository will exist within 30 years after Indian Point ceases operation. See *id.* at 16-17. Clearwater concludes that long-term storage of waste at Indian Point will result, and the NRC must provide site-specific analysis of the waste impact that has not been generically addressed. *Id.* at 17. Clearwater candidly recognizes that similar contentions have been denied in numerous NRC adjudicatory proceedings, *id.* at 17-24, but it attempts to differentiate those rulings on the grounds that the previous rulings were based on an assumption that waste would only be stored for no more than 30 years beyond the expiration of the license. *Id.* at 24-25. Clearwater states that the new information contained in the Commissioners' voting records undermines the assumption. *Id.* at 25-26. Following additional historical discussions related to waste storage, *id.* at 25-30, Clearwater re-asserts that the Commission's generic findings with respect to onsite fuel storage are only good for storage up to 30 years beyond license expiration. *Id.* at 30. Clearwater states that because the Commission acknowledged that the exact date when a repository might be ready cannot be predicted, the Board must consider the issue in this proceeding. See *id.* at 30. Clearwater states that given the present uncertainty, the NRC must, as part of its NEPA analysis, consider indefinite long-term storage of spent fuel at the Indian Point site. *Id.* at 33.

## 2. Staff Response to Contention EC-7

A review of the history and current status of the Commission's Waste Confidence rule demonstrates that Clearwater's proposed new contentions lack adequate factual and legal basis, and should be rejected as an impermissible challenge to that rule, as set forth in 10 C.F.R. § 51.23. Further, none of the information provided in support of the contention constitutes materially different information, and as such, the contention is impermissibly late.

(a) Regulatory History

The Commission issued its Waste Confidence Decision on August 31, 1984,<sup>29</sup> thereby resolving on a generic basis the issue of whether on-site storage of spent fuel after the expiration of reactor operating licenses needs to be considered in an individual reactor licensing proceeding. As part of its "Waste Confidence Decision" the Commission made five reasonable assurance findings regarding waste storage and disposal, including a finding that environmental protection and safety would be assured for at least 30 years beyond the license of the reactor. 49 Fed. Reg. at 34,658.<sup>30</sup> In an associated rulemaking, the Commission added 10 C.F.R. § 50.54(b) as a new condition on every license issued, and a new 10 C.F.R. § 51.23(a) -- providing, *inter alia*, the Commission's generic determination that, if necessary, a reactor's spent fuel can be stored at the reactor site, or away from the reactor site, safely and without significant environmental impact, for 30 years beyond the licensed term of operation. 49 Fed. Reg. at 34,694. The same rulemaking added 10 C.F.R. § 51.23(b), which stated that no discussion of the environmental impact of spent fuel storage beyond the term of the license is required in any environmental report, environmental impact assessment, or environmental impact

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<sup>29</sup> See "Waste Confidence Decision", 49 Fed. Reg. 34,658 (Aug. 31, 1984); "Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses," 49 Fed. Reg. 34,688 (Aug. 31, 1984).

<sup>30</sup> The Commission found reasonable assurance that (1) safe disposal of high level radioactive waste and spent fuel in a mined geologic repository is technically feasible; (2) one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007-09, and that sufficient repository capacity will be available within 30 years beyond expiration of any reactor operating license to dispose of existing commercial high level radioactive waste and spent fuel originating in such reactor and generated up to that time; (3) high-level radioactive waste and spent fuel will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all high-level radioactive waste and spent fuel; (4) if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating licenses at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations; and (5) safe independent onsite or offsite spent fuel storage will be made available if such storage capacity is needed. 49 Fed. Reg. at 34,659-60.

statement pertaining to the issuance or amendment of a reactor operating license. *Id.*

On September 18, 1990, the Commission published the results of its review of the Waste Confidence Decision, in which it revised findings (2) and (4).<sup>31</sup> In addition, the Commission revised its rules in § 51.23(a), to reflect delays in the opening of a high level waste repository, and to clarify that the 30-year post-operation period included the term of a renewed license.<sup>32</sup>

