

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-0247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

February 12, 2010

MEMORANDUM AND ORDER

(Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater's Motion for Leave to Admit New Contentions)

Before this Board is a Motion for Leave to Add New Contentions filed by Hudson River Sloop Clearwater, Inc. (Clearwater) relating to the potential environmental and safety impacts of the long-term storage of spent fuel at the Indian Point facility.¹ Because the Board finds that the proposed contentions raise significant legal and policy issues and that the resolution of these issues would materially advance the orderly disposition of this proceeding,² we hereby certify to the Commission the questions raised by Clearwater's Motion, which challenge the continued viability of the Waste Confidence Rule.

Existing Commission regulations provide that:

¹ Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add a New Contention Based Upon New Information (Oct. 26, 2009) [hereinafter Clearwater Motion]. The Board notes that although the title of Clearwater's Motion refers to "a" new contention, Clearwater has moved to admit two new contentions in its motion. *Id.* at 39. Accordingly, this Memorandum and Order addresses both proffered contentions. Further, as the NRC Staff has noted, while the first submission of Clearwater's Motion was on October 26, 2009, the final version was transmitted on November 6, 2009. See NRC Staff's Answer to Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add New Contentions Based Upon New Information (Nov. 20, 2009) at 1 n.1 [hereinafter NRC Staff Answer]. Citations in this Memorandum and Order to Clearwater's Motion will be to the most recent version of Clearwater's Motion.

² 10 C.F.R. §§ 2.319(l), 2.323(f)(1), and 2.341(f)(1).

no 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, reactor combined license or amendment, or initial ISFSI license or amendment for which application is made, is required in any environmental report. . . .³

In light of recent developments affecting the proposed Yucca Mountain nuclear waste repository, we hereby ask the Commission to advise the Board whether we should: (1) defer ruling on Clearwater's Motion until the Commission undertakes an evaluation of the impact, if any, that these recent developments will have on the viability of the Commission's Waste Confidence Rule; (2) rule on Clearwater's pending motion consistent with the current language of Section 51.23; (3) admit Clearwater's new contentions notwithstanding Section 51.23; or (4) take some other action to be specified by the Commission.

We shall hold our ruling on the admissibility of Clearwater's new contentions in abeyance pending the receipt of guidance from the Commission. However, we shall not, unless directed otherwise by the Commission, delay any other aspect of the proceeding, as the Board is of the opinion that we can proceed to evidentiary hearing on the admitted contentions pending the receipt of direction from the Commission on the certified issue.

I. Clearwater's Motion for Leave to Admit a New Contention

A. Procedural Background

This proceeding arises from a challenge to the application of Entergy Nuclear Operations, Inc. (Entergy or Applicant) for the renewal of its operating licenses for Indian Point Nuclear Generating Units 2 and 3 in Buchanan, New York.⁴ On July 31, 2008, the Board

³ 10 C.F.R. § 51.23(b).

⁴ See 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, 42,134-35 (Aug. 1, 2007).

admitted the State of New York (New York), Riverkeeper, Inc. (Riverkeeper), and Clearwater as parties to this proceeding and granted the State of Connecticut (Connecticut), Westchester County (Westchester), and the Town of Cortlandt (Cortlandt) an option, which was subsequently accepted by Connecticut and Cortlandt, to participate in this proceeding as interested governmental entities.⁵

Thereafter, New York sought to admit new contentions in February 2009 based on the publication of the NRC Staff's Draft Supplemental Environmental Impact Statement (Draft SEIS).⁶ One of these contentions, NYS-34, was based on the Commission's proposed Waste Confidence Decision Update,⁷ and alleged that, in violation of the National Environmental Policy

⁵ LBP-08-13, 68 NRC 43, 217 (2008). See also Licensing Board Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) (Dec. 18, 2008) at 2 (unpublished).

⁶ See State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement (Feb. 27, 2009) [hereinafter New York Draft SEIS Contentions].

⁷ In October of 2008, the NRC proposed a revision to its Waste Confidence Rule, proposing to (1) reaffirm all findings in its 1990 rulemaking on Waste Confidence and (2) amend Findings 2 and 4 to read:

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 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.

Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

Act (NEPA), the Draft SEIS failed to address “significant new information regarding the potential impacts to off-site land use from long-term or indefinite storage of high level nuclear waste on the Indian Point site.”⁸ The Board did not admit NYS-34 because the Proposed Waste Confidence Rule Update did not result in any immediate change to the rule. Accordingly, the Board found that NYS-34 was an impermissible challenge to NRC regulations under 10 C.F.R. § 2.335(a).⁹

On June 16, 2009, the NRC General Counsel submitted its “Final Update of the Commission’s Waste Confidence Decision,” SECY-09-0090, to the Commission, in which it proposed generally leaving intact the Commission’s Waste Confidence findings. However, in making this recommendation the NRC Staff noted that:

[T]he basis for the rule is limited to the evidence supporting Finding 4 (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 revised or renewed license) of that reactor), the draft final rule language is amended to be consistent with Finding 4. The draft final rule language is also amended to include Finding 2. This is to make clear that Finding 4 does not contemplate indefinite storage and underscores the Commission’s expectation of repository availability within 50-60 years beyond licensed operation.¹⁰

Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008). The comment period was originally to last until December 8, 2008, but the NRC Staff extended it to February 6, 2009. Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation and Waste Confidence Decision Update: Extension of Comment Period, 73 Fed. Reg. 72,370 (Nov. 28, 2008).

⁸ New York Draft SEIS Contentions at 37-46.

⁹ Licensing Board Order (Ruling on New York State’s New and Amended Contentions) (June 16, 2009) at 16 (unpublished).

¹⁰ SECY-09-0090, Final Update of the Commission’s Waste Confidence Decision at 3-4 (June 16, 2009) (ADAMS Accession No. ML091660274) [hereinafter SECY-09-0090].

In September 2009, each of the three sitting Commissioners voted on whether to approve SECY-09-0090: Chairman Jaczko approved the update,¹¹ while Commissioners Klein¹² and Svinicki approved in part and disapproved in part.¹³

On October 26, 2009, Clearwater filed its motion, which put forth one environmental contention and one safety contention, construing the Commission's notation votes on SECY-09-0090 as new information that undermined further reliance on the Waste Confidence Rule. Clearwater then argued that the NRC Staff could not satisfy its responsibilities under the Atomic Energy Act (AEA) and NEPA without a disposal plan from Entergy for high-level radioactive waste (HLW) generated at Indian Point Units 2 and 3 after the plant's current licenses expire.¹⁴ Supporting Clearwater's Motion, New York,¹⁵ Cortlandt,¹⁶ Connecticut,¹⁷ and Riverkeeper each

¹¹ Chairman Jaczko's Notation Vote on SECY-09-0090: Final Update of the Commission's Waste Confidence Decision (Sept. 17, 2009), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009-0090vtr-gbj.pdf> [hereinafter Jaczko Notation Vote].

