February 18, 2011

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-LR/286-LR
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	

NRC STAFF'S ANSWER TO THE STATE OF NEW YORK'S MOTION FOR LEAVE TO FILE AMENDED BASES TO CONTENTION 17A (TO BE DESIGNATED 17B) AND REQUEST FOR AN EXEMPTION OR WAIVER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Board's "Scheduling Order" of July 1, 2010, the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files its answer to Amended Contention 17-B[1] and the request for an exemption or waiver ("Petition")[2] filed by the State of New York ("State" or "New York") on January 24, 2011,[3] concerning the Commission's

[1] "State of New York Contention 17B" (Jan. 24, 2011); "State of New York Motion for Leave to File Timely Amended Bases to Contention 17A (Now to Be Designated Contention 17B)" (Jan. 24, 2011).

[2] "State of New York's Request for a Determination That the Proposed Amended Bases for Contention 17A Are Not Barred by 10 C.F.R. § 51.23(b), or That Exemption From the Requirements of 10 C.F.R. § 51.23(b) Should Be Granted, or That the State Has Made a *Prima Facie* Case That § 51.23(b) Should Be Waived as Applied to Contention 17B" (Jan. 24, 2011) ("Petition").

[3] This Answer is filed in accordance with the Board's Order of February 17, 2011, extending, *inter alia*, the page limit for consolidated responses to New York's Contention 17-B and Petition. *See* "Order (Extending Page Limitations for Pleadings as They Apply to Answers to Clearwater's and Riverkeeper's January 24, 2011, Joint Motion, and New York State's Motion to Amend Contention 17A and Waiver Petition, Filed January 24, 2011)" (Feb. 17, 2011), at 1.

issuance of the revised Waste Confidence Rule on December 23, 2010,[4] and the Staff's issuance of the Final SEIS for Indian Point Units 2 and 3 ("IP2" and "IP3") in December 2010.[5]

For the reasons set forth below, the Staff opposes, in part, the admission of Contention 17-B for failure to meet the Commission's contention admissibility and timeliness standards. Specifically, to the extent that Contention 17-B challenges the adequacy of the Final SEIS based on its alleged failure to discuss the environmental impacts or alternatives associated with the generation and storage of spent fuel, it lacks an adequate factual and legal basis and should be rejected as an impermissible challenge to 10 C.F.R. § 51.23 and 10 C.F.R. Part 51, Appendix B, Table B-1. In addition, several of the bases and supporting information advanced by New York impermissibly raise assertions that New York could have, but failed to, raise earlier in this proceeding; further, aspects of Contention 17-B are not supported by materially different new information. Accordingly, if the Atomic Safety and Licensing Board ("Board") determines to admit Contention 17-B, portions of the contention should be excluded for the reasons and to the extent set forth herein. Insofar as Contention 17-B seeks to amend Contention 17-A to refer to the Staff's Final SEIS, the Staff does not oppose its admission.

Finally, the Staff submits that New York has not established a *prima facie* case showing the existence of "special circumstances" under 10 C.F.R. § 2.335(b) to support its request for a waiver, nor has it demonstrated that an exemption is appropriate under 10 C.F.R. § 51.6. Accordingly, the Staff respectfully submits that the Board should deny the State's Petition.

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[4] *See* (1) Final Rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 75 Fed. Reg. 81032 (Dec. 23, 2010); (2) "Waste Confidence Decision Update," 75 Fed. Reg. 81037 (Dec. 23, 2010).

[5] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (Dec. 2010) ("FSEIS").

BACKGROUND

The State of New York filed Contention 17 on November 30, 2007.[6] As filed by the State, Contention 17 asserted:

> NYS Contention 17
>
> The Environmental Report fails to include an analysis of adverse impacts on off-site land use of license renewal and thus erroneously concludes that relicensing of IP2 and IP3 "will have a significant positive economic impact on the communities surrounding the station" (ER Section 8.5) and understates the adverse impact on off-site land use (ER Sections 4.18.4 and 4.18.5) in violation of 10 C.F.R. Part 51, Subpart A, Appendix B.

NYS Petition at 167 (capitalization omitted). In support of this contention, New York asserted that the analysis of land use impacts in the Environmental Report ("ER") submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") is deficient "because it ignores the positive impact on land use and land value from denial of the license extension." *Id.* at 168. New York stated that the ER "looks only at tax-driven and population-driven impacts" and "completely ignor[es] the impact on adjacent lands of the unexpected continued operation of a nuclear generating facility." *Id.* at 169. Further, New York asserted that property values in the vicinity of the Indian Point site would rise if the licenses were not renewed, relying on the Declaration of Stephen C. Sheppard and a report which he had authored. *Id.* at 172-74. Both the Applicant and the Staff opposed the admission of Contention 17.[7]

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[6] "New York State Notice of Intention to Participate and Petition to Intervene" (Nov. 30, 2007) ("NYS Petition"), at 167-74.

[7] *See* "NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to the 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 Cortland, and (7) Westchester County" (Jan. 22, 2008) ("Staff Response to Initial Contentions"), at 58-59; and "Answer of Entergy Nuclear Operations, Inc. Opposing New York State Notice of Intention to Participate and Petition to Intervene" (Jan. 22, 2008) ("Applicant's Response to Initial Contentions"), at 113-18.

On July 31, 2008, the Atomic Safety and Licensing Board ("Board") issued its ruling on petitions to intervene and the admissibility of contentions.[8] Therein, the Board, *inter alia*, granted New York's petition and admitted NYS Contention 17,[9] explaining its decision as follows:

> In conducting its analysis of the impact of the license renewal on land-use, Entergy should have considered the impact on real estate values that would be caused by license renewal or non-renewal. NRC Regulations do not limit consideration to tax-driven land-use changes. Table B-1 merely notes that "significant changes in land use may be associated with population and tax-revenue changes resulting from license renewal." It does not limit consideration to tax-driven land-use changes. Accordingly, we admit NYS-17 as a contention of omission.

Indian Point, LBP-08-13, 68 NRC at 115-16 (emphasis added & footnotes omitted).[10]

In December 2008, the Staff issued its Draft Supplemental Environmental Impact Statement ("Draft SEIS" or "DSEIS"),[11] concerning the requested license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3"). In its Draft SEIS, the Staff provided a preliminary analysis of the environmental impacts of license renewal and alternatives thereto. Like the Applicant's ER, the Draft SEIS considered population-related and tax revenue-related offsite land use impacts, and it concluded that there would be no population-related or tax revenue-related land use impacts "during the license renewal term beyond those already being experienced." DSEIS § 4.4.3, at

[8] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43 (2008).

[9] *Indian Point*, LBP-08-13, 68 NRC at 113-16.

[10] As summarized by the Board, Contention 17 asserted: "The ER limits consideration of land value to tax-driven land-use changes and does not consider the impact on real estate values caused by license renewal or the positive impacts on land values if the license is not renewed." *Id.* at 218.

[11] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Draft Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3," NUREG-1437, Draft Supp. 38 (Dec. 2008) ("DSEIS").

4-40–4-41. Further, however, the Draft SEIS explicitly evaluated the impact on property values that might result from non-renewal of the licenses, and concluded as follows:

> The shutdown of IP2 and IP3 may result in increased property values of the homes in the communities surrounding the site (Levitan and Associates, Inc. 2005). This would result in some increases in tax revenues. However, to fully offset the revenues lost from the shutdown of IP2 and IP3, taxing jurisdictions most likely would have to compensate with higher property taxes [Id.]. The combined increase in property values and increased taxes could have a noticeable effect on some area homeowners and business, though Levitan and Associates did not indicate the magnitude of this effect and whether the net effect would be positive or negative.
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> Revenue losses from Indian Point operation would likely affect only the communities closest to and most reliant on the plant's tax revenue and PILOT [Payment-In-Lieu-Of-Taxes]. If property values and property tax revenues increase, some of these effects would be smaller. The NRC staff concludes that the socioeconomic impacts of plant shutdown would likely be SMALL to MODERATE (MODERATE effects for the Hendrick Hudson Central School District, Village of Buchanan, Town of Cortlandt, and the Verplanck Fire District). See Appendix J to NUREG-0586, Supplement 1 (NRC 2002), for additional discussion of the potential impacts of plant shutdown.