In 1996, the Commission revised § 51.53 and stated that no aspect of spent fuel storage within the scope of the generic determination of § 51.23(b) needs to be addressed in the environmental report submitted for license renewal.<sup>33</sup> Subsequently, on December 6, 1999, the Commission announced the results of a 10-year review of the Waste Confidence Decision – in which it concluded that a comprehensive reevaluation of the Waste Confidence Decision was not then necessary.<sup>34</sup>

On October 9, 2008, the Commission announced its decision to undertake an updated review of the Waste Confidence Decision.<sup>35</sup> As part of the update, the Commission proposed,

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<sup>31</sup> Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990). The Commission provided revised findings (2) and (4), in which it found reasonable assurance that: (2) that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in such reactor and generated up to that time; and (4) 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. 55 Fed. Reg. at 38,474.

<sup>32</sup> “Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation,” 55 Fed. Reg. 38,472 (Sept. 18, 1990).

<sup>33</sup> “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467 (June 5, 1996), *as amended by* 61 Fed. Reg. 66,537 (Dec. 18, 1996).

<sup>34</sup> “Waste Confidence Decision Review: Status,” 64 Fed. Reg. 68,005 (Dec. 6, 1999).

<sup>35</sup> “Waste Confidence Decision Update,” 73 Fed. Reg. 59,551 (Oct. 9, 2008).

*inter alia*, to find reasonable assurance that spent fuel generated can be stored safely without significant environmental impacts for at least 60 years beyond licensed reactor operation, instead of the previous 30 years. 73 Fed. Reg. at 59,551. The Commission sought public comment on the proposal, *Id.* at 59,552. In addition, the Commission published parallel proposed rules, for comment.<sup>36</sup>

(b) Contention EC-7 Constitutes an Impermissible Challenge to the Commission's Regulations.

In its Corrected Petition, Clearwater describes the Commission's decision to disapprove SECY-09-0090 as a determination "not to amend the Waste Confidence Rule to find generically that a centralized waste disposal facility for spent fuel will be available 50-60 years after the current licenses for nuclear power stations expire because it did not have an adequate basis for making that prediction." Corrected Petition at 2. In addition, Clearwater alleged that certain comments made by Commissioners Klein and Svinicki demonstrated their lack of confidence in their ability to predict when a waste disposal repository would be built. *Id.* at 3-4.

In its Waste Confidence rule, as set forth in 10 C.F.R. § 51.23,<sup>37</sup> the Commission established a generic determination that the environmental impacts of spent fuel storage for 30 years beyond the term of a license is not required in any environmental report or

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<sup>36</sup> Proposed Rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 73 Fed. Reg. 59,547 (Oct. 9, 2008).

<sup>37</sup> In 10 C.F.R. § 51.23(a), the Commission-reached a generic determination that:

[I]f 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.

environmental impact statement issued with regard to a license renewal application.<sup>38</sup> Based on the outcome of its vote on SECY-09-0090, the Commission's Waste Confidence Decision remains unchanged -- as does the Commission's prohibition against considering in any operating reactor license renewal proceeding, the environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations, for the period following the term of the license, as set forth in 10 C.F.R. § 51.23.

Notwithstanding Clearwater's assertion that the Commissioners' statements in their vote sheets on SECY-09-0090 constitute significant new information, it is undisputed that the Commission has neither amended nor revoked its Waste Confidence rule. Clearwater's request for admission of its two new proposed contentions constitutes a direct attack on that rule, and is clearly barred by the mandate of 10 C.F.R. § 51.23(b).<sup>39</sup> Further, Clearwater has not filed a petition for waiver of the Commission's regulations under 10 C.F.R. § 2.335,<sup>40</sup> as this Board has

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<sup>38</sup> The Commission's regulations state that, in connection with the renewal of an operating license, the Commission shall prepare an environmental impact statement as a supplement to NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996). 10 C.F.R. 51.95(c). Regarding waste storage, the rules specify in part that "the supplemental environmental impact statement prepared at the license renewal stage need not discuss . . . any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b)." 10 C.F.R. § 51.95(c)(2).

<sup>39</sup> 10 C.F.R. § 51.23(b) states, in pertinent part:

"[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, . . . , is required in any environmental report, environmental impact statement, environmental assessment, or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear power reactor under parts 50 and 54 of this chapter, . . . .