¹² Commissioner Klein's Notation Vote on SECY-09-0090: Final Update of the Commission's Waste Confidence Decision (Sept. 16, 2009), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009-0090vtr-dek.pdf> [hereinafter Klein Notation Vote].

¹³ Commissioner Svinicki's Notation Vote on SECY-09-0090: Final Update of the Commission's Waste Confidence Decision (Sept. 24, 2009), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009-0090vtr-cls.pdf> [hereinafter Svinicki Notation Vote].

¹⁴ Clearwater Motion at 14-15, 28.

¹⁵ 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 Generated at Indian Point (Nov. 19, 2009) [hereinafter New York Answer].

¹⁶ Town of Cortlandt's Answer 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 (Nov. 20, 2009) [hereinafter Cortlandt Answer].

¹⁷ Answer of Richard Blumenthal, Attorney General of Connecticut 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 (Nov. 20, 2009) [hereinafter Connecticut Answer].

filed separate answers.¹⁸ Opposing Clearwater's Motion, Entergy¹⁹ and the NRC Staff²⁰ filed separate answers on November 20, 2009. Clearwater filed its Reply on November 27, 2009.²¹

B. Clearwater's Motion

Clearwater's Motion seeks admission of two new contentions, Environmental Contention 7 (Clearwater EC-7) and Safety Contention 1 (Clearwater SC-1). Clearwater EC-7 specifically alleges that:

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.²²

Clearwater SC-1 specifically alleges that:

The license renewal application requesting the licensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of 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.²³

¹⁸ Answer of Riverkeeper, Inc. in Support of Hudson River Sloop Clearwater Inc.'s New Contentions EC-7 and SC-1 (Nov. 20, 2009) [hereinafter Riverkeeper Answer].

¹⁹ Answer of Entergy Nuclear Operation's, Inc. Opposing Clearwater's Motion for Leave to Add New Waste Confidence Contentions (Nov. 20, 2009) [hereinafter Entergy Answer].

²⁰ NRC Staff Answer.

²¹ Combined Reply to NRC Staff and Entergy's Answer in Opposition to Clearwater's Motion for Leave to Add New Contentions Based Upon New Information (Nov. 20, 2009) [hereinafter Clearwater Reply].

²² Clearwater Motion at 15.

²³ Id.

Pointing to federal precedent, which it argues may mandate NEPA analyses outside of NRC rules in licensing proceedings to fulfill the NRC's statutory duties under NEPA,²⁴ Clearwater urges the Board to deem these contentions to be within the scope of this license renewal proceeding under 10 C.F.R. § 2.309(f)(1)(iii) because of what Clearwater represents as the Commission's recognition that spent fuel would stay on-site long after the period of the license renewal.²⁵

Clearwater argues that an adequate factual basis for its contentions can be found in the Commissioners' notation votes²⁶ and the Declaration of Dr. Gordon R. Thompson.²⁷ Clearwater maintains that these new contentions raise a material factual dispute with the NRC Staff because they demonstrate that possible adverse impacts from the indefinite on-site storage of nuclear waste have not been adequately addressed.²⁸ In light of the Commissioners' statements regarding waste confidence, Clearwater construes the failure to include an analysis of long-term storage of HLW as failing to satisfy the obligations under the interpretation of NEPA

²⁴ Namely, San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 449 F.3d 1016 (9th Cir. 2006), cert. denied sub nom. PG&E v. San Luis Obispo Mothers for Peace, 549 U.S. 1166 (2007). The Board notes that the Commission has held that San Luis Obispo Mothers for Peace is applicable in cases where an NRC-licensed facility is located in the Ninth Circuit. Areva Enrichment Services, LLC (Eagle Rock Enrichment Facility), CLI-09-15, 70 NRC __, __ (slip op. at 3) (July 26, 2009). The facility in this proceeding is located in the Second Circuit; accordingly, the Board notes that San Luis Obispo Mothers for Peace is not binding precedent.

²⁵ Clearwater Motion at 35 (citations omitted).

²⁶ See supra notes 12-13.

²⁷ See Clearwater Motion at 16 (citations omitted); Clearwater Motion, Exh. 1, 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) [hereinafter Thompson Decl.].

²⁸ Clearwater Motion at 35-36 (citations omitted).

articulated by the Court of Appeals in Minnesota v. U.S. Nuclear Regulatory Commission,²⁹ which was the impetus for the Waste Confidence Rule.³⁰ Clearwater further argues that Clearwater SC-1 raises a material safety dispute because the license renewal application (LRA) contains no aging management plans for spent fuel storage casks due to the Waste Confidence Rule.³¹

Procedurally, Clearwater claims that the contentions are timely under 10 C.F.R. § 2.309(f)(2) because: (1) the Commissioners' notation votes and their individual comments on the NRC Staff's proposed updates to the Waste Confidence Rule constitute information not previously available, since the votes were not cast until September 2009; (2) this information is "materially different from information previously available" because the votes are the latest and most fundamental event undermining the Commission's Waste Confidence Rule; and (3) the contentions were filed on October 26, 2009, within thirty days of the previously unavailable information becoming available.³² In the alternative, Clearwater asserts that these new contentions meet the 10 C.F.R. § 2.309(c) balancing test for the admissibility of nontimely contentions, because good cause existed for not filing earlier since the notation votes were not available until September 24, 2009 (the date Commissioner Svinicki's vote became public).³³ Regarding fulfillment of the other 10 C.F.R. § 2.309(c) factors, Clearwater represents that: (1) it is already a party to the proceeding; (2) it has already demonstrated in its initial petition to intervene that it has individual members whose interests could suffer from the plant's

²⁹ Minnesota v. U.S. Nuclear Regulatory Comm'n, 602 F.2d 412 (D.C. Cir. 1979).

³⁰ Clearwater Motion at 25-30 (citations omitted).

³¹ Id. at 36-37 (citations omitted).

³² Id. at 35-38 (citations omitted).