DSEIS at 8-29 – 8-30. In sum, the Staff determined that the magnitude of land use impacts resulting from license renewal would be "SMALL," as defined in the Generic Environmental Impact Statement ("GEIS").[12] *Id.* at 4-40 & 8-27.[13]

On February 27, 2009, the State of New York filed new and amended contentions regarding the Indian Point Draft SEIS,[14] including New York Contentions 17-A and 34. In

[12] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," NUREG-1437, Vol. 1 (May 1996) ("GEIS").

[13] Similarly, the Staff considered the land use impacts of the "no-action" alternative, in which the operating licenses of IP2 and IP3 are not renewed. In this regard, the Staff observed that "full dismantling of structures and site decontamination may not occur for up to 60 years after plant shutdown," DSEIS at 8-25, the land use impacts would be similar regardless of whether decommissioning occurs after 40 or 60 years of operation, DSEIS at 8-27, and the land use impacts of plant shutdown would be "SMALL." *Id.*

Contention 17A, the State challenged the Staff's discussion of land use impacts in the Draft SEIS. *See* DSEIS Contentions at 14-20.[15] Just as it had asserted in NYS Contention 17 with respect to the Applicant's ER, in Amended Contention 17-A the State asserted that the Staff's Draft SEIS had "ignore[d]" the adverse impact of license renewal on nearby land values. DSEIS Contentions at 15. Nowhere in its contentions challenging the Draft SEIS did the State acknowledge or address the Draft SEIS's discussion of property value impacts (*see* DSEIS at 8-29); similarly, nowhere did the State address the Draft SEIS discussion of the 60-year period that would be required before the site would be decommissioned following plant shutdown. Rather, New York claimed that if the licenses are not renewed, "the plants would be decommissioned in 6 years such that the site would be available for unrestricted use and all the nuclear wastes at the site would be gone by 2025." DSEIS Contentions at 15.[16]

In Contention 34, 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." 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

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[14] "State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement" (Feb. 27, 2009) ("DSEIS Contentions").

[15] Both the Applicant and the Staff opposed the admission of NYS Contention 17-A. *See* (1) "NRC Staff's Answer to Amended and New Contentions Filed by the State of New York and Riverkeeper, Inc., Concerning the Draft [SEIS]" (Mar. 24, 2009) ("Staff Response to DSEIS Contentions"), at 14-16, and (2) "Answer of Entergy Nuclear Operations, Inc. Opposing New and Amended Environmental Contentions of New York State" (Mar. 24, 2009) ("Applicant's Response to DSEIS Contentions"), at 15-30.

[16] The State provided no apparent basis for its assertion that the site could be decommissioned "in 6 years," or any reason to believe that the site would be remediated and all spent fuel would be gone from the site by 2025. *See* DSEIS Contentions at 15.

Waste Confidence rule and findings.[17] The Staff and Applicant opposed the admission of New York Contention 34.[18] In this regard, the Staff noted, in part, that notwithstanding the State's reference to the Commission's proposed amendment of its waste confidence rule, 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.[19]

On June 16, 2009, the Board ruled on the admissibility of the State's new and amended DSEIS contentions, in which it decided, *inter alia*, to admit Contention 17-A.[20] In so ruling, the Board found that the amended contention updated original NYS Contention 17 to assert that the Staff "erred in a similar manner to Entergy," so that "the original contention is now relevant to the Draft SEIS, as well as to the ER." Order of June 16, 2009, at 8. The Board rejected Contention 34, however, finding that it was inadmissible. 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.[21]

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[17] DSEIS Contentions at 38-41, 44-45 (citing Proposed Rule, "Waste Confidence Decision Update," 73 Fed. Reg. 59,551 (Oct. 9, 2008)).

[18] *See* (1) Staff Response to DSEIS Contentions at 24-27; (2) Applicant's Response to DSEIS Contentions at 55-66.

[19] Staff Response to DSEIS Contentions at 25.

[20] "Order (Ruling on New York State's New and Amended Contentions)" (June 16, 2009) ("Order of June 16, 2009"), at 7-8.

[21] *Id.* at 16.

On February 26, 2010, the Applicant filed a motion for summary disposition of Contention 17/17-A. Therein, the Applicant asserted that Contention 17/17-A should be dismissed, on the grounds that (1) the asserted impacts on property values are not required to be considered in an EIS under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321, *et seq*., where the impacts "are not directly linked to some physical impact to these properties" but instead are "associated with the public's perception of risk and aversion to nuclear power facilities and spent fuel storage"; (2) "NEPA does not require consideration of impacts that are dependent on numerous speculative actions by unknown third parties to develop the IPEC site and the surrounding land," and (3) as a contention of omission, "the omission alleged in this contention was rendered moot by the Draft SEIS." Motion at 6. The Staff filed a response in support of the Applicant's Motion, submitting that Contention 17/17-A should be dismissed as a matter of law.[22] The Board, however, denied the Applicant's Motion, ruling that Contention 17/17-A was within the scope of the proceeding and that there remained a genuine dispute on a material fact regarding the socioeconomic impacts of license renewal of property adjacent to Indian Point.[23]

In December of 2010, the Staff published its Final Supplement to the GEIS for the license renewal of Indian Point Units 2 and 3.[24] In the Final SEIS, the Staff addressed comments on the Draft SEIS from the public, including many raising issues regarding offsite land use and impacts arising out of spent fuel storage. *See, e.g.*, FSEIS at A-103-06, A-121-22, A-138-41, A-144-50,

[22] "NRC Staff's Answer to Applicant's Motion for Summary Disposition of New York State Contention 17/17-A (Property Values)" (Mar. 18, 2010), at 8.

[23] "Memorandum and Order (Denying Entergy's Motion for the Summary Disposition of NYS Contention 17/17A)" (Apr. 22, 2010), at 11.

[24] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Final Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3," NUREG-1437, Final Supp. 38 (Dec. 2010) ("FSEIS").

A-160-62. As in the Applicant's ER and the Draft SEIS, the Final SEIS considered population-related and tax revenue-related offsite land use impacts, and it concluded that there would be no population-related or tax revenue-related land use impacts "during the license renewal term beyond those already being experienced." FSEIS at 4-45–4-47. The Final SEIS evaluated the impact on property values that might result from non-renewal of the licenses, and concluded as follows:

> The shutdown of IP2 and IP3 may result in increased property values of the homes in the communities surrounding the site (Levitan and Associates, Inc. 2005). This would result in some increases in tax revenues. However, to fully offset the revenues lost from the shutdown of IP2 and IP3, taxing jurisdictions most likely would have to compensate with higher property taxes [Id.]. The combined increase in property values and increased taxes could have a noticeable effect on some area homeowners and business, though Levitan and Associates did not indicate the magnitude of this effect and whether the net effect would be positive or negative.
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> Revenue losses from Indian Point operation would affect the communities closest to and most reliant on the plant's tax revenue and PILOT [Payment-In-Lieu-Of-Taxes]. If property values and property tax revenues increase, some of these effects would be smaller. The NRC staff concludes that the socioeconomic impacts of plant shutdown would likely be SMALL to MODERATE (MODERATE effects for the Hendrick Hudson Central School District, Village of Buchanan, Town of Cortlandt, and the Verplanck Fire District). See Appendix J to NUREG-0586, Supplement 1 (NRC 2002), for additional discussion of the potential impacts of plant shutdown.

FSEIS at 8-24–8-25. As in the Draft SEIS, the Staff determined that the magnitude of land use impacts resulting from license renewal would be "SMALL," as defined in the Generic Environmental Impact Statement ("GEIS"). *Id.* at 4-46 & 8-22.[25]

[25] The Staff also considered the land use impacts of the "no-action" alternative, in which the operating licenses of IP2 and IP3 are not renewed. As in the Draft SEIS, the Staff observed that "[f]ull dismantling of structures and decontamination of the site may not occur for up to 60 years after plant shutdown," FSEIS at 8-20, the land use impacts would be similar regardless of whether decommissioning occurs after 40 or 60 years of operation, *id.*, and the land use impacts of plant shutdown would be "SMALL." FSEIS at 8-22.