<sup>40</sup> As stated in 10 C.F.R. § 2.335, absent the granting of a waiver or exception, "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to [10 C.F.R. Part 2]." 10 C.F.R. § 2.335(a).

previously recognized is necessary for any such contentions to be considered.<sup>41</sup> For these reasons, Clearwater's motion should be denied and Contention EC-7 must be rejected as an impermissible challenge to the Commission's regulations. See, e.g., "Order (Ruling on New York State's New and Amended Contentions)" (June 16, 2009), slip op. at 16 (rejecting New York Contention 34 as an impermissible attack upon the Commission's regulations; *cf.* *Tennessee Valley Authority (Watts Bar Unit 2)*, LBP-09-26, 70 NRC \_\_\_, \_\_\_ (Nov. 19, 2009), slip op. at 44 (rejecting Contention 4 concerning need for power and alternative energy sources, as barred by § 51.95(b), absent the filing of a petition for waiver under § 2.335).

(c) Contention EC-7 Is Impermissibly Late, in that It Is Not Supported by Materially Different New Information..

In its Corrected Petition, Clearwater addresses the late filing requirements in 10 C.F.R. § 2.309(f)(2)(i), (ii), and (iii), in a brief and conclusory manner. See Corrected Petition at 38. Those conclusory statements, however, fail to provide sufficient facts to support a favorable finding under § 2.309(f)(2).

Elsewhere in its Corrected Petition, Clearwater asserts that new and significant information is presented by the Commission's deferral of rulemaking to revise the Waste Confidence decision, and by its claim that fuel could remain on-site for longer than the license-plus-thirty-years which the Commission has assessed. Corrected Petition at 33-35. In making these claims, however, Clearwater fails to demonstrate how the Commission's decision to leave the existing rules unchanged can possibly constitute information that is "materially different than information previously available." Clearwater points to no reason why it was unable earlier to make this speculative claim earlier – and indeed, Clearwater could have made its claim a year

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<sup>41</sup> See, e.g., "Order (Ruling on New York State's New and Amended Contentions)" (June 16, 2009), slip op. at 16.

ago, when the Commission proposed to extend its confidence period from 30 years to 50-60 years and sought public comment on that proposal. See 73 Fed. Reg. 59,551 (Oct, 9, 2008); 73 Fed. Reg. 59,547 (Oct, 9, 2008). The September 2009 decision by the Commission not to change its rules had the effect of maintaining the status quo, and does not amount to new information.<sup>42</sup>

Further, Clearwater's reliance on Commissioner Svinicki's CVR as new information is misplaced, for several reasons. First, the Commissioner's historical discussion of the Nuclear Waste Policy Act ("NWPA"), the National Environmental Policy Act ("NEPA"), and related court cases (see Corrected Petition at 27), constitutes a recitation of previously available history, and does not constitute new information under 10 C.F.R. § 2.309(f)(2)(ii). Second, the Commissioner's statements that more public input should be received (CVR at 1) is not new information. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station) LBP-06-11, 63 NRC 391, 399 (2006). Third, Clearwater's reliance on Commissioner Svinicki's discussion of the challenges of conducting a NEPA-analysis for long term fuel storage (Corrected Petition at 34-35, *citing* Svinicki CVR at 2) is also misplaced because it ignores Commissioner Svinicki's subsequent conclusion that:

My comments here should not be interpreted as casting doubt on the Commission's prior and existing findings of waste confidence. I am confident that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impact in either the reactor spent fuel storage basin, or in dry cask storage on an onsite or offsite independent spent fuel storage

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<sup>42</sup> This Board has previously ruled that the Commission's proposed undertaking of rulemaking constituted new and materially different information. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order Ruling on New York State's New and Amended Contentions" (June 16, 2009), slip op. at 16; *cf.* 10 C.F.R. § 2.309(f)(2). In contrast, the Commission's current decision not to approve SECY-09-0090 does not constitute new and materially different information, since it left the current rule in place and did not change the status quo.

installation, or in some combination of these storage options, for many decades.

Svinicki CVR at 3. Thus, again, the Commissioner's discussions do not amount to materially-different information sufficient to satisfy 10 C.F.R. § 2.309(f)(2)(ii).