³³ Id. at 39-40 (citations omitted).

relicensing; (3) admitting these contentions would “likely . . . have a material effect on the licensing decision that is before the Commission”; (4) it “has no other available means to protect [its] interests because in the absence of an admitted contention, the required analyses would not be done”; (5) even though admitting these contentions could delay the proceeding, according to Clearwater, such a delay is better than a breach of NEPA; and (6) admitting these contentions would lead to development of a sound record because the analysis in the current record is deficient since the environmental and safety impacts of the indefinite storage of HLW at the Indian Point facility have not been addressed.³⁴

C. New York’s Answer

New York asserts that these new contentions should be admitted.³⁵ New York differentiates these contentions from NYS-34, which the Board rejected in June 2009, by noting that NYS-34 was based on the doubt that the NRC Staff expressed in the October 2008 proposed rulemaking regarding the availability of a permanent waste disposal repository by 2025, while “the Commissioners themselves have now described their views in formal votes in the [Administrative Procedure Act (APA)] rulemaking proceeding and have concluded that they cannot now make a reasonable assurance finding that an off-site permanent waste disposal repository will be available by any particular time in the future.”³⁶ Therefore, New York reasons, the issue of waste confidence, while previously inadmissible as outside the scope of this proceeding, is now open for litigation. New York maintains that environmental issues associated with the indefinite storage of spent nuclear fuel on-site and safety issues associated with “maintaining spent fuel at the site indefinitely without an adequate aging management

³⁴ Id. at 40 (citations omitted).

³⁵ New York Answer at 1.

³⁶ Id. at 5-6.

plan[] for the spent fuel storage structures” should be resolved as part of this proceeding.³⁷ New York maintains that any license renewal of Indian Point must be preceded by a “thorough evaluat[ion]” of “all major environmental impacts and safety concerns” under NEPA, the AEA, and Minnesota v. NRC.³⁸

As an alternative, New York suggests that the Board “refer the decision on admissibility of the contentions to the Commission or notify [the Commission] that the Board will await further Commission action.”³⁹ New York argues that even though the Commissioners’ September 2009 notation votes do not expressly alter the regulatory text, such action should not be “a barrier to a full and fair exploration of environmental and safety issues that federal statutes (NEPA and AEA) and federal courts require be addressed,” since, according to New York, these votes cast serious doubt on the Commission’s reasonable assurance of a solution to waste disposal by 2025 (the date reflected in the Waste Confidence Rule itself).⁴⁰

New York concedes that the Commission has frowned upon delays in ruling on contention admissibility, but distinguishes those COL cases from this proceeding, which is a license renewal proceeding under Part 54.⁴¹ New York further suggests that for the Board to defer ruling on the admissibility of Clearwater’s contentions would serve “the Commission’s interest in efficiency and predictability.”⁴² New York represents that the Commission’s recent notation votes foreshadow the inevitable withdrawal of the Waste Confidence Rule and that

³⁷ Id. at 6-8.

³⁸ Id. at 8.

³⁹ Id. at 12.

⁴⁰ Id. at 12-16 (citations omitted).

⁴¹ Id. at 15 n.5 (citations omitted).

⁴² Id. at 16.

there is a need to resolve the issues of HLW storage and disposal in this proceeding, thereby obviating the likely successful appeal of any denial of the admission of these contentions.⁴³

Finally, New York asks the “NRC Staff to explain: (1) whether or not the Staff will request that the Commissioners suspend [10 C.F.R.] § 51.23; and (2) whether or not Staff will accept the long-term or indefinite storage of high-level radioactive waste at Indian Point.”⁴⁴

D. Cortlandt’s Answer

Cortlandt also urges that Clearwater’s contentions be admitted.⁴⁵ Specifically, Cortlandt represents that “[t]wo out of the three Commissioners officially stated that they are unable to determine when off-site storage will be available for spent fuel waste currently stored on-site at nuclear facilities.”⁴⁶ Cortlandt concludes that such statements undermine the Waste Confidence Rule, which serves as a justification for the absence of analysis by Entergy and the NRC Staff of the environmental effects of indefinite on-site storage of spent nuclear fuel.⁴⁷

E. Connecticut’s Answer

Connecticut maintains that Clearwater’s contentions are admissible due to the “new information revealed in the Commissioners’ Notation votes,” since “[t]he issue of when or whether there will be a high level repository must be considered in evaluating the safety and environmental issues associated with storage of spent fuel waste” at Indian Point for the thirty-year period after license renewal.⁴⁸ Connecticut asserts that:

⁴³ Id.

⁴⁴ Id. at 17.

⁴⁵ Cortlandt Answer passim.

⁴⁶ Id. at 2.

⁴⁷ Id. at 2-3.

⁴⁸ Connecticut Answer at 4.

Because [10 C.F.R.] § 51.23 states that spent fuel can be stored safely and without significant adverse environmental impacts for 30 years after a reactor's shutdown and that a waste repository will be open by 2025, and since there is now no basis to conclude that the spent fuel will be gone within 30 years after a reactor ceases power generation, Clearwater properly offers two contentions that (1) challenge the adequacy of the environmental analysis of indefinite spent fuel storage at the Indian Point site and (2) challenge the safety of maintaining spent fuel at the site indefinitely without an adequate aging management plan for the spent fuel storage structures.⁴⁹

In the alternative, Connecticut urges the Board to either (1) delay ruling on these contentions until the Commission elucidates its September 2009 notation votes or (2) use its authority to manage the conduct of this proceeding to notify the Commission that denial of the contentions would likely lead to inefficiencies in resolving the issues in this proceeding.⁵⁰

F. Riverkeeper's Answer

Riverkeeper also asserts that Clearwater's contentions should be admitted.⁵¹

Riverkeeper supports its position with the representation that the two notation votes against upholding the Waste Confidence decision "explicitly recognize that the long intended plan for a geologic repository at Yucca Mountain is no longer an option."⁵² Riverkeeper thus deems dependence on the Waste Confidence Rule improper because it merely "relies upon a generic determination of no significant impact [that] relates to a definitive timeframe of 'temporary' onsite storage for 30 years beyond the expiration of a reactor's operation."⁵³ Riverkeeper concedes that these new contentions could be interpreted as inadmissible challenges to NRC

⁴⁹ Id.

⁵⁰ Id. at 5.

⁵¹ Riverkeeper Answer at 1.

⁵² Id. at 2 (citations omitted).

⁵³ Id. at 4.

regulations,⁵⁴ however, Riverkeeper interprets these notation votes as “a definitively articulated determination as to the future of Yucca Mountain, which in turn, definitely removes the foundation of the current rule” that serves as the (now defunct) basis for Entergy’s and the NRC Staff’s failure to conduct site-specific environmental analyses of the effects of long-term storage of spent nuclear fuel at Indian Point.⁵⁵

As alternatives to admitting these new contentions, Riverkeeper supports either certifying the question of these contentions’ admissibility to the Commission due to the “significant and novel legal or policy issues, [whose] resolution . . . would materially advance the orderly disposition of the proceeding” or delaying their resolution until there is further Commission action.⁵⁶ First, Riverkeeper asserts that “it would be highly detrimental to the public interest if interested entities were forced to await final formal resolution of the Waste Confidence Decision update to proffer a contention on this issue,” which could be resolved through a Commission decision whether these are admissible contentions.⁵⁷ Second, “since the Commission’s Votes form the basis for Clearwater’s new contentions, the Commission would be in a perfect position to determine the appropriateness of Entergy’s and the NRC Staff’s apparent reliance on now baseless regulations.”⁵⁸ Lastly, while acknowledging that deferring the issue of these contentions’ admissibility “would cause delay” if the Board does not admit these contentions or certify them to the Commission, Riverkeeper sees deferral as “necessary to

⁵⁴ Id.