On December 23, 2010, the Commission issued its Waste Confidence Decision Update and, in a parallel rulemaking, its amendments to the Waste Confidence Rule.[26] Therein, the Commission revised the second and fourth findings in its Waste Confidence Decision to reflect its reasonable assurance that a mined geologic repository will be available when necessary and that spent fuel can be stored safely without significant environmental impacts for at least 60 years beyond the licensed life of a reactor (including the term of a renewed or revised license).[27]

On January 24, 2011, New York filed its motion for leave to file timely amended bases to Contention 17B, accompanied by its petition for a waiver or exemption. As set forth below, Contention 17-B is inadmissible, in part, for failing to meet the contention admissibility and timeliness standards set forth in 10 C.F.R. § 2.309(f)(1) and (f)(2). In addition, New York's Petition and supporting materials fail to establish either that Commission regulations should be waived in this proceeding or that New York should be granted an exemption from the Commission's regulations.

DISCUSSION

I. Contention 17-B Is Inadmissible In Part

A. Legal Standards Governing the Admission of Late-Filed Contentions

The legal requirements governing the admissibility of contentions are well established, and have been addressed by this Board on numerous occasions. In brief, pursuant to 10 C.F.R. § 2.309, the regulations require that a contention must satisfy the following timing and basis requirements in order to be admitted. These requirements are discussed below.

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[26] *See supra* note 2.

[27] Final Rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 75 Fed. Reg. 81,032 (Dec. 23, 2010) (to be codified at 10 C.F.R. § 51.23(a) (effective Jan. 24, 2011)); "Waste Confidence Decision Update," 75 Fed. Reg. 81,037, 81,038 (Dec. 23, 2010).

1. Requirements for Late-Filed Contentions

To be timely, the request and/or petition must be filed pursuant to the time specified in the Federal Register notice of opportunity for a hearing 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)-(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). Pursuant to 10 C.F.R. § 2.309(c), the petitioner must address these eight factors in its nontimely filing, the most important of which is "(i) Good cause, if any, for the failure to file on time." *See* 10 C.F.R. § 2.309(c)(1)(i)-(viii).[28]

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--
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> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

[28] New York is an admitted party to this proceeding, and has previously demonstrated its standing to intervene. Accordingly, the "good cause" factor specified in 10 C.F.R. § 2.309(c)(1)(i) is the principal factor to be considered in assessing the timeliness of New York's current contention.

10 C.F.R. § 2.309(f)(2).[29] In delineating this requirement, the Commission further stated that:

> [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* § 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.[30]

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 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); *Entergy 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*, LBP-07-14, 66 NRC at 210 n.95.[31] A newly-created document that

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[29] There is a clear analogy between the requirement that data or conclusions must "differ significantly" from information in previously available documents, 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.*

[30] Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

[31] 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).

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).[32]

Finally, when new and 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, consistent with the Board's "Scheduling Order" of July 1, 2010 (at 6), and 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).[33]

2. 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:
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> (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;
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> (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;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position

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[32] *See Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 142 (July 8, 2009), *aff'd in part, rev'd in part on other grounds*, CLI-10-2, 71 NRC __ (Jan. 7, 2010), slip op. at 1; *see also Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), "Memorandum and Order (Ruling on Request to Admit New Contention)," (unpublished), slip op. at 8 (Apr. 29, 2009).

[33] *See generally, Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (May 25, 2006).

> 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) [P]rovide 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 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).[34] 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).

Finally, as set forth in 10 C.F.R. § 2.309(f)(2), petitioners must base their contentions on existing documents and information:

> 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.[35]

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[34] 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.

[35] *See* "Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

B. Contention 17-B Is Inadmissible in Part For Failure to Meet the Timeliness and Contention Admissibility Standards

Contention 17-B reiterates many of the assertions contained in New York's contentions 17 and 17-A, providing additional references to the Final SEIS (*see, e.g.*, citations added to ¶¶ 3 and 5). The Staff does not oppose the admission of Contention 17-B to the extent that it applies the provisions of previously-admitted Contention 17-A to the Final SEIS.

At the same time, however, New York has supplemented Contention 17-B with new arguments and new bases, which are either untimely, lacking an adequate basis, or barred as an impermissible challenge to the Commission's rules. Specifically, New York newly asserts that the Final SEIS fails to address the impact on land use and property values resulting from the storage of spent fuel during and after the period of licensed operations; that the Final SEIS fails to consider the positive impact on land use as part of the no-action alternative; and that the Final SEIS fails to discuss the impacts of Entergy's "newly announced intention to abandon the facility for 60 years." *See* Contention 17-B at ¶¶ 2, 22, 23-28.

Accordingly, for the reasons set forth below, Contention 17-B should be rejected, in part, on the grounds that it (1) constitutes an impermissible challenge to Commission regulations, (2) lacks an adequate basis, or (3) is not timely, in that it is not supported by materially new information and impermissibly raises assertions that New York could have, but failed to, raise earlier in this proceeding.

1. Contention 17-B Constitutes an Impermissible Challenge to the Commission's Regulations

Contention 17-B, to the extent that it challenges the updated Waste Confidence Rule and Category 1 issues under 10 C.F.R. Part 51, Subpart A, Appendix B, should be rejected as an impermissible challenge to the Commission's regulations.

a. Regulatory History of the Waste Confidence Decision

The Commission issued its initial Waste Confidence Decision on August 31, 1984,[36] 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 operating license term of the reactor. 49 Fed. Reg. at 34,658.[37] 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 statement pertaining to the issuance or amendment of a reactor operating license. *Id.*

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[36] *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).

[37] 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.

On September 18, 1990, the Commission published the results of its review of its initial Waste Confidence Decision, in which it revised findings (2) and (4) regarding the period of time covered by its decision.[38] 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.[39]

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.[40] 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.[41]

On October 9, 2008, the Commission announced its decision to undertake an updated review of the Waste Confidence Decision.[42] As part of the update, the Commission proposed, *inter alia*, to find reasonable assurance that spent fuel generated can be stored safely without

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[38] "Waste Confidence Decision Review," 55 Fed. Reg. 38,474 (Sept. 18, 1990). In revising findings (2) and (4), the Commission 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.

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

[40] "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).

[41] "Waste Confidence Decision Review: Status," 64 Fed. Reg. 68,005 (Dec. 6, 1999).

[42] "Waste Confidence Decision Update," 73 Fed. Reg. 59,551 (Oct. 9, 2008).

significant environmental impacts for at least 60 years beyond licensed reactor operation, including the term of license renewal (if any), 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.[43]

On December 23, 2010, after consideration of the comments it had received, the Commission amended 10 C.F.R. § 51.23(a) and separately published a final update and revision to the Waste Confidence Decision.[44] The newly-amended 10 C.F.R. § 51.23(a), as revised on December 23, 2010, now states:

> § 51.23 Temporary storage of spent fuel after cessation of reactor operation--generic determination of no significant environmental impact.
>
> (a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 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 at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

10 C.F.R. § 51.23 (emphasis added). The Commission explained its revision of Findings (2) and (4) in the final rule by stating as follows:

> Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

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[43] 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).

[44] Final Rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 75 Fed. Reg. 81,032 (Dec. 23, 2010) (to be codified at 10 C.F.R. § 51.23(a) (effective Jan. 24, 2011)); "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010).

> Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and 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.
>
> The Commission, in response to public comments, and to achieve greater consistency with Finding 4, is also modifying the rule to include a time frame for the safe storage of [spent nuclear fuel]:
>
> The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 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 at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary

75 Fed. Reg. at 81,033.[45]

Significantly, in adopting its December 2010 update of the Waste Confidence Rule, the Commission did not change 10 C.F.R. § 51.23(b), nor the other sections cited within § 51.23(b) (*i.e.* 10 C.F.R. §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95, and 51.97(a)). Thus, § 51.23(b) and (c) continue to read:

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[45] The Commission addressed the issue of when a geologic repository will open, stating as follows:

> The Commission believes that there is <u>no specific date by which a repository must be available for safety or environmental reasons</u>; the Commission did not define a period when a repository will be needed for safety or environmental reasons in 1990 and it is not doing so now—it is only explaining its view of when a repository could reasonably be expected to be available after a Federal decision to construct a repository.