Clearwater's reference to Commissioner Klein's statement that the proposed update to the rules should consider recent announcements by the Presidential Administration, similarly misses the mark. See Corrected Petition at 3, *quoting* Klein CVR at 1. Rather, Commissioner Klein stated only that the public should be afforded an opportunity to comment on these developments, and that the waste confidence decision and rulemaking should be re-noticed in the *Federal Register* for that purpose. Klein CVR at 1. Commissioner Klein's comments had no effect on the continued validity of the Waste Confidence rule.

In addition to citing the Commissioners' recent CVRs, Clearwater relies upon the Declaration of Dr. Gordon Thompson ("Thompson Declaration") and the Thompson/TSEP Report, which it attached as Exhibit 1 to its Corrected Petition. See *e.g.* Corrected Petition at 16; Thompson Declaration at 2. Clearwater's reliance on these documents does not support the admission of its new contentions. First, Clearwater does not contend that the Thompson materials constitute new information, and indeed, his statements are not new. Apart from the fact that the Thompson/TSEP Report was published long ago (in February 2009), the contents of that report were not new even when the report was published. Thus, several other Boards have recently held that similar contentions supported by Dr. Thompson and his Thompson/TSEP Report failed to satisfy 10 C.F.R. § 2.309(f)(2) because they were not based upon information that was previously unavailable. See *e.g.*, *Progress Energy Florida* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2),

LPB 09-10, 69 NRC \_\_\_\_ (July 8, 2009) (slip op. at 102)<sup>43</sup>; *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), "Order Denying Motion to Admit Proposed Contention Eight" (June 9, 2009), slip op. at 5 (unpublished); *Virginia Electric and Power Co. d/b/a/ Dominion Virginia Power and Old Dominion Electric Cooperative* (Combined License Application for North Anna Unit 3), "Order Denying Motion to Admit Proposed Contention Nine" (June 2, 2009), slip op. at 5 (unpublished); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), Licensing Board Memorandum and Order, (Apr. 29, 2009), slip op. at 8 (unpublished).

(d) A Balancing of the Factors in § 2.309(c) Does Not Support Admission of EC-7.

Clearwater argues that its filing meets the requirements of 10 C.F.R § 2.309(c), although it asserts that this standard is inapplicable. Motion at 36-37. Clearwater asserts that it shows good cause under § 2.309(c)(1)(i) because it could not have filed its contention before the Commission voted on SECY-09-0090. Motion at 38. However, Clearwater's argument fails, because the Commissioners' votes maintained the *status quo*; although the vote occurred in September 2009, it did not provide any new information that could support the filing of a contention. Further Clearwater could have filed its concerns based on Dr. Thompson's Declaration and the Thompson/TSEP Report at any time in the past. Indeed, the prior multiple filings in other proceedings of related contentions supported by Dr. Thompson's report demonstrate that Clearwater could have filed its contentions sooner. Thus, the good cause

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<sup>43</sup> The Board in *Levy County* also rejected the suggestion that the October 9, 2008 Federal Register Notice that the NRC was revisiting its Waste Confidence findings and was soliciting comments thereon was per se sufficient to meet 10 C.F.R. § 2.309(f)(2)(i). *Levy County*, LPB-09-10, 69 NRC at \_\_\_\_ (slip op. at 102). The Levy County Board analyzed and rejected the proffered contention under the eight-factor balancing test of 10 C.F.R. 2.309(c). *Id.* at slip op. 103. See also, *Bellefonte*, slip op. at 7-8 (holding that the petitioners had failed to show that the notice of proposed rulemaking constituted newly available and materially different information).

factor in § 2.309(c)(1)(i) does not weigh in Clearwater's favor.

The balancing factor of broadening and delaying the proceeding in 10 C.F.R. § 2.309(c)(1)(vii) also weighs against Clearwater, as multiple issues including the status of rulemaking and the Staff's GEIS, renewal of dry cask certificates (under 10 C.F.R. Part 72), and review of the Department of Energy's Yucca Mountain project (under 10 C.F.R. Part 63), would substantially exceed the scope of the issues pertinent to license renewal review under 10 C.F.R. Parts 51 and 54. Clearwater's assertion that the admission of its contention would avert any delay which might result from an incorrect decision in this proceeding is to no avail (see Corrected Petition at 40); this concern is both speculative and beyond the scope of 10 C.F.R. § 2.309(c)(1)(vii), which is concerned about delays in *this* proceeding.