⁵⁵ Id. at 5-6.

⁵⁶ Id. at 6-7 (citing 10 C.F.R. § 2.341(f)).

⁵⁷ Id. at 7.

⁵⁸ Id. at 7-8.

ensure fairness to the parties and prevent detriment to the public interest [that] would result from failing to allow the parties to litigate this issue now.”⁵⁹

G. Entergy’s Answer

Entergy states that Clearwater’s new contentions do not meet the admissibility requirements of 10 C.F.R. § 2.309(c), (f)(1), and (f)(2) and should be denied pursuant to 10 C.F.R. § 2.335(a) as impermissible attacks on an NRC regulation.⁶⁰ First, Entergy argues that Clearwater’s new contentions are not based on previously unavailable information that is materially different since they “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.”⁶¹ Entergy asserts that these contentions do not satisfy the 10 C.F.R. § 2.309(f)(2) test for new contentions and the 10 C.F.R. § 2.309(c) test for nontimely contentions since Clearwater has made no showing of good cause for the timeliness of its filings and instead has the opportunity to submit comments in the Commission’s ongoing rulemaking.⁶²

Moreover, Entergy urges the Board to read Clearwater’s new contentions as improper challenges to both the adequacy of the current (and as yet unchanged) Waste Confidence Rule and an ongoing rulemaking dealing with the possible updating of the Waste Confidence Rule, despite the Board’s rejection of similar Waste Confidence claims, and the NRC’s general prohibition against challenging NRC regulations under 10 C.F.R. § 2.335(a) and ongoing rulemakings.⁶³ Next, Entergy characterizes the aspects of these contentions dealing with Indian

⁵⁹ Id. at 8.

⁶⁰ Entergy Answer at 3, 16.

⁶¹ Id. at 2 (citations omitted).

⁶² Id. at 8-9 (citations omitted).

⁶³ Id. at 2, 10-11 (citations omitted).

Point's ISFSI as outside the scope of this 10 C.F.R. Part 54 proceeding because such facilities are licensed under 10 C.F.R. Part 72.⁶⁴ Additionally, Entergy argues that Clearwater has not presented a genuine dispute over a material issue of law or fact since Clearwater's motion does not address the portions of Entergy's LRA that deal with aging management plans for spent fuel pools.⁶⁵

Entergy also urges the Board to disregard the alternatives to admitting the contentions suggested by the parties:

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.⁶⁶

Accordingly, Energy opposes admission, certification, referral, or the holding in abeyance of Clearwater's new contentions.

H. The NRC Staff's Answer

The NRC Staff opposes admission, certification, referral, or the holding in abeyance of Clearwater's new contentions, and urges the Board to view Clearwater's new contentions as "impermissible challenge[s] to the Commission's 'Waste Confidence' rule, lack[ing] adequate legal and factual support, [failing to] meet the Commission's requirements in 10 C.F.R. § 2.309(f)(1), and . . . not meet[ing] the new contention filing requirements of 10 C.F.R.

⁶⁴ Id. at 2-3, 13-14 (citations omitted).

⁶⁵ Id. at 3, 12-15 (citations omitted).

⁶⁶ Id. at 3 n.8 (citing Tennessee 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)).

§ 2.309(f)(2).⁶⁷ The NRC Staff portrays Clearwater's contentions as impermissible challenges to NRC regulations under 10 C.F.R. § 2.335(a) since the Commission has not altered the existing Waste Confidence Rule and Clearwater has not petitioned the Commission for a waiver of the Commission's regulations.⁶⁸ According to the NRC Staff, (1) there is no new and materially different information upon which Clearwater can support its new contentions under 10 C.F.R. § 2.309(f)(2) since the September 2009 notation votes leave the existing rule unchanged; (2) Clearwater could have raised the same claims (that were later rejected by this Board) when the original proposed rulemaking was announced by the NRC in October 2008; (3) Commissioners Svinicki and Klein did not explicitly vote to strike down the existing rule, instead soliciting additional public comments; and (4) the Thompson Declaration and its contents were created in February 2009, long before the September 2009 notation votes.⁶⁹ Moreover, like Entergy, the NRC Staff asserts that the issues of dry-cask and long-term storage are beyond the scope of this proceeding, while arguing that Clearwater has "fail[ed] to identify any portion of the Indian Point LRA which it contends is inadequate."⁷⁰ In the same vein, the NRC Staff offers rebuttal to Clearwater's position that the NRC Staff has not fulfilled its duties to evaluate the safety of long-term spent fuel storage by arguing that an admissible new contention under 10 C.F.R. § 2.309(f)(2) must be based on an application itself rather an evaluation of the NRC Staff's review.⁷¹

⁶⁷ NRC Staff Answer at 1-2.

⁶⁸ Id. at 17-18 (citations omitted).

⁶⁹ Id. at 18-21 (citations omitted).

⁷⁰ Id. at 23-25 (citations omitted).

⁷¹ Id. at 25-26 (citations omitted).

The NRC Staff also asserts that there has been no showing of good cause under 10 C.F.R. § 2.309(c) and therefore Clearwater's new contentions are nontimely. In addition, even though Clearwater insists "that admitting the contentions would assist in developing a sound record," the NRC Staff claims that Clearwater has not demonstrated how such a useful result would be reached since Clearwater's petition only brings up generic issues, not those related to this specific proceeding.⁷²

I. Clearwater's Reply

In response to Entergy's and the NRC Staff's claims that the new contentions are impermissible challenges to NRC regulations, Clearwater asserts that although the Commissioners' September 2009 notation votes did not expressly rescind the Waste Confidence Rule, there is no longer a factual basis for the rule since, by proposing "to adopt a 60 year rule, the Commission clearly made plain it no longer viewed the 30 Year Rule as tenable."⁷³ Clearwater also contends that the Waste Confidence Rule and the GEIS deal only with the period of license extension and the thirty years afterward, without addressing the environmental impacts of the period after the thirty years beyond the license extension, since the Commissioners' votes represent a lack of confidence that any long-term solution to spent fuel storage will be reached by that time. This, Clearwater maintains, contravenes the NRC's duties under NEPA and the AEA.⁷⁴ Echoing New York and the answers of other Interveners, Clearwater proposes that, if the Board is not clear about the meaning of the Commissioners' notation votes and their effect on these contentions' admissibility, it should either refer these contentions to the Commission or admit them "and then ask the Commission whether it wishes

⁷² Id. at 21-22 (citations omitted).