75 Fed. Reg. at 81,035-81,036 (emphasis added).

> (b) Accordingly, as provided in §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95, and 51.97(a), and within the scope of the generic determination in paragraph (a) of this section, 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, 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, or issuance or amendment of a combined license for a nuclear power reactor under parts 52 and 54 of this chapter, or the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.
>
> (c) This section does not alter any requirements to consider the environmental impacts of spent fuel storage during the term of a reactor operating license or combined license, or a license for an ISFSI in a licensing proceeding.

Likewise, regarding what an applicant's Environmental Report must contain, 10 C.F.R. § 51.53(c)(2) remains unchanged, and continues to state as follows:

> [The Applicant's Environmental Report--Operating 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).

Similarly, regarding the Staff's environmental impact statement at the operating license renewal stage, 10 C.F.R. § 51.95(c)(2) does not require a discussion of spent fuel storage:

> . . . the supplemental environmental impact statement prepared at the license renewal stage <u>need not discuss</u> . . . <u>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).</u>

10 C.F.R. § 51.95(c) (emphasis added). Importantly, as the Commission observed, "the Waste Confidence Decision and Rule satisfy a portion of the NRC's NEPA obligations—those associated with the environmental impacts after the end of license life." 75 Fed. Reg. at 81,033. The Commission further observed that "the Waste Confidence Decision is the Environmental

Assessment—the NRC's NEPA analysis—that provides the basis for the generic determination of no significant environmental impacts reflected in the rule (10 C.F.R. 51.23)." *Id.*

b. Contention 17-B Impermissibly Challenges the Commission's Regulations

Contention 17-B contains new bases purporting to modify the reasons why license renewal would substantially and adversely impact offsite land use and tax revenues. Motion at 4. Specifically, New York newly asserts that an additional twenty years of operation will exacerbate the adverse impact on offsite land values because more spent fuel will be generated and stored on-site. Contention 17-B at 7 ¶ 20. New York contends that the Final SEIS fails to discuss the impact on offsite land values of this additional generation and on-site storage of spent fuel, and it therefore does not satisfy the requirements of 10 C.F.R. § 51.71 and 10 C.F.R. Part 51, Subpart A, Appendix B. *Id.* at 7-8 ¶¶ 21, 23. Further, New York states that the revised Waste Confidence Rule does not indicate a date by which spent fuel will be removed from a plant site, and, as a result, "[t]he prospect of the continued presence of the spent fuel" at IP2 and IP3 after decommissioning will have a "severe adverse impact on the value of land adjacent to the site . . . ." *Id.* at 8-9 ¶¶ 24-28. Thus, New York asserts, because the Final SEIS fails to consider these adverse consequences, it falls short of the requirements of Part 51. *Id.* at 9 ¶ 27. Finally, New York states that the Final SEIS ignores adverse impacts on tax revenues that would result from Indian Point's conversion into a "high level nuclear waste storage facility," *id.* at 10 ¶ 32, and that the Final SEIS does not consider changes in property values associated with an increase in dry cask storage of spent fuel for the license renewal period, *id.* at 10-11 ¶ 33.

The bases and evidence provided by New York in support of Contention 17-B are similar to claims previously introduced by New York in its proposed Contention 34. There, New York asserted that the Draft SEIS violated NEPA and "related regulations" because it did not address

any environmental impacts that may be caused from the long-term or indefinite storage of high level nuclear waste at Indian Point following license renewal and shutdown of IP2 and IP3. *See* DSEIS Contentions at 37; *cf.* Order of June 16, 2009, at 14.

The Board has previously rejected these assertions, in rejecting Contention 34 as an impermissible challenge to the NRC's regulations; the Board found that the original version of 10 C.F.R. § 51.23(b) was still in force and "[did] not permit 'discussion of any environmental impact of spent fuel storage' at nuclear reactor sites." Order of June 16, 2009, at 16, *quoting* 10 C.F.R. § 51.23(b) (emphasis in original). The same result should be applied to Contention 17-B.

In Contention 17-B, New York renews its argument that 10 C.F.R. § 51.23(b) does not bar its claim that the NRC Staff must consider impacts of potential indefinite on-site storage of spent fuel at Indian Point, but now limits the scope of its contention to impacts on land use and property values. *See* Petition at 3. New York's argument hinges upon language in § 51.23(b) limiting the application of that section to environmental impacts of spent fuel storage falling within the "scope of the generic determination in paragraph (a) of [§ 51.23]" that spent fuel can be stored "without significant environmental impacts" for at least 60 years beyond the licensed life of a reactor. *Id.* at 3-4. New York reasons that, because neither revised § 51.23(a) nor the Waste Confidence Decision Update explicitly discusses the environmental impacts of indefinite on-site storage of spent fuel on offsite land use and property values, those impacts are not "within the scope" of § 51.23(a)'s generic determination and must be considered in the Final SEIS. *Id.* at 3; *see also* Sipos Declaration at ¶ 22.

New York's argument is unavailing, in light of the plain language of the revised Waste Confidence Rule and its regulatory history. As described above, the pertinent revisions to § 51.23(a) do not alter the scope of the Commission's generic determination other than to extend the application of that determination to a minimum period of 60 years following the end

of the license renewal term, from the previous rule's specification of 30 years. Thus, the Commission continues to find reasonable assurance that no significant environmental impacts will result from the on-site storage of spent fuel until offsite storage or disposal is available. *See* 10 C.F.R. § 51.23(a) (revised). Moreover, 10 C.F.R. § 51.23(b), the plain language of which remains unchanged, continues to apply this generic determination to licensing proceedings conducted under 10 C.F.R. Parts 50, 52, 54, and 72. 10 C.F.R. § 51.23(b) (revised). Therefore, just as the prior version of § 51.23(b) prohibited claims that an ER or EIS must consider the environmental impacts of spent fuel storage after the end of licensed operations, the revised version of § 51.23(b) does as well.[46] And, as both versions of § 51.23(b) obviate the need to consider "any environmental impacts" related to the Commission's generic determination in § 51.23(a), the plain language of the Rule indicates that any impacts on offsite land use and property value were and are covered within the scope of that determination. The Board's rationale in rejecting Contention 34 thus applies, as well, to Contention 17-B.[47]

Further, in the Waste Confidence Decision Update, the Commission clarified what was meant by the phrase "within the scope of the generic determination in paragraph (a) of this section" in 10 C.F.R. § 51.23(b). The Commission indicated that this phrase was intended to differentiate between the need to consider the environmental impacts of spent fuel storage during the term of the operating license and the need to consider such impacts after the term

[46] *See* Order of April 22, 2010, slip op. at 13-14 (holding that NEPA contentions relating to the on-site storage of spent fuel are inadmissible "due to the Waste Confidence Rule").

[47] Moreover, the December 2010 update to the Waste Confidence Rule did not change the Commission's long-standing holdings regarding the limited scope of license renewal proceedings. Indeed, after the new Waste Confidence Rule and Waste Confidence Decision Update went into effect, the Board in the *Seabrook* proceeding reiterated the Commission's holding, in several cases, that Category 1 issues like spent fuel storage are exempt from analysis in an individual license renewal proceeding. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-02, 73 NRC __, __ (Feb. 15, 2011), slip op. at 44-45. Further, "[']Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically[']" and "[']All such issues, including accident risk, fall outside the scope of license renewal proceedings.[']" *Id.* at __ (slip op. at 44) (quoting *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 2 & 4), CLI-01-17, 54 NRC 3, 23 (2001)).

elapses.