Clearwater states that admitting the contentions would assist in developing a sound record. Corrected Petition at 40. However, that conclusory statement misses the mark. Under 10 C.F.R. § 2.309(c), Clearwater must address how its participation would assist in developing a sound record. Clearwater offers no explanation of *how* it will assist in developing the record. The issues of waste storage are already addressed in multiple places through rulemaking and through the separate certification process associated with dry casks. Even without this contention, the NRC has already addressed the topic. *Cf. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976)* (discussing, in the context of discretionary intervention, the issues related to developing a sound record).

B. Clearwater's Proffered Safety Contention is Inadmissible

1. Contention SC-1

In its safety contention SC-1, Clearwater asserts:

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.

Corrected Petition at 15.

Clearwater generally does not distinguish its arguments made in support of SC-1 from those made to support EC-7, other than its assertion that Entergy must provide an adequate Aging Management Program (“AMP”) for casks and pools used to store spent fuel. See Corrected Petition at 30. See also Corrected Petition at 16 (alleging, *inter alia*, that the Commission cannot comply with the Atomic Energy Act without an analysis of indefinite on-site storage), and 30 (asserting that the Atomic Energy Act requires site-specific review of the safety impacts of indefinite onsite storage). Clearwater does not provide further support for its assertions in this contention.

## 2. Staff Response

To be admissible, Contention SC-1 must meet both the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i - iv) and the timing requirements of 10 C.F.R. § 2.309(f)(2). If the contention does not meet § 2.309(f)(2), it must meet § 2.309(c) (governing the submission of untimely contentions. Safety Contention SC-1 fails these tests.

### (a) Contention SC-1 Does Not Meet the Requirements of § 2.309(f)(1)

In its Motion, Clearwater makes no meaningful effort to discuss and apply the factors in § 2.309(f)(1)(i)-(vii) to proposed Contention SC-1. For example, pursuant to 10 C.F.R. § 2.309(f)(1)(ii), Clearwater must provide a brief explanation of the contention. However, there is no meaningful explanation of the safety claims made therein. See Petition at 15-33 (discussing the history of the environmental claim, but providing only conclusory remarks on the safety claim).

Contention SC-1 is composed of four claims: (1) Entergy failed to analyze sufficiently the aging of dry casks, (2) Entergy failed to analyze sufficiently the aging of its spent fuel pools,

(3) Entergy failed to establish the safety of long-term storage using casks and pools; and (4) the Staff failed to establish the safety of long-term storage. As explained below, none of these claims establishes an admissible contention.

i. Dry Cask Storage Is Beyond the Scope of the Proceeding

Pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a contention must raise issues that are within the scope of the proceeding. In Contention SC-1, however, Clearwater raises concerns regarding the safety of dry cask storage. The safety of Indian Point's dry storage casks, however, is an issue that is beyond the scope of this proceeding, which addresses the renewal of the IP2 and IP3 reactor operating licenses under 10 C.F.R. Part 54. Instead, the safety of a spent fuel storage cask is reviewed in a proceeding conducted under 10 C.F.R. Part 72,<sup>44</sup> Accordingly, the portion of SC-1 concerned with the safety of dry cask storage is inadmissible and beyond the scope of the Indian Point License Renewal proceeding.

ii. Clearwater Fails to Dispute Any Spent Fuel Pool Provisions in the LRA

10 C.F.R. § 2.309(f)(1)(vi) requires that a petitioner identify the specific portions of the application that it disputes, along with the supporting reasons for each dispute. Contrary to this requirement, Clearwater fails to identify any portion of the Indian Point LRA which it contends is inadequate. Within the LRA, Entergy discussed aging management programs associated with spent fuel pools. For example, for the Spent Fuel Storage Racks, the LRA indicates that the AMP for "Water Chemistry Control - Primary and Secondary" is used to manage the loss of material aging effect. LRA at p. 3.5-51, Table 3.5.2-3, ("Turbine Building, Auxiliary Building, and

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<sup>44</sup> A Certificate of Compliance ("CoC") is issued for spent fuel storage casks under 10 C.F.R. § 72.238. See, e.g., CoC No. 1014, approving the HI-STORM 100 Cask System for use from May 31, 2000, to June 1, 2020. The renewal of a CoC is governed by 10 C.F.R. § 72.240.