⁷³ Clearwater Reply at 5.

⁷⁴ Id. at 3-7 (citations omitted).

to exercise sua sponte review.”⁷⁵ Clearwater also seeks to counter Entergy’s and the NRC Staffs’ assertions that dry-cask storage is inappropriate for review in this proceeding by arguing that NEPA does require an environmental analysis and the AEA does require a safety analysis of the effects of such storage, an analysis that has not been completed in light of the Commissioners’ September 2009 notation votes.⁷⁶ Additionally, Clearwater addresses Entergy’s and the NRC Staff’s timeliness arguments by reiterating that the new and significant information upon which Clearwater relies (namely, the Commissioners’ votes) was not available to Clearwater until shortly before Clearwater filed its new contentions.⁷⁷

II. The Waste Confidence Rulemaking

On October 25, 1979, in response to the remand of the U.S. Court of Appeals for the District of Columbia Circuit in Minnesota v. NRC, the Commission began to conduct “a generic proceeding to reassess its degree of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of, to determine when any such disposal will be available, and whether such wastes can be safely stored until they are safely disposed of.”⁷⁸ On August 31, 1984, after nearly five years of analysis, the Commission issued its Final Waste Confidence Decision, finding inter alia that (1) the safe disposal of nuclear waste “in a mined geologic repository is technically feasible”; (2) one such repository would be available by 2007-09, and sufficient repository capacity would be available thirty years after the expiration of any reactor operating license; (3) nuclear waste would be managed safely until a repository is available; (4)

⁷⁵ Id. at 7 (emphasis added).

⁷⁶ Id. at 8-13 (citations omitted).

⁷⁷ Id. at 13-16 (citations omitted). Clearwater considers these votes as representing “the Commission’s abandonment of its long-term policy of predicting when off-site disposal capacity for spent fuel pool waste would become available.” Id. at 15 (citations omitted).

⁷⁸ Storage and Disposal of Nuclear Waste, 44 Fed. Reg. 61,372, 61,372-73 (Oct. 25, 1979).

spent fuel could “be stored safely and without significant environmental impacts” in a spent fuel storage basin or ISFSI for at least thirty years beyond the expiration of a reactor’s license; and (5) safe spent fuel storage would be made available if needed.⁷⁹ The Commission codified these findings at 10 C.F.R. § 51.23.⁸⁰ In 1990, the Commission affirmed the findings of the original decision but amended the rule to extend the time frame for when the repository would be open until 2025.⁸¹ In 1999, the Commission confirmed the findings in the 1990 decision and determined that it would re-evaluate that decision “when the impending repository development and regulatory activities have run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of the 1990 Waste Confidence findings.”⁸²

On October 9, 2008, the Commission Staff published a Waste Confidence Decision Update, wherein it reviewed its Waste Confidence findings, updated those findings, and proposed two amendments to the findings.⁸³ The first proposed amendment would extend the time frame within which a repository can reasonably be expected to be available to dispose of nuclear waste and spent fuel to fifty to sixty years beyond the licensed life for operation of any reactor.⁸⁴ The second proposed amendment would find that spent fuel can be stored safely without significant environmental impacts for at least sixty years beyond the licensed life for

⁷⁹ Rulemaking on the Storage and Disposal of Nuclear Waste (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 293 (1984); Final Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,658 (Aug. 31, 1984).

⁸⁰ Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984).

⁸¹ Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,474 (Sept. 18, 1990).

⁸² Waste Confidence Decision Review: Status, 64 Fed. Reg. 68,005, 68,005 (Dec. 6, 1999).

⁸³ 73 Fed. Reg. at 59,551.

⁸⁴ Id. at 59,553.

operation of that reactor in spent fuel pools or ISFSIs.⁸⁵ On the same day, this proposed rule was published for public comment.⁸⁶

The NRC Staff reviewed the public comments and developed a draft final rule that would amend the Waste Confidence Rule in SECY-09-0900. Beyond the proposals offered in October 2008, the NRC Staff also took into account events that have occurred since the proposed rule's publication, "notably the intent of the new Administration not to open a repository at the Yucca Mountain, Nevada, site even if it should receive a license."⁸⁷ The NRC Staff's draft final rule added that "if significant and pertinent unexpected events occur, raising substantial doubt about the continued validity of the findings, the Commission would consider revisiting the findings."⁸⁸ Finally, the NRC Staff's draft final rule suggested that the Commission could defer final action "to incorporate additional information on direction of the federal HLW disposal program as it becomes available over the next few months."⁸⁹

The three Commissioners submitted notation votes in response to SECY-09-0900. Chairman Jaczko voted to approve the Final Update, while Commissioners Klein and Svinicki opted to approve in part and disapprove in part. Chairman Jaczko approved of the NRC Staff's draft Waste Confidence decision but expressed his support for changes that would make clear that the Commission believes "that these findings apply because we are confident that a

⁸⁵ Id.

⁸⁶ Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008).

⁸⁷ SECY-09-0900 at 2-3.

⁸⁸ Id. at 3.

⁸⁹ Id. at 4.

disposal solution is technically feasible for HLW and spent fuel.”⁹⁰ The Chairman suggested that his changes would need to be re-noticed for “a short, narrow, public comment period.”⁹¹

Commissioner Klein asserted that the Commission should allow the public “to comment on whether and, if so, how the Administration’s recent announcements of changes in the Nation’s [HLW] repository program should affect the proposed update.”⁹² Commissioner Klein indicated that he would support a limited re-noticing to allow for public comment on developments that occurred after the close of the comment period, and would also invite comments on whether “the Commission could reasonably modify its draft final findings and draft final rule to reflect the potential consideration of a broader range of disposal options.”⁹³

Commissioner Svinicki also voted to not support publication of the final rule proposed by the NRC Staff.⁹⁴ Commissioner Svinicki agreed that the decision and rule should be re-noticed for limited comment based on the Administration’s recent announcements regarding HLW disposal.⁹⁵ After this new proposed comment period, according to Commissioner Svinicki, the NRC Staff should either recommend an update to the Waste Confidence findings and rule, or find that the issue is not ripe for the Commission’s informed judgment to be updated “until the policy debate matures further.”⁹⁶ Finally, Commissioner Svinicki asserted that her comments “should not be interpreted as casting doubt on the Commission’s prior and existing findings of

⁹⁰ Jaczko Notation Vote at 1.

⁹¹ Id.

⁹² Klein Notation Vote at 1.

⁹³ Id.

⁹⁴ Svinicki Notation Vote at 1.

⁹⁵ Id.