75 Fed. Reg. at 81,041. Thus, the phrase, "within the scope of the generic determination in [§ 51.23(a)]," is not intended to limit the Commission's generic determination to only certain types of environmental effects, as New York suggests. Rather, as the Commission stated, the "[e]nvironmental analysis for this period [*i.e.*, after the licensing term elapses] is covered by the environmental analysis the NRC has done in this update to the Waste Confidence Decision . . . [which] enables the Commission to generically resolve this issue . . . ." 75 Fed. Reg. at 81,041 (emphasis added).[48] As the land use impacts alleged by New York are related to the ongoing storage of spent fuel after the end of the licensing period, these impacts fall within the scope of the Commission's generic determination in § 51.23(a).[49]

Finally, New York, itself, appears to recognize that its new bases are a direct challenge to the revised Waste Confidence Rule, as it seeks a waiver, and in the alternative, an exemption, from the terms of § 51.23(b).[50] Indeed, New York states that it raised the issue of potential site-specific impacts in its comments to the Waste Confidence Rule revision, and that the Commission responded that the appropriate recourse would be to seek a waiver of the terms of § 51.23(b). Petition at 18-20.

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[48] The storage of spent fuel during the term of license renewal is addressed *infra*.

[49] New York also attempts to surmount the prohibition on challenging NRC regulations in this proceeding by asserting that the Commission has failed to consider "the environmental impact of spent fuel storage at the reactor site beyond 60 years after plant shutdown." Contention 17-B at 8-9 ¶ 24; *see also generally* 9 ¶ 25-28; 10 ¶ 30. However, the plain language of the Waste Confidence Rule indicate that its findings are applicable for "at least 60 years beyond the licensed life" of operations. *See* 10 C.F.R. of § 51.23(a). It is reasonable to conclude that, if the Commission intended to limit its generic finding to a maximum of 60 years, it would have been a simple matter to do so. Moreover, the Commission found it unnecessary to specify an upper bound, given its confidence that a permanent repository will be available "when necessary." *See* 75 Fed. Reg. at 81,042-81,043.

[50] The State previously argued that Contention 34 was admissible without a need for a waiver of § 51.23, based on its view that the original Waste Confidence Rule's prohibition on considering environmental impacts from waste storage had been disavowed by the Commission in its October 9, 2008 Waste Confidence Decision Update. *See* Order of June 26, 2009, at 14-15.

In light of the plain language of the rule and its regulatory background, the revised Waste Confidence Rule's prohibition on considering any environmental impacts resulting from the on-site storage of spent fuel after the end of licensed operations applies to this contention. To the extent that Contention 17-B alleges a deficiency in the Final SEIS for failing to consider these impacts, therefore, it is an impermissible challenge to the Waste Confidence Rule and is outside the scope of this proceeding. Furthermore, as discussed in Part III, *infra*, New York has failed to make a *prima facie* showing of special circumstances, such that the Commission's regulations should be waived in this proceeding or that New York should be granted an exemption from those regulations.

New York also raises an issue involving the "impacts on the value and potential use of adjacent lands" due to additional dry cask storage during the license renewal period. Contention 17-B at 4 ¶¶ 7-10; *see also* 10-11 ¶ 33. To the extent that the State suggests that the Final SEIS is inadequate because it does not consider the impact on land use from the generation and storage of spent fuel during the term of the renewed operating license, 10 C.F.R. § 51.23(b) does not apply.[51] However, the storage of spent fuel during the license renewal period, including the increased volume of spent fuel generated and stored on-site during the license renewal term, is a Category 1 issue as codified in Table B-1, 10 C.F.R. Part 51, Appendix B, and as such may not be challenged in a license renewal proceeding absent a waiver or suspension of the rule as part of a rulemaking proceeding.[52] New York has not

[51] *See* 75 Fed. Reg. at 81,041 (responding to a comment by, *inter alia*, the Attorney General of New York concerning the scope of Commission's generic determination in revised 10 C.F.R. § 51.23(a)).

[52] *See 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, 19-21 (2007), *reconsideration denied*, CLI-07-13, 65 NRC 211, 214 (2007). Table B-1 states, for on-site spent fuel, that "[t]he expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available." 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1

requested a waiver of 10 C.F.R. Part 51, Appendix B,

Table B-1, to permit the filing of this portion of the contention. Accordingly, consideration of this issue is precluded in this proceeding.[53]

2. Contention 17-B Lacks an Adequate Factual Basis

In addition to mounting an impermissible challenge to the Commission's rules, Contention 17-B appears to be premised on the faulty assumption that all spent fuel will be removed and the Indian Point site will be fully decommissioned by 2025 (*i.e.*, within 10 years after the cessation of licensed operations). New York contends, "If the licenses for IP2 and IP3 are not extended, owners and potential purchasers of land adjacent to Indian Point can contemplate that the site will be cleared of an operating nuclear plant and the structures associated with operation of the plant by 2025." Contention 17-B at 5 ¶ 11. No basis has been shown to exist for this claim. In fact, the Commission's regulations contemplate that decommissioning will be achieved within 60 years after permanent cessation of operations, *see* 10 C.F.R. § 50.82(a)(3), and the Final SEIS similarly contemplates a 60-year period for decommissioning. Final SEIS at 8-20. Moreover, New York apparently contradicts itself later in

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(emphasis added). Consequently, the Staff has found that the impacts of on-site spent fuel are "SMALL." *Id.*

[53] Even if New York's assertions were not barred by the Waste Confidence Rule or 10 C.F.R. Part 51, Appendix B, Table B-1, they impermissibly attempt to raise an issue that is not cognizable under NEPA. New York has not asserted that the alleged adverse impact on offsite property values will result from any actual or physical harmful impact to those properties, such as might result from offsite contamination or noxious activity. Rather, the State claims instead that the adverse impact would arise from the storage of spent fuel, by itself, and would be eliminated by non-renewal of the IP2 and IP3 operating licenses. *See, e.g.*, Contention 17-B at 5 ¶¶ 11-12. To the extent that the harm alleged by New York would result not from any harm caused by the facility, but from the public's alleged perception of the risk of on-site spent fuel storage, this alleged impact is beyond the scope of the environmental impacts required to be considered under NEPA. *See, e.g.*, *Metropolitan Edison Co. v. People Against Nuclear Energy ["PANE"]*, 460 U.S. 766, 778 (1983) (psychological stress is not a cognizable impact under NEPA). *Cf. Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 109 n.26 (1998) (negative impacts on local property values may be considered in an EIS if they "will flow directly from radiological and environmental impacts" of the facility, rather than from "psychological effects stemming from a fear of nuclear power").

the contention, when it states, "all parties must assume that the site will contain a non-operating nuclear facility for a period of 60 years from the end of operations." Contention 17-B at 8 ¶ 22.[54] No factual basis whatsoever has been provided by the State to support its or its expert's assumption that the Indian Point site will be cleared of all structures associated with the plant following a cessation of operations. Therefore, to the extent that the contention relies upon this assumption, Contention 17-B lacks an adequate factual basis.

3. Contention 17-B Does Not Meet the Timeliness Standards of 10 C.F.R. § 2.309(f)(2) and (c)

Even if the Board determines that New York has met the Commission's standards for contention admissibility set forth in 10 C.F.R. § 2.309(f)(1), Contention 17-B should be rejected, in that it fails to meet the Commission's standards for new and amended contentions in 10 C.F.R. § 2.309(f)(2) and (c). In this regard, several of the bases newly advanced by New York, and the information submitted in support of the contention, impermissibly raise assertions that New York could have, but failed to, raise earlier in this proceeding. In addition, aspects of Contention 17-B are not supported by materially different new information, as required by 10 C.F.R. § 2.309(f)(2).

First, New York declares that its new bases regarding the on-site storage of spent fuel after the end of licensed operations are timely and arise out of new information that is materially different from previously available information, *i.e.*, the revised Waste Confidence Rule and the Waste Confidence Decision Update. Motion at 1-2. New York states that the revised Rule's removal of any date certain by which a waste repository will be available constitutes a material change that will have a "severe adverse impact on the value of land adjacent to the site." Motion at 2; Contention 17-B at 6 ¶ 15, 10 ¶ 30. This claim, however, is premised on the

[54] As discussed *infra*, however, this basis is advanced upon non-timely information, and therefore is not itself admissible because it does not meet the Commission's timeliness standards at 10 C.F.R. § 2.309(f)(2) and (c).

baseless assumption that, as a result of this revision to the Waste Confidence Rule, spent fuel will be stored at the Indian Point site "indefinitely," whereas that possibility was "ruled out" by the Commission's previous Waste Confidence findings. Motion at 3. Significantly, however, New York disregards the Commission's statement that it has confidence that sufficient repository capacity will be available "when necessary," and that its revisions of the Rule "do not mean that the Commission has endorsed indefinite storage of [spent nuclear fuel] and [high level waste]" at reactor sites. 75 Fed. Reg. at 81,041. Further, it ignores 10 C.F.R. § 50.82(a)(3), which contemplates that decommissioning will be achieved within 60 years after permanent cessation of operations. The Final SEIS similarly contemplates a 60-year period for the decommissioning of IP2 and IP3, *see* Final SEIS at 8-20, as did the Draft SEIS, *see* DSEIS at 8-25. New York therefore fails to demonstrate how the revisions to the Waste Confidence Rule are materially different from information previously available.

Second, New York raises, for the first time, a challenge to the adequacy of the Final SEIS's discussion of the impacts of license renewal on land use and land value. *Compare* Contention 17-B at ¶ 2 *with* New York's DSEIS Contentions at 15 ¶ 2. Both Contention 17 and amended Contention 17-A were explicitly admitted by the Board as "contentions of omission."[55] As the Staff noted previously, "nowhere did [Contention 17-A] challenge the adequacy of the Draft SEIS discussion of property values."[56] Now, New York changes the theory under which it seeks the admission of Contention 17-B, from one of omission to one challenging the adequacy of the Final SEIS's analysis of land use impacts. However, New York's assertion is one that it

[55] *See* LBP-08-13, 68 NRC at 116 ("we admit NYS Contention-17 as a contention of omission"); Order of June 16, 2009, at 8 ("this amended contention updates the original to reflect that New York contends that the NRC Staff erred in a similar manner to Entergy and that the original contention is now relevant to the Draft SEIS, as well as to the ER. We admit the amended contention as such and consolidate it into NYS-17").

[56] *See* "NRC Staff's Answer to Applicant's Motion for Summary Disposition of New York State Contention 17/17-A (Property Values)" (Mar. 18, 2010), at 10.

could have, but did not, raise earlier: The discussion of land use impacts in the Final SEIS contains no new information concerning these issues – material or otherwise – beyond the information that was contained in the Draft SEIS. Thus, in Contention 17-B, New York cites the Staff's discussion in the Final SEIS at 4-45 to 4-47 and 8-25, *see* Contention 17-B at ¶¶ 3, 5, but a comparison of these sections to parallel sections in the Draft SEIS shows that these sections remain entirely unchanged. *Compare* Draft SEIS at 4-40 to 4-41 and 8-29 to 8-30 *with* Final SEIS at 4-45 to 4-47 and 8-25.[57] Accordingly, New York could have raised its adequacy argument at the time it filed its petition regarding the Draft SEIS, but did not do so; nor does the Final SEIS contain materially different new information, as needed to support Contention 17-B. Consequently, New York's argument regarding the adequacy of the Draft FEIS should be rejected as nontimely under 10 C.F.R. § 2.309(f)(2).

Finally, New York advances a new basis for the contention relying on information that has been available to the State for quite some time. New York asserts that the Final SEIS contains no discussion of the adverse impacts that would result from "Entergy's newly announced intention to abandon the facility for 60 years to allow its decommissioning trust fund to accumulate sufficient funds" – relying upon an August 13, 2009 Entergy submittal to the NRC and a December 28, 2009 letter from an NRC project manager to Entergy. *See* Contention 17-B at 8 ¶ 22. Moreover, the Draft SEIS, issued in December 2008, indicated the possibility that full decommissioning might not occur for up to 60 years after plant shutdown. *See* DSEIS at 8-25. Therefore, in proffering this basis, New York fails to demonstrate how this contention has been submitted in a timely fashion and arises out of new information not previously available.

[57] One sentence in the Draft SEIS was rephrased in the Final SEIS, but the change does not represent new or materially different information. *Compare* Draft SEIS at 8-29 ("there may also be an immediate reduction in property tax revenues for Westchester County") with Final SEIS at 8-24 ("property tax payments to Westchester County may be reduced").

Similarly, New York relies upon the Commission's Waste Confidence Decision Update to advance its argument that the Commission did not specifically consider the impacts of post-shutdown spent fuel storage on land use and property values. *See* Contention 17-B at 7 ¶¶ 18-19, *citing* 75 Fed. Reg. 81,032-76. However, New York could have advanced this argument earlier, when it filed its original Contention 17; as New York notes elsewhere in its submission, none of the Commission's prior Waste Confidence rulemakings explicitly considered these impacts. *See* Declaration of AAG John J. Sipos (Jan. 24, 2011), at 6 ¶ 22. Therefore, New York did not have to wait for the issuance of the revised Waste Confidence Rule to raise this argument, because it would have applied equally to the Rule prior to its December 2010 revision. Thus, New York does not show that the revised Rule and Waste Confidence Decision Updates provide materially different information for these purposes, as they do not represent a change from previous Commission rulemakings.

In sum, Contention 17-B does not identify any new issue raised in the Final SEIS, which would constitute grounds for amendment of the contention under 10 C.F.R. § 2.309(f)(2). In addition, Contention 17-B does not identify any information that was previously unavailable, or that is materially different from information which was previously available, which would constitute grounds for amendment under 10 C.F.R. § 2.309(f)(2)(i)-(iii).[58] Accordingly, apart from New York's request to amend the contention to refer to the Final SEIS, the Staff opposes the admission of Contention 17-B, for the reasons set forth above.

[58] New York has not attempted to argue that its filing meets the requirements of 10 C.F.R. § 2.309(c) (requiring a petitioner to address eight factors in a nontimely filing, the most important of which is good cause for the failure to file on time).

II. New York's Request for a Waiver or Exemption Should Be Denied

On January 24, 2011, in conjunction with its motion to file Contention 17-B, New York filed a request for waiver of or exemption from the Commission's Waste Confidence Rule.[59] In its Waiver/Exemption Petition, New York asserts that the NRC's revised Waste Confidence Rule would not serve the purposes for which the Commission promulgated it, with respect offsite land use impacts resulting from the on-site storage of spent fuel after the end of Indian Point's licensed operations. Petition at 11, 13-17; Sipos Declaration at 3-4 ¶ 18. Consequently, New York requests a waiver of the provisions of 10 C.F.R. § 51.23(b) "to the extent they prevent consideration of site-specific offsite land use impacts associated with increased amount of, and time of onsite storage of, spent fuel that will be generated as a result of the proposed relicensing" of IP2 and IP3. Sipos Declaration at 3-4 ¶ 18.[60] Further, New York asserts that an exemption from the application of 10 C.F.R. § 51.23(b) to Contention 17-B is both required by law and in the public interest. *Id.* at 8. In support of the Petition, New York filed the Declaration of Assistant Attorney General John Sipos, who, in turn, refers to and incorporates his previous declarations.[61]

As set forth below, New York's Petition and supporting materials fail to make a *prima facie* showing of the requisite "special circumstances" such that the Commission's regulations

[59] *See* State of New York's Request For a Determination That the Proposed Amended Bases for Contention 17A Are Not Barred By 10 C.F.R. § 51.23(b), Or That Exemption From the Requirements of 10 C.F.R. § 51.23(b) Should Be Granted, Or That the State Has Made A *Prima Facie* Case That § 51.23(b) Should Be Waived as Applied to Contention 17B (Jan. 24, 2011) ("Waiver Petition").

[60] As described *supra*, to the extent that the State is concerned with the impact on land use from the generation and storage of spent fuel during the term of the renewed license, 10 C.F.R. § 51.23(b) does not apply. *See* Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,041 (Dec. 23, 2010) (responding to a comment by, *inter alia*, the Attorney General of New York concerning the scope of Commission's generic determination in revised 10 C.F.R. § 51.23(a)). Moreover, the State has not requested a waiver of 10 C.F.R. Part 51 Appendix B for this contention.

[61] "Declaration of AAG John J. Sipos" (Jan. 24, 2011) ("Sipos Declaration") (Attachments 12–14).

should be waived in this proceeding, and fails to demonstrate that New York should be granted an exemption from the Commission's regulations. Accordingly, its Petition should be denied.