Other Structures Structural Components and Commodities (IP2 and IP3)"). Nowhere does Clearwater challenge this, or any other AMP provided in the LRA for spent fuel pools, including those portions that directly deal with the aging of spent fuel storage components. Thus, because Clearwater fails to address and dispute the application, the spent fuel pool portion of SC-1 is not admissible.

iii. Long-Term Storage is Beyond the Scope of License Renewal

Clearwater alleges, in part, that the Applicant failed to establish that that any combination of spent fuel pool and dry cask fuel storage will provide adequate protection of safety over the long term. Corrected Petition at 15. However, as previously discussed, the LRA contains programs addressing the spent fuel pool, and Clearwater did not dispute those programs. Also, post-operation storage plans are subject to separate review and preliminary approval under the current operating license regulations under 10 C.F.R. § 50.54(bb), the provisions of which are a condition of the current operating licenses.<sup>45</sup> Clearwater provides no legal citation to support its view that the LRA must contain a long-term combination safety assessment, thus this portion of Contention SC-1 is inadmissible.

iv. The Challenge to Staff Performance is Not Admissible

In its Corrected Petition, Clearwater alleges that the NRC Staff has failed to establish the

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<sup>45</sup> Under 10 C.F.R. § 50.54(bb), a licensee must submit for NRC review and preliminary approval its program for management of all irradiated fuel at the reactor during the period following permanent cessation of operations until the Secretary of Energy takes possession of the fuel for ultimate disposal in a repository. In promulgating 10 C.F.R. § 50.54(bb), the Commission stated that, while no specific actions were required, the licensees' actions could include continued storage of spent fuel in the reactor spent fuel storage basin, storage in an on-site or off-site independent spent fuel storage installation licensed under 10 C.F.R. Part 72; and transshipment to and storage of the fuel at another operating reactor site in another reactor's basin. 49 Fed. Reg. at 34,689. On October 23, 2008, Entergy submitted information pursuant to 10 C.F.R. § 50.54(bb), for Indian Point Units 1 and 2. See Letter from J. E. Pollock to NRC, Subject "Unit 1 & 2 Program for Maintenance of Irradiated Fuel and Preliminary Decommissioning Cost Analysis in accordance with 10 CFR 50.54 (bb) and 10 CFR 50.75(f)(3)."

safety of long-term spent fuel storage. Corrected Petition at 15. This assertion fails to state an admissible contention. Thus, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), a petitioner must include references to specific portions of the application that it disputes; Clearwater's assertion concerning the Staff fails to meet this requirement. *Cf.* 10 C.F.R. § 2.309(f)(2) (requiring that contentions be based upon the application). Further, the Commission has stated that "the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action, not the nature of the NRC Staff's review." *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station)*, CLI-08-17, 68 NRC 231, 237 (2008), citing *Pa'ina Hawaii, LLC*, CLI-08-3, 67 NRC 151, 168 n.73 (2008). Thus, the Board may not consider the portion of Contention SC-1 that claims the Staff failed to perform its duties.

(b). SC-1 Does Not Meet the Requirements of 10 C.F.R. § 2.309(f)(2)

Contention SC-1, like Contention EC-7, was submitted in response to the Commission's decision not to change its *environmental* rules in 10 C.F.R. Part 51. See Corrected Petition at 38. Insofar as Contention SC-1 is based on statements in the Commissioners' VCRs, which accompanied its September 2009 decision to leave the Waste Confidence rule in place, it is not supported by new and materially different information and fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(ii). Further, Clearwater's concerns over aging management of casks, fuel pools, and the long-term safety could have been filed much sooner (*e.g.*, upon Clearwater's initial review of Entergy's application). Clearwater's attempt to raise these issues now is impermissibly late.