⁹⁶ Id.

waste confidence,” and that she remained “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 [ISFSI], or in some combination of these storage options, for many decades.”⁹⁷

III. Waste Confidence Rule Challenges

Over the past several years the continued viability of the Waste Confidence Rule has been challenged in many adjudicatory proceedings. However, numerous Boards, including this Board, have uniformly and correctly rejected these challenges as attacks on Commission regulations that the Boards were not authorized to entertain.⁹⁸ The clear guidance, followed by all Boards, is that challenges to the Waste Confidence Rule must be made in the context of a rulemaking, not in the context of an adjudicative proceeding.⁹⁹

IV. Certification to the Commission

Under NRC regulations, a function of the Presiding Officer is to “[c]ertify questions to the Commission for its determination, either in the presiding officer’s discretion, or on motion of a party or on direction of the Commission.”¹⁰⁰ Certification is warranted if the presiding officer finds “that the decision or ruling involves a novel issue that merits Commission review at the

⁹⁷ Id. at 3.

⁹⁸ See 10 C.F.R. § 2.335(a) (“[N]o rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.”).

⁹⁹ Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 344-45 (1999) (License Renewal Application) (ruling that the proper venue for challenging Waste Confidence Rule is in rulemaking petition and that challenges to the subject of an ongoing rulemaking are improper for resolution in license renewal proceedings). See also Appendix A.

¹⁰⁰ 10 C.F.R. § 2.319(l).

earliest opportunity.”¹⁰¹ Although interlocutory review is generally discouraged,¹⁰² and Boards may certify questions only “sparingly” and with a “compelling reason,”¹⁰³ the Commission will review such certified questions “if the certification or referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.”¹⁰⁴

While Clearwater’s Motion has been pending, significant events have occurred that, in our judgment, warrant Commission attention. Specifically, on February 1, 2010, the Administration announced its proposed budget for fiscal year 2011, stipulating, inter alia, that all funding for the development of the Yucca Mountain geologic repository for the storage of HLW will be eliminated.¹⁰⁵ Moreover, on the same day, the Department of Energy submitted a Motion to Stay the ongoing HLW proceeding, in which it stated that it intends to withdraw, with prejudice, its pending application to construct a repository for the storage of HLW including

¹⁰¹ Id. § 2.323(f)(1).

¹⁰² Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998). See Virginia Elec. & Pwr. Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983).

¹⁰³ Vermont Yankee Nuclear Pwr. Corp. (Vermont Yankee Nuclear Power Station), ALAB-421, 6 NRC 25, 27 (1977).

¹⁰⁴ 10 C.F.R. § 2.341(f)(1).

¹⁰⁵ Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 2011, app., at 437 (2010), available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf> [hereinafter FY 2011 Budget] (“The Administration has determined that developing a repository at Yucca Mountain, Nevada, is not a workable option and that the Nation needs a different solution for nuclear waste disposal. As a result, the Department [of Energy] will discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010.”).

spent nuclear fuel.¹⁰⁶ Accordingly, it appears that the construction of a repository for HLW at Yucca Mountain is no longer considered as a viable option. Furthermore, no other alternative has been identified at this time. Rather, the “Blue Ribbon Commission on America’s Nuclear Future” has been established with the mandate “to develop a new strategy for nuclear waste management and disposal.”¹⁰⁷

Prior to the original Waste Confidence proceeding, the Commission stated that, as a matter of policy, it “would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.”¹⁰⁸ Thereafter, when the Commission initially made its Waste Confidence decision in 1984 it found “reasonable assurance that one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007-09,”¹⁰⁹ and, as a result, it had reasonable confidence that HLW would be disposed of safely. But it then went on to note that its decision was “unavoidably in the nature of a prediction” and that it would periodically “review its conclusions on waste confidence . . . until a repository for high-level radioactive waste and spent fuel is available.”¹¹⁰ During the 1990 review of the continued viability of its Waste Confidence decision, the Commission recognized that “the possibility existed that spent fuel might be stored in existing or new storage facilities for some period beyond 2007-2009” but

¹⁰⁶ U.S. Department of Energy’s Motion to Stay the Proceeding (Feb. 1, 2010) at 1 (ADAMS Accession No. ML100321641).

¹⁰⁷ FY 2011 Budget at 437.

¹⁰⁸ Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391, 34,393 (July 5, 1977).

¹⁰⁹ 49 Fed. Reg. at 34,659-60.

¹¹⁰ Id. at 34,660.

found “reasonable assurance that at least one mined geologic repository [would] be available within the first quarter of the twenty-first century.”¹¹¹

In 1999, the Commission again revisited its Waste Confidence Rule and concluded that “the experience and developments since 1990 [the previous review] confirm[ed] the Commission’s 1990 Waste Confidence findings.”¹¹² But, once again, the Commission noted that it “would consider undertaking a comprehensive evaluation when the impending repository development and regulatory activities have run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of the 1990 Waste Confidence findings.”¹¹³

In that review, the Commission also summarized the history of the Yucca Mountain project, noted that “there has been substantial progress toward consideration and possible licensing of a [HLW] repository,”¹¹⁴ and stated that the “appropriate trigger for the next review could be a combination of events or it could be a single event.”¹¹⁵ The Commission then cited “any significant delays in DOE’s repository development schedule or a decision by the Secretary of Energy to not recommend Yucca Mountain as a candidate site” as the kind of events that could “necessitate a reevaluation of the . . . Waste Confidence Decision.”¹¹⁶

The pending withdrawal by DOE of the Yucca Mountain Application suggests that a mined geologic repository for commercial high-level radioactive waste and spent fuel will not be

¹¹¹ Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 55 Fed. Reg. 38,472, 38,472 (Sept. 18, 1990).

¹¹² 64 Fed. Reg. at 68,005.

¹¹³ Id.

¹¹⁴ Id. at 68,006.

¹¹⁵ Id. at 68,007.

¹¹⁶ Id. at 68,007.

available in the foreseeable future. This occurrence appears to be the kind of event that the Commission viewed as an appropriate trigger for a reevaluation of the Waste Confidence Rule. Accordingly, instead of ruling on Clearwater's Motion at this time, we view it to be prudent to seek clarification regarding the Commission's view of the continuing viability of its Waste Confidence decision and 10 C.F.R. § 51.23. Because the Commissioners' September 2009 notation votes resulted in neither the approval of SECY-09-0090 nor a Staff Requirements Memorandum¹¹⁷ directing the NRC Staff on how to proceed with issuing SECY-09-0090 as a final rule or to reopen the comment period for rulemaking, it is not apparent to the Board that there is an "ongoing rulemaking" that would preclude our consideration of this issue.¹¹⁸ Nevertheless, the Board finds that it is appropriate to certify this question to the Commission in order for the Board to receive guidance regarding whether the Waste Confidence Rule remains viable despite the Administration's decision to abandon Yucca Mountain.