A. Legal Standards Governing Petitions for Waiver Under 10 C.F.R. § 2.335

This Board has previously had occasion to consider and apply the Commission's requirements for a waiver of its regulations.[62] In brief, pursuant to 10 C.F.R. § 2.335(a), "[e]xcept as provided in [§ 2.335 (b), (c), and (d)], 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 this part." Subsection (b) provides the sole ground for petition of waiver, *i.e.*, the petitioner must make a *prima facie* showing[63] that special circumstances exist such that the application of the regulation would not serve the purposes for which it was adopted. 10 C.F.R. § 2.335(b); *Tennessee Valley Authority* (Watts Bar Unit 2), LBP-10-12, 71 NRC __ (June 29, 2010) (slip op. at 3). As this Board has held, the petitioner must show circumstances specific to the proceeding, "of a nature that the purpose for which the challenged regulation was promulgated would be perverted if applied as written in the ongoing proceeding," *i.e.*, "at a minimum, that circumstances specific to this proceeding 'undercut the rationale for the rule

[62] *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), "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)" (Feb. 12, 2010), slip op. at 22; *Indian Point*, "Order (Ruling on New York State's New and Amended Contentions)" (June 16, 2009), slip op. at 16; *Indian Point*, "Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition)" (Jul. 31, 2008), slip op. at 2-7; *Indian Point*, LBP-08-13, 68 NRC at 216-17.

[63] "Prima facie" is not defined in the Commission's regulations, but one Board has recently interpreted the term to require a "substantial showing"; that is, "the affidavits supporting the petition must present each element of the case for waiver in a persuasive manner with adequate supporting facts." *Tennessee Valley Authority* (Watts Bar Unit 2), LBP-10-12, 71 NRC __ (June 29, 2010) (slip op. at 3 n.9) (citing *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 22 (1988); *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2, ALAB-653, 16 NRC 55, 72 (1981).

sought to be waived.'"[64] The petitioning party must submit with the waiver petition an affidavit specifically identifying the aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted. Further, "[t]he affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested." 10 C.F.R. § 2.335(b).

In applying these provisions, the Commission has emphasized that a waiver may be granted only upon a showing that four requirements have been satisfied:

> (i) the rule's strict application "would not serve the purposes for which [it] was adopted;" (ii) the movant has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;" (iii) those circumstances are "unique" to the facility rather than "common to a large class of facilities;" and (iv) a waiver of the regulation is necessary to reach a "significant safety problem."

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551; 559-60 (2005) (footnotes omitted).[65] As the Commission stated in *Millstone*, these elements are deliberately conjunctive – all four factors must be met. *Id.*

Finally, as this Board has recognized,[66] the Board is not empowered to grant a waiver; rather, if it determines that the petitioning party has made a prima facie showing that these requirements have been met, it may certify the matter to the Commission for a determination of

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[64] *Indian Point*, "Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition)" (Jul. 31, 2008), slip op. at 3, *citing Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 597 (1988) (emphasis added).

[65] Although the Commission stated that it would only waive application of a rule if a party demonstrated that the waiver was necessary to reach a "significant safety problem," that ruling pertained to the regulation for which a waiver was sought in that proceeding. The Staff assumes that the Commission could also determine to waive a regulation if necessary to reach a significant environmental issue.

[66] *See, e.g.*, Order of July 31, 2008, slip op. at 2-3 & 7.

whether the application of the regulation should be waived or an exception made. 10 C.F.R. § 2.335(c).

B. New York Has Failed to Establish a Prima Facie Case Showing That a Waiver of the Commission's Waste Confidence Rule Is Warranted

New York claims that the Final SEIS is inadequate because it "fails to address the significant and substantial environmental impact on offsite land use that will occur if [IP1 and IP2] are relicensed and additional spent fuel is generated and stored on site for an indefinite period." Petition at 3. New York notes that, although Contention 17-B remains unchanged except for a new reference to the Final SEIS, a portion of the new bases for the contention focus on the period after licensed operations will cease and the adverse impact on land use, including property values and tax revenues, that will result from the continued presence of spent fuel on-site after shutdown. *Id.* Thus, New York seeks a waiver of 10 C.F.R. § 51.23(b), which declares that, "within the scope of the generic determination in [§ 51.23(a)], no discussion of any environmental impact of spent fuel storage in reactor 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 impact statement," for, *inter alia*, license renewal. 10 C.F.R. § 51.23(b) (emphasis added). For its part, 10 C.F.R. § 51.23(a), as amended, determines on a generic basis that spent fuel can be stored safely and "without significant environmental impacts" for at least 60 years beyond the end of a reactor's licensed operation, including the term of a renewed license, and further, that sufficient repository capacity for disposal of the reactor's spent fuel will be available "when necessary."

In support of its Petition, New York claims that strict enforcement of § 51.23(b) would not serve the purposes of the Waste Confidence Rule and would exclude consideration of special circumstances that were not considered in the rulemaking. Petition at 13. New York recognizes that one of the Commission's purposes in promulgating the revised Waste Confidence Rule is to

address the "environmental . . . implications of such storage." *Id.* However, New York never states precisely how an application of the plain language of § 51.23(b) in this proceeding fails to serve this purpose, or any other purpose, of the Waste Confidence Rule. Rather, New York asserts only that the Commission has never evaluated the "site-specific environmental implications of long term storage of spent nuclear fuel at Indian Point" in any of its Waste Confidence decisions. Petition at 14 (emphasis added). Apparently these circumstances, coupled with New York's assertion that the Commission has always found land use impacts to be "inherently site-specific and thus inappropriate for consideration as part of a generic finding," causes New York to believe that the exclusion of these issues in the Indian Point license renewal proceeding would not serve the purposes for which the Rule was adopted. New York fails to show, however, that this license renewal proceeding differs from all other license renewal proceedings, such that application of the rule in this proceeding would not serve the purpose for which the rule was adopted.

The Commission's determination in the Waste Confidence Rule was reached after consideration of various comments raising the issue of site-specific impacts – including comments submitted by New York regarding, specifically, land use impacts. *See* Petition at 19; Waste Confidence Decision Update, 75 Fed. Reg. at 81,044; 81,050. It is clear, therefore, that the particular circumstances alleged by New York were in fact considered in the course of the rulemaking proceeding. While every nuclear reactor site may differ from every other, the Commission was certainly aware of the site-specific nature of on-site spent fuel storage when it promulgated the Waste Confidence Rule. Thus, New York's argument constitutes a generic challenge to the rule, rather than a site-specific challenge based on special circumstances unique to Indian Point. Further, as this argument would apply to the license renewal application

of any nuclear power plant, it fails to demonstrate the existence of special circumstances which would warrant a waiver of Commission regulations in this specific license renewal proceeding.[67]

In further support of its Petition, New York asserts that the generation of additional spent fuel during the license renewal period, and its on-site storage after the end of licensed operations, will have substantial and unique impacts on property values in the area of Indian Point that do not apply to other sites. Sipos Declaration at 4; Petition at 14-18. In support of this assertion, New York cites the four declarations submitted by Dr. Stephen C. Sheppard, including his report dated January 24, 2011 ("2011 Sheppard Report"). *See* Sipos Declaration at 4; Petition at 14-18. New York proffers as evidence of substantial impacts Dr. Sheppard's most recent report, in which he concludes that license renewal combined with a delay in site reclamation would impose estimated economic costs on surrounding communities of between $169 and $237 million. 2011 Sheppard Report at 6. However, even if Dr. Sheppard's findings are assumed to be correct, they fail to establish a *prima facie* showing that these impacts would be substantially different in kind from the impacts that would be experienced at other NRC-licensed facilities, such that application of the Waste Confidence Rule here would "pervert" or defeat the purposes for which the rule was adopted.