(c). The Factors of § 2.309(c) do not Support Admission of SC-1

To have Contention SC-1 admitted under 10 C.F.R. § 2.309(c), Clearwater would need to address the eight factors in 10 C.F.R. § 2.309(c)(1). 10 C.F.R. § 2.309(c)(2). However, Clearwater's application of the eight-factor test of § 2.309(c) (Corrected Petition at 38-40) concentrates on NEPA issues and does not explain why this *safety* contention could not have

been filed earlier. Further, for the reasons stated above with respect to Contention EC-7, this contention fails to satisfy the requirements governing the admissibility of untimely contentions under 10 C.F.R. § 2.309(c).

CONCLUSION

Clearwater's two new contentions constitute an impermissible challenge to the Commission's Waste Confidence rule. Further, Clearwater has not demonstrated the existence of new and materially-different information to support the admission of its new contentions. In addition, Clearwater Contentions EC-7 and SC-1 fail to meet the admissibility requirements of 10 C.F.R. § 2.309(c) and (f). For these and other reasons stated above, Clearwater's request for the admission of Contentions EC-7 and SC-1 should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David E. Roth', with a long, sweeping horizontal stroke extending to the right.

David E. Roth  
Counsel for NRC Staff

Dated at Rockville, MD  
this 20th day of November 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
ENTERGY NUCLEAR OPERATIONS, INC. ) Docket Nos. 50-247/286-LR  
 )  
(Indian Point Nuclear Generating )  
Units 2 and 3) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO HUDSON RIVER SLOOP CLEARWATER, INC.'S MOTION FOR LEAVE TO ADD NEW CONTENTIONS BASED UPON NEW INFORMATION" have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by an asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail this 20<sup>th</sup> day of November, 2009:

Lawrence G. McDade, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [Lawrence.McDade@nrc.gov](mailto:Lawrence.McDade@nrc.gov)

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16G4  
Washington, DC 20555-0001  
E-mail: [OCAAMAIL.resource@nrc.gov](mailto:OCAAMAIL.resource@nrc.gov)

Dr. Richard E. Wardwell  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [Richard.Wardwell@nrc.gov](mailto:Richard.Wardwell@nrc.gov)

Office of the Secretary  
Attn: Rulemaking and Adjudications Staff  
Mail Stop: O-16G4  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [Hearing.Docket@nrc.gov](mailto:Hearing.Docket@nrc.gov)

Dr. Kaye D. Lathrop  
Atomic Safety and Licensing Board Panel  
190 Cedar Lane E.  
Ridgway, CO 81432  
E-mail: [Kaye.Lathrop@nrc.gov](mailto:Kaye.Lathrop@nrc.gov)

Zachary S. Kahn, Esq.  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [Zachary.Kahn@nrc.gov](mailto:Zachary.Kahn@nrc.gov)

Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, DC 20555-0001  
(Via Internal Mail Only)

Kathryn M. Sutton, Esq.\*  
Paul M. Bessette, Esq.  
Morgan, Lewis & Bockius, LLP  
1111 Pennsylvania Avenue, NW  
Washington, D.C. 20004  
E-mail: [ksutton@morganlewis.com](mailto:ksutton@morganlewis.com)  
E-mail: [pbessette@morganlewis.com](mailto:pbessette@morganlewis.com)  
E-mail: [martin.o'neill@morganlewis.com](mailto:martin.o'neill@morganlewis.com)

Michael J. Delaney, Esq.\*  
Vice President – Energy Department  
New York City Economic Development  
Corporation (NYCDEC)  
110 William Street  
New York, NY 10038  
E-mail: [mdelaney@nycedc.com](mailto:mdelaney@nycedc.com)

Justin D. Pruyne, Esq.\*  
Assistant County Attorney  
Office of the Westchester County Attorney  
148 Martine Avenue, 6<sup>th</sup> Floor  
White Plains, NY 10601  
E-mail: [jdp3@westchestergov.com](mailto:jdp3@westchestergov.com)  
Daniel E. O'Neill, Mayor\*  
James Seirmarco, M.S.  
Village of Buchanan  
Municipal Building  
Buchanan, NY 10511-1298  
E-mail: [vob@bestweb.net](mailto:vob@bestweb.net)

Josh Kirstein, Esq.  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U. S, Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-Mail: [Josh.Kirstein@nrc.gov](mailto:Josh.Kirstein@nrc.gov) .