Also, as noted above, we shall hold our ruling on the admissibility of Clearwater's New Contentions in abeyance pending the receipt of guidance from the Commission, but, unless

¹¹⁷ See Commission Direction-Setting and Policymaking Activities, available at <http://www.nrc.gov/about-nrc/policymaking.html> (last updated May 15, 2009) ("Issues before the Commission are decided by majority vote. After the Commission completes voting on a SECY Paper or Commission Action Memoranda, the Office of the Secretary (SECY) records the decision in a memorandum to the staff called 'Staff Requirements Memorandum' (SRM) and also issues a 'Commission Voting Record' (CVR) which includes the record of votes and individual views of all Commissioners. SRMs are also issued following each Commission meeting to document any discussion or requests made at the meeting.").

¹¹⁸ See Oconee, CLI-99-11, 49 NRC at 344-45.

directed otherwise by the Commission, we will not delay any other aspect of the pending proceeding, as we are of the opinion that we can proceed to hearing on the already admitted contentions subject to direction from the Commission on the certified question.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹¹⁹

_____/RA/_____
Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

_____/RA/_____
Dr. Kaye D. Lathrop
ADMINISTRATIVE JUDGE

_____/RA/_____
Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 12, 2010

¹¹⁹ Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Alfred J. Donahue, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

APPENDIX A

Below is a list of Board and Commission decisions dealing with challenges to the Waste

Confidence Rule, along with a brief explanation of the disposition of the issue:

Published Cases Dealing With Waste Confidence Rule Contentions

Tennessee Valley Auth. (Watts Bar Unit 2), LBP-09-26, 70 NRC __, __ (slip op. at 45-47) (Nov. 19, 2009) (Operating License) (dismissing a contention that claimed that the application did not include adequate plans for maintaining spent fuel as a challenge to Commission's Waste Confidence Rule; refusing to admit the contention or hold it in abeyance pending further Commission action on Waste Confidence rulemaking)

S. Texas Project Nuclear Operating Co. (South Texas Project Units 3 and 4), LBP-09-21, 70 NRC __, __ (slip op. at 13-23) (Aug. 27, 2009) (Combined License) (holding that a contention amounted to an attack on the Waste Confidence Rule and was therefore inadmissible, notwithstanding statements by government officials suggesting that the Yucca Mountain Waste Repository will not be built)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC __, __ (slip op. at 20-21, 23) (Aug. 10, 2009) (Combined License) (refusing to hold a contention in abeyance or refer to the Commission; holding that contention was an impermissible attack on the Waste Confidence Rule and therefore inadmissible)

Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 NRC __, __ (slip op. at 24-34) (Aug. 6, 2009) (Combined License) (refusing to admit or hold in abeyance a contention against the assumption of a federal high-level waste disposal capacity, since it was a challenge to both the Waste Confidence Rule and the subject of an ongoing Commission rulemaking)

Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC __, __ (slip op. at 16-19) (July 31, 2009) (Combined License) (declining to admit or hold in abeyance a contention regarding the technical basis for safety of future waste storage since it was an impermissible challenge to Commission's regulation and the ongoing policy review of the Waste Confidence Rule)

Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC __, __ (slip op. at 61-66) (July 8, 2009) (Combined License) (holding that the Waste Confidence Rule applies to "any" reactor and dismissing a contention regarding environmental safety of spent nuclear fuel storage as an impermissible challenge to a Commission regulation)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 217-220 (2009) (Combined License) (refusing to admit a contention asserting insufficient discussions of waste disposal in the combined license application, declaring such a contention an impermissible challenge to the Waste Confidence Rule and that a rulemaking petition is the proper method for challenging the Waste Confidence Rule)

Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 586-87 (2008) (Combined License) (ruling that a contention alleging inadequate discussion of timeframes for disposal of spent nuclear fuel was an impermissible challenge to the Waste Confidence Rule)

Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 456-57 (2008) (Combined License) (finding that the Waste Confidence Rule applies to new reactors and thus a contention regarding safety of spent fuel was inadmissible)

Tennessee Valley Auth. (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 415-16 (2008) (Combined License) (holding that the disposal of high-level nuclear waste was not admissible subject of combined license proceeding due to the Waste Confidence Rule)

Virginia Elec. and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 336-37 (2008) (Combined License) (holding that the Waste Confidence Rule precluded the discussion of environmental impacts of irradiated fuel in combined license proceeding and that a challenge to the validity of the Waste Confidence Rule was outside the scope of the proceeding as an impermissible challenge to NRC regulations)

Crow Butte Res., Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 341-42 (2008) (License Amendment) (holding that the Waste Confidence Rule precluded the consideration of cost-benefit analysis of the proper storage of fuel rod waste in license renewal proceeding for in-situ leach uranium recovery facility)

S. Nuclear Operating Co. (Vogtle ESP Site), LBP-07-3, 65 NRC 237, 267-68 (2007) (Early Site Permit) (dismissing a contention alleging an inadequate discussion of the impact of on-site storage of spent fuel as challenge to NRC regulations and refusing to conditionally admit a party until that party's rulemaking petition on Waste Confidence was addressed)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 167-170 (2006) (License Renewal) (holding that a contention asserting the inadequate discussion of spent fuel's environmental impacts in the environmental report and the generic environmental impact statement was an impermissible challenge to the Waste Confidence Rule)

Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 359-360 (2006) (License Renewal) (dismissing a contention based on a claim of the non-viability of the Waste Confidence Rule because it was outside scope of a license renewal proceeding)

Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 296-97 (2004) (Early Site Permit) (rejecting a contention that asserted that the Waste Confidence Rule was inapplicable due to concerns regarding terrorism and the environmental impacts of permanent disposal of irradiated fuel, ruling that such a contention was outside the scope of an early site permit proceeding as an attack on NRC regulations without receipt of waiver from the Commission)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 164-66 (2001) (License Renewal) (holding that issues regarding spent fuel storage

were outside the scope of license renewal proceedings as impermissible challenges to the Waste Confidence Rule)

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 202, 241-42 (1998) (ISFSI) (dismissing contention that application had inadequate description of licensed facility's connection to national high level waste program as an impermissible challenge to the Waste Confidence Rule and that petitioners had not provided sufficient basis to seek waiver from the Waste Confidence Rule as an NRC regulation)

Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 77-78 (1996) (Decommissioning) (holding that the Waste Confidence Rule precluded the discussion of post-license waste disposal plans in a decommissioning proceeding)

Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993) (License Amendment) (holding that a contention alleging unsolved problem of radioactive waste storage and disposal was precluded by the Waste Confidence Rule)

Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 871-72 (1986) (License Amendment) (holding that the Waste Confidence Rule precluded admission of a contention based on inadequate analysis of health, safety, and environmental impacts of proposed license amendment)