In addition, New York quotes extensively from Dr. Sheppard's 2007 report, to establish that his estimated findings are based upon Census data unique to the Indian Point area. *See* Sipos Declaration at 4-6. But, as New York notes, Dr. Sheppard relied upon general studies of the effects of power plants on property values to reach his conclusions. Contention 17-B at 11-12 ¶¶ 34 & 35. New York explains that one of the studies on which Dr. Sheppard relies indicates that power plants in general have a "statistically significant impact" on property values

[67] The Staff notes that New York has, in fact, challenged the amended Waste Confidence Rule on a generic basis, in a petition for review filed before the U.S. Court of Appeals for the District of Columbia Circuit, on February 14, 2011.

up to a distance of 11,500 feet from a facility, and that Dr. Sheppard theorizes that the impact of nuclear power plants on the surrounding area is even larger. Contention 17-B at 11 ¶ 34. New York also adopts the conclusion of another study relied upon by Dr. Sheppard, which finds that nuclear power plants in general have greater impact on property values that gas and oil-fired facilities, as support for its contention. *Id.* at 11-12 ¶ 35. It is clear, therefore, that New York's arguments concerning § 51.23 could just as easily be raised in connection with other license renewal applications, and New York thus fails to demonstrate the existence of special circumstances unique to Indian Point.

Nor is there any reason to suggest that the license renewal application for IP2 and IP3 should be treated differently from other license renewal applications. As previously noted, every facility occupies a different location, and therefore every facility's impact on land use, property values, and tax revenues in its surrounding community could be unique in some respect. The Commission's revision of § 51.23 could therefore affect each facility's land use impacts; however, New York has not demonstrated that the application of § 51.23 in this proceeding would defeat the purpose for which the rule was adopted, to warrant waiving the application of § 51.23(b) in this proceeding.

In sum, New York has failed to satisfy its four-fold obligation to demonstrate (a) that strict application of the Waste Confidence Rule would not serve the purposes for which it was adopted; (b) that any "special circumstances" were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;" (c) that those circumstances are "unique" to Indian Point Units 2 and 3 rather than "common to a large class of facilities;" and (d) that a waiver of the regulation is necessary to reach a "significant safety [or environmental] problem." *Millstone*, CLI-05-24, 62 NRC at 559-60. Accordingly, New York's petition for a waiver should be denied.

C. New York Has Failed to Establish That It Meets the Requirements for an Exemption

As an alternative to its request for a waiver, New York seeks a determination that it should be "exempt" from the prohibition in revised 10 C.F.R. § 51.23(b) against raising an issue in this proceeding regarding the impacts of spent fuel storage at IP2 and IP3 after the license renewal period. Petition at 8. New York points to 10 C.F.R. § 51.6, which permits the Commission, upon application or its own initiative, to "grant such exemptions from the requirements of the regulations in [Part 51] as it determines are authorized by law and are otherwise in the public interest." New York asserts that a special exemption from the application of 10 C.F.R. § 51.23(b) to Contention 17-B is not only authorized, but is required by law, and is in the public interest. *Id.*

As an initial matter, New York's petition for an exemption neglects to address the fact that 10 C.F.R. § 51.6 plainly grants the Commission, not the Board, the authority to grant a waiver under this provision. *See* Petition at 11 ("the State of New York urges the Board to use the authority of 10 C.F.R. § 51.6 to exempt it from the requirements" of the Waste Confidence Rule) (emphasis added). New York has not shown that this authority has been delegated to the Board. Indeed, insofar as the Staff is aware, the authority to grant exemptions from the Commission's regulations has not been delegated to the Atomic Safety and Licensing Board Panel (ASLBP).[68]

[68] The Commission's authority to grant exemptions from its regulations has been delegated to the Staff. In particular, as applicable here, this authority has been delegated to the Director of the Office of Nuclear Reactor Regulation. *See* Attachments 2 and 3 to "Applicant's Answer to Proposed Amended Contention New York State 17B and the Associated Request for Exemption and/or Waiver of 10 C.F.R. § 51.23(b)" (Feb. 18, 2011). *See also Gulf States Utilities Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995) (the Licensing Board "is not authorized to grant exemptions to NRC regulations or to acquiesce in arguments that would result in circumvention of those regulations"); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977) ("We find no authority in the Atomic Energy Act or in any of the Commission's regulations which empowers us to grant the exemption").

In addition, New York has not demonstrated that 10 C.F.R. § 51.6 is an appropriate mechanism to litigate a contention raising the issue of impacts from spent fuel storage at Indian Point. In general, "where the interpretation or the application of a regulation to particular facts is questioned," a "petition for a waiver or exception is permissible and generally should be utilized." *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-85-33, 22 NRC 442, 445 (1985) (emphasis added), *citing Washington Public Power Supply System* (WPPSS Nuclear Projects Nos. 3 & 5), CLI-77-11, 5 NRC 719, 723 (1977). Here, as New York raises a question of regulatory interpretation and application – whether it may attempt to litigate a contention regarding land use impacts from the storage of spent fuel at Indian Point – 10 C.F.R. §2.335, not 10 C.F.R. § 51.6, provides the appropriate basis for its petition. *Cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 436 (1999). Indeed, the Commission has indicated that a petition for waiver is the appropriate route for New York to pursue if it seeks to challenge the Waste Confidence Rule in this proceeding.[69]

Finally, even if this Board were authorized and inclined to grant a request for an exemption under 10 C.F.R. § 51.6, New York has not shown that it is an "interested person" within the meaning of § 51.6, such that it is authorized to request an exemption from 10 C.F.R. § 51.23(b). The document on which New York relies, LIC-103, "Requests for Exemption from NRC Regulations," indicates that the provision is intended to permit licensees to seek relief from compliance with a provision of Part 51. *See* LIC-103, Requests for Exemption from NRC Regulations (Jul. 26, 2002), at 1. Although, as New York notes, LIC-103 does not indicate that other "interested persons" are precluded from seeking relief under § 51.23(b), the NRC Staff is unaware of any exemption granted under this provision to a party in an adjudicatory proceeding that was not itself subject to the requirements of Part 51. Indeed, the petition cited by the State

[69] *See* 75 Fed. Reg. at 81,044, 81,050.

concerns a license applicant's request for relief from the procedural requirement of concurrent submittal of an ER and a license application. *See* Petition at 11. Part 51 imposes no obligations on New York, and therefore the State cannot claim that it should be exempt from the burdens of compliance with Part 51. Accordingly, the State's request for an exemption should be denied.

CONCLUSION

New York's amended contention constitutes an impermissible challenge to the Commission's Waste Confidence Rule, as amended, and to 10 C.F.R. Part 51, Appendix B, Table B-1. Further, New York has not demonstrated the existence of new and materially different information to support the admission of its new contention. For these reasons, New York's request for the admission of Contention 17-B should be denied, except insofar as it seeks to amend Contention 17-A to refer to the Staff's Final SEIS.

Furthermore, New York has failed to make a *prima facie* case showing of special circumstances, such that the Commission should waive the application of 10 C.F.R. § 51.23(b) to enable the State to litigate these matters. The State has not shown that the strict application of the Waste Confidence Rule would not serve the purposes for which the Commission adopted it. Nor has the State shown that any circumstances unique to Indian Point were not considered in the rulemaking proceeding leading to the promulgation of the Rule. Finally, the State has not shown that it is entitled an exemption under 10 C.F.R. § 51.6. Therefore, New York's request for an exemption or a waiver should also be denied.

Respectfully submitted,

Emily Monteith
Counsel for NRC Staff

Dated at Rockville, MD
this 18th day of February 2011

CERTIFICATION OF COUNSEL

In accordance with 10 C.F.R. § 2.323(b) and the Board's Scheduling Order of July 1, 2010, I certify that I made a sincere effort to make myself available to listen and respond to the moving parties, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues were unsuccessful.

Respectfully submitted,

Emily Monteith
Counsel for NRC Staff

Dated at Rockville, MD
this 18th day of February 2011

February 18, 2011

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 THE STATE OF NEW YORK'S MOTION FOR LEAVE TO FILE AMENDED BASES TO CONTENTION 17A (TO BE DESIGNATED 17B) AND REQUEST FOR AN EXEMPTION OR WAIVER," dated February 18, 2011, 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 18th day of February, 2011:

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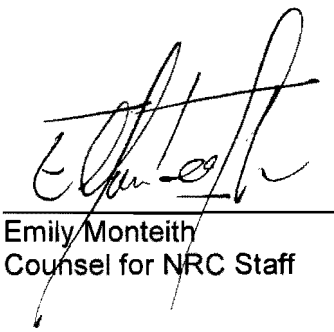

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