William C. Dennis, Esq.\*  
Assistant General Counsel  
Entergy Nuclear Operations, Inc.  
440 Hamilton Avenue  
White Plains, NY 10601  
E-mail: [wdennis@entergy.com](mailto:wdennis@entergy.com)

Mylan L. Denerstein, Esq.\*  
Janice A. Dean, Esq.  
Executive Deputy Attorney General,  
Social Justice  
Office of the Attorney General  
of the State of New York  
120 Broadway, 25<sup>th</sup> Floor  
New York, NY 10271  
E-mail: [mylan.denerstein@oag.state.ny.us](mailto:mylan.denerstein@oag.state.ny.us)  
[janice.dean@oag.state.ny.us](mailto:janice.dean@oag.state.ny.us)

Ross H. Gould, Esq.\*  
10 Park Ave, #5L  
New York, NY 10016  
T: 917-658-7144  
E-mail: [rgouldesq@gmail.com](mailto:rgouldesq@gmail.com)

John J. Sipos, Esq.\*  
Charlie Donaldson, Esq.  
Assistants Attorney General  
New York State Department of Law  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
E-mail: [john.sipos@oag.state.ny.us](mailto:john.sipos@oag.state.ny.us)

Robert Snook, Esq.\*  
Office of the Attorney General  
State of Connecticut  
55 Elm Street  
P.O. Box 120  
Hartford, CN 06141-0120  
E-mail: [robert.snook@po.state.ct.us](mailto:robert.snook@po.state.ct.us)

Phillip Musegaas, Esq.\*  
Deborah Brancato, Esq.  
Riverkeeper, Inc.  
828 South Broadway  
Tarrytown, NY 10591  
E-mail: [phillip@riverkeeper.org](mailto:phillip@riverkeeper.org)  
[dbrancato@riverkeeper.org](mailto:dbrancato@riverkeeper.org)

Elise N. Zoli, Esq.\*  
Goodwin Procter, LLP  
Exchange Place  
53 State Street  
Boston, MA 02109  
E-mail: [ezoli@goodwinprocter.com](mailto:ezoli@goodwinprocter.com)

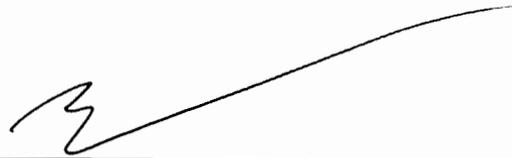
Martin J. O'Neill, Esq.\*  
Morgan, Lewis & Bockius, LLP  
1000 Louisiana Street, Suite 4000  
Houston, TX 77002  
E-mail: [martin.o'neill@morganlewis.com](mailto:martin.o'neill@morganlewis.com)

Daniel Riesel, Esq.\*  
Thomas F. Wood, Esq.  
Ms. Jessica Steinberg, J.D.  
Sive, Paget & Riesel, P.C.  
460 Park Avenue  
New York, NY 10022  
E-mail: [driesel@sprlaw.com](mailto:driesel@sprlaw.com)  
[jsteinberg@sprlaw.com](mailto:jsteinberg@sprlaw.com)

Joan Leary Matthews, Esq.\*  
Senior Attorney for Special Projects  
New York State Department of  
Environmental Conservation  
Office of the General Counsel  
625 Broadway, 14<sup>th</sup> Floor  
Albany, NY 12233-1500  
E-mail: [jmatthe@gw.dec.state.ny.us](mailto:jmatthe@gw.dec.state.ny.us)

John Louis Parker, Esq.\*  
Office of General Counsel, Region 3  
New York State Department of  
Environmental conservation  
21 South Putt Corners Road  
New Paltz, NY 12561-1620  
E-mail: [jlparker@gw.dec.state.ny.us](mailto:jlparker@gw.dec.state.ny.us)

Manna Jo Greene\*  
Hudson River Sloop Clearwater, Inc.  
112 Little Market Street  
Poughkeepsie, NY 12601  
E-mail: [mannajo@clearwater.org](mailto:mannajo@clearwater.org)



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David E. Roth  
Counsel for NRC Staff