Unpublished Cases Dealing with Waste Confidence Rule Contentions

Indian Point Licensing Board Order (Ruling on New York State's New and Amended Contentions) (June 16, 2009) at 13-16 (License Renewal) (holding that proposed revisions to Waste Confidence Rule were not sufficient for new contention since the Waste Confidence Rule had not yet been amended)

Calvert Cliffs Licensing Board Order (Denying Motion to Admit Proposed Contention Eight) (June 9, 2009) at 4-8 (Combined License) (refusing to admit or hold in abeyance a contention based on proposed revisions to the Waste Confidence Rule, since such a contention was an attack on an ongoing rulemaking and a still valid NRC regulation that was outside the scope of a combined license adjudication proceeding)

North Anna Unit 3 Licensing Board Order (Denying Motion to Admit Proposed Contention Nine) (June 2, 2009) at 2-3, 6-7 (Combined License) (holding that a contention that asserted that the NRC may not rely on the Waste Confidence Rule during the ongoing rulemaking was inadmissible since the Waste Confidence Rule was a regulation that could not be challenged in a combined license adjudication proceeding)

Bellefonte Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Apr. 29, 2009) at 11-12 (Combined License) (finding that the Waste Confidence Rule barred the admission of a contention that asserted that an applicant's environmental report

and environmental impact statement was required to mention plans for disposing of nuclear waste)¹²⁰

¹²⁰ See also Nevada v. NRC, 199 Fed. Appx. 1, 1-2 (D.C. Cir. 2006) (upholding the validity of the Waste Confidence Rule and ruling that its existence did not inappropriately bias the NRC in favor of licensing Yucca Mountain geological depository since it only applied to reactor facility storage pools or ISFSIs); Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 281 n.90 (2006) (License Renewal) (noting the D.C. Circuit's decision in Nevada v. NRC regarding the Waste Confidence Rule); Amergen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 202 n.9 (2006) (License Renewal) (although rejecting the contention on other grounds, ruling that the Waste Confidence Rule is not a bar to contentions based on emergency safety plans for safety pools during the license period); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 23 n.14 (2001) (License Renewal) (holding that the Waste Confidence Rule only barred litigating the issue of waste storage for the period after the expiration of an applicant's license in a license renewal proceeding, not during the license period).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (CERTIFICATION TO THE COMMISSION OF A QUESTION RELATING TO THE CONTINUED VIABILITY OF 10 C.F.R. § 51.23(b) ARISING FROM CLEARWATER'S MOTION FOR LEAVE TO ADMIT NEW CONTENTIONS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Sherwin E. Turk, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Brian Harris, Esq.
Andrea Z. Jones, Esq.
Karl Farrar, Esq.
Brian Newell, Paralegal

Administrative Judge
Lawrence G. McDade, Chair

Administrative Judge
Richard E. Wardwell

Administrative Judge
Kaye D. Lathrop
190 Cedar Lane E.
Ridgway, CO 81432

Zachary S. Kahn, Law Clerk
Joshua A. Kirstein, Law Clerk

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

MEMORANDUM AND ORDER (CERTIFICATION TO THE COMMISSION OF A QUESTION RELATING TO THE CONTINUED VIABILITY OF 10 C.F.R. § 51.23(b) ARISING FROM CLEARWATER'S MOTION FOR LEAVE TO ADMIT NEW CONTENTIONS)

William C. Dennis, Esq.
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601

Andrew M. Cuomo, Attorney General
John J. Sipos, Assistant Attorney General
Mylan L. Denerstein
Deputy Assistant Attorney General
Division of Social Justice
Janice A. Dean
Assistant Attorney General
Office of the Attorney General
of the State of New York
The Capitol
State Street
Albany, New York 12224

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
Mauri T. Lemoncelli, Esq.
Counsel for Entergy Nuclear Operation, Inc.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Joan Leary Matthews, Esq.
Senior Attorney for Special Projects
New York State Department
of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

Michael J. Delaney
Vice President, Energy Department
New York City Economic Development
Corporation (NYCEDC)
110 William Street
New York, NY 10038

Robert D. Snook, Esq.
Office of The Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Arthur J. Kremer, Chairman
New York Affordable Reliable Electricity
Alliance (AREA)
347 Fifth Avenue, Suite 508
New York, NY 10016

Stephen C. Filler, Board Member
Hudson River Sloop Clearwater, Inc.
303 South Broadway, Suite 222
Tarrytown, NY 10591

Docket Nos. 50-247-LR and 50-286-LR
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 RELATING TO THE CONTINUED VIABILITY OF 10 C.F.R. § 51.23(b) ARISING FROM
 CLEARWATER'S MOTION FOR LEAVE TO ADMIT NEW CONTENTIONS)

Daniel E O'Neill, Mayor
 James Siermarco, M.S.
 Liaison to Indian Point
 Village of Buchanan
 Municipal Building
 236 Tate Avenue
 Buchanan, NY 10511-1298

Manna Jo Greene, Environmental Director
 Hudson River Sloop Clearwater
 112 Little Markey Street
 Poughkeepsie, NY 12601

Thomas F. Wood, Esq.
 Town of Cortlandt
 Daniel Riesel, Esq.
 Jessica Steinberg, J.D.
 Counsel for the Town of Cortlandt
 Sive, Paget & Riesel, P.C.
 460 Park Avenue
 New York, NY 10022

Nancy Burton, Esq.
 Connecticut Residents Opposed
 to Relicensing of Indian Point (CRORIP)
 147 Cross Highway
 Redding Ridge, CT 06876

Elise N. Zoli, Esq.
 Goodwin Proctor, LLP
 Exchange Place
 53 State Street
 Boston, MA 02109

Justin D. Pruyne
 Assistant County Attorney, Litigation Bureau
 Of Counsel to Charlene M. Indelicato, Esq.
 Westchester County Attorney
 148 Martine Avenue, 6th Floor
 White Plains, NY 10601

FUSE USA
 John LeKay
 Heather Ellsworth Burns-DeMelo
 Remy Chevalier
 Bill Thomas
 Belinda J. Jaques
 351 Dyckman Street
 Peekskill, New York 10566

Westchester Citizens' Awareness Network
 (WestCan), Citizens Awareness Network,
 (CAN), et al
 Susan H. Shapiro, Esq.
 21 Pearlman Drive
 Spring Valley, NY 10977

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

MEMORANDUM AND ORDER (CERTIFICATION TO THE COMMISSION OF A QUESTION RELATING TO THE CONTINUED VIABILITY OF 10 C.F.R. § 51.23(b) ARISING FROM CLEARWATER'S MOTION FOR LEAVE TO ADMIT NEW CONTENTIONS)

Philip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591

Richard L. Brodsky
Assemblyman
5 West Main Street
Suite 205
Elmsford, NY 10523

Sarah L. Wagner, Esq.
Legislative Office Building, Room 422
Albany, NY 12248

[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 12th day of February, 2010