

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

February 18, 2011

**APPLICANT'S ANSWER TO HUDSON RIVER SLOOP
CLEARWATER, INC. AND RIVERKEEPER, INC.'S
NEW CONTENTIONS CONCERNING THE WASTE CONFIDENCE RULE**

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Recognizing that their first two contentions likely remain outside the scope of this proceeding for essentially the same reasons set forth in CLI-10-19, Petitioners this time also submit a second set of two contentions: “[i]n the alternative, if the Board decides that Petitioners cannot challenge duly adopted NRC rules in these proceedings”⁴ The “alternative” contentions are premised on a perceived gap in the Commission’s findings supporting the amended Waste Confidence Rule.⁵ Specifically, Petitioners allege that “the Commission’s generic findings with respect to onsite fuel storage in both wet pools and dry casks relate only to the period 60 years beyond the expiration of a plant’s operating license” and no further.⁶

As an initial matter, there is essentially nothing new in Petitioners’ proposed contentions. Indeed, most of Petitioners’ pleading is a recitation of the legal history of the Waste Confidence Rule and federal efforts to develop a repository for spent fuel and high-level waste,⁷ largely copied from Clearwater’s earlier contentions.⁸ The proposed contentions themselves essentially duplicate the contentions proffered by Clearwater over a year ago.⁹ As Petitioners recognize, the Commission rejected those claims in CLI-10-19.¹⁰ Indeed, similar claims have also been uniformly rejected in other proceedings.

Similarly, Petitioners’ New Contentions should be denied in their entirety. First, Petitioners directly challenge the Waste Confidence Rule, 10 C.F.R. § 51.23, as amended,

⁴ New Contentions at 18.

⁵ *See id.* at 18, 33.

⁶ *Id.* at 33.

⁷ *See generally id.* at 3-17, 18-27, 29-33, 34, 36-38.

⁸ *See generally* Hudson River Sloop Clearwater, Inc.’s Motion for Leave to Add New Contentions Based Upon New Information (Oct. 26, 2009; corrected version, Nov. 6, 2009), available at ADAMS Accession Nos. ML093080129, ML093200503.

⁹ *See* Licensing Board 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) at 18-22 (Feb. 12, 2010) (unpublished) (“Feb. 12, 2010 Order”).

¹⁰ CLI-10-19, slip op. at 2.

contrary to the acknowledged, long-standing NRC prohibition against attacks on Commission regulations, codified in 10 C.F.R. § 2.335. Second, Petitioners' safety contentions are untimely, contrary to 10 C.F.R. § 2.309(f)(2) and (c). Third, Petitioners attempt to raise issues related to the Indian Point Energy Center ("IPEC" or "Indian Point") Independent Spent Fuel Storage Installation ("ISFSI"), which are not within the scope of this proceeding, and therefore do not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii). Finally, by ignoring the portions of Entergy's license renewal application ("LRA") that include aging management programs ("AMPs") for the spent fuel pools, Petitioners fail to raise a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Accordingly, the New Contentions fail to meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1).

II. BACKGROUND

A. The Waste Confidence Rulemaking and the Status of Efforts to Remove Spent Nuclear Fuel from Reactor Sites

The general history of the Waste Confidence Rule has been recited by both the Board and Commission in response to several prior proposed contentions and related documents in this proceeding.¹¹ Most importantly, the Commission has plainly stated that, "[i]n the area of waste storage, the Commission largely has chosen to proceed generically' through the rulemaking process – that is, the Waste Confidence Rule, codified at 10 C.F.R. § 51.23 – instead of litigating issues case-by-case in adjudicatory proceedings."¹²

¹¹ See, e.g., Feb. 12, 2010 Order at 18-22.

¹² CLI-10-19 slip op. at 2 (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

In 2008, the Commission proposed to update the Waste Confidence Rule to “confirm the Commission’s confidence that spent fuel storage is safe and secure over long periods of time.”¹³ This review led to certain revisions in 2010 to the Commission’s waste confidence “Findings” (*i.e.*, the conclusions that support the Waste Confidence Rule).¹⁴ Specifically, the Commission revised its second Waste Confidence Finding from a conclusion that there is reasonable assurance that a repository with sufficient capacity will be available within the first quarter of the twenty-first century to a conclusion that sufficient repository capacity will be available *when necessary*.¹⁵

The target date for repository availability was removed from this finding because “recent events have demonstrated that the Commission is unable to predict with confidence when a successful program to construct a repository will start.”¹⁶ This is because, although the Commission has confidence that spent fuel can be safely stored without significant environmental impacts for long periods, there are issues beyond the Commission’s control, including political and societal challenges that make it premature to predict a precise date for repository availability.¹⁷ In 2010 the Commission also revised its fourth Waste Confidence Finding from one that spent fuel can be safely stored for 30 years beyond a reactor’s licensed life for operation, to one that concludes that spent fuel can be safely stored for *at least 60 years* beyond licensed operation, including the term of a renewed license.¹⁸ Consistent with these

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

¹⁴ *See* 2010 Waste Confidence Decision, 75 Fed. Reg. at 81,038.

¹⁵ *See id.* at 81,038-39.

¹⁶ *Id.* at 81,048.

¹⁷ *See id.* at 81,042.

¹⁸ *See id.* at 81,038.

findings, the Commission revised 10 C.F.R. § 51.23(a) regarding the environmental impacts of spent fuel storage as follows:

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 waste and spent fuel generated in any reactor *when necessary*.¹⁹

Finally, the Commission directed the NRC Staff to further develop a plan for a rulemaking and an Environmental Impact Statement (“EIS”) to assess the environmental impacts and safety of long-term waste storage, beyond 120 years.²⁰

Importantly, and contrary to Petitioners’ proposed contentions, the Waste Confidence Rule does not—and cannot—establish the schedule for the removal of spent nuclear fuel from any reactor site, including IPEC. Under the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 *et seq.* (“NWPA”), the federal government, through DOE, remains solely responsible for siting and building a repository.²¹ Neither the Board nor the Commission has the statutory authority to take such actions. The Commission itself recognizes that the schedule for such activities is influenced by many “issues beyond the Commission’s control, including the political and societal challenges of siting a [high-level waste] repository, that make it premature to predict a precise date or time frame when a repository will become available.”²² Thus, Section 51.23, as amended, simply reflects the current reality; *i.e.*, uncertainty regarding the timing of the

¹⁹ 10 C.F.R. § 51.23(a) (emphasis added). *See also* 2010 Waste Confidence Decision, 75 Fed. Reg. at 81,038.

²⁰ 2010 Waste Confidence Decision, 75 Fed. Reg. at 81,040.

²¹ *See id.* at 81,049.

²² *See id.* at 81,042.

availability of a geologic repository for spent nuclear fuel and high-level waste, but it does not set forth or establish any timetable for such removal.²³

The effect of the amended rule, however, is to continue the Commission's long-standing generic treatment via rulemaking which precludes litigation of such issues in individual licensing proceedings.²⁴ Relying now on the Commission's 2010 Waste Confidence Decision, 10 C.F.R. § 51.23(b) remains unchanged, and continues to state that:

[N]o discussion of *any environmental impact* of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license . . . for which application is made, is required in any environmental report, environmental impact statement . . . or other analysis prepared in connection with the issuance . . . of an operating license for a nuclear power reactor under parts 50 and 54 of this chapter . . .²⁵

Thus, 10 C.F.R. § 51.23(b) unambiguously applies to "any environmental impact." Furthermore, 10 C.F.R. § 51.95(c)(2) provides that "the supplemental environmental impact statement prepared at the license renewal stage need not discuss . . . any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b)." Thus, all environmental impacts of spent fuel storage following the license renewal period have been and continue to be outside the scope of this proceeding.²⁶

B. Clearwater and Riverkeeper's New Waste Confidence Contentions

On January 24, 2010, Clearwater and Riverkeeper submitted four new contentions, two environmental and two safety-related. As noted above, the first two contentions are premised on

²³ See *id.* at 81,040.

²⁴ See CLI-10-19, slip op. at 2-3.

²⁵ Emphasis added.

²⁶ See, e.g., CLI-10-19, slip op. at 2-3; *Oconee*, CLI-99-11, 49 NRC at 343-46; *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 170 (2006).

the assumption that the “new waste confidence rule is invalid.”²⁷ In the first, an environmental contention (“CW EC-8/RK EC-6”), Petitioners allege:

The environmental analysis carried out to assess the potential impacts of relicensing Indian Point Units 2 and 3 is inadequate because it provides an insufficient analysis of the potential impacts of generating more spent fuel leading to additional waste storage on site, the alternative methods of accomplishing such storage, and potential alternatives to additional waste storage on the site, including the no-action alternative.²⁸

In the second, a safety contention (“CW SC-2/RK TC-3”), Petitioners allege:

The license renewal application requesting the relicensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site in the long term. In addition, both the applicant and the NRC Staff have failed to establish that any combination of such storage will provide adequate protection of safety over the long term.²⁹

These contentions essentially duplicate, with minor changes (or no changes, in the case of CW SC-2/RK TC-3), the contentions Clearwater submitted in October 2009 and that the Commission rejected in CLI-10-19.³⁰

Recognizing that their first two contentions likely remain outside the scope of this proceeding for essentially the same reasons set forth in CLI-10-19, Petitioners this time also submit a second set of two contentions: “[i]n the alternative, if the Board decides that Petitioners cannot challenge duly adopted NRC rules in these proceedings”³¹ Thus, in the “rule valid scenario,” there is a second environmental contention (“CW EC-9/RK EC-7”):

The environmental analysis carried out to assess the potential impacts of relicensing Indian Point Units 2 and 3 is inadequate

²⁷ New Contentions at 17.

²⁸ *Id.*

²⁹ *Id.* at 18.

³⁰ CLI-10-19, slip op. at 3.

³¹ New Contentions at 18.

because it provides an insufficient analysis of the potential impacts of generating more spent fuel during the period commencing 60 years after the expiration of each license. Missing elements include analysis of: a) the long term impact of additional waste storage on site; b) the alternative methods of accomplishing such storage; and c) potential alternatives to additional waste storage on the site, including the no-action alternative.³²

And there is a second safety contention (“CW SC-3/RK TC-4”):

The license renewal application requesting the relicensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site during the period commencing 60 years after the date the license expires at each unit. In addition, both the applicant and the NRC Staff have failed to establish that that any combination of such storage will provide adequate protection of safety over the long term.³³

In support of these New Contentions, Petitioners refer to, but do not include, a declaration from Dr. Gordon R. Thompson prepared in support of Clearwater’s prior rejected proposed contentions.³⁴ That declaration, however, refers only to other documents.³⁵

Aside from their explicit challenges to the amended Waste Confidence Rule, Petitioners also raise a host of new and vaguely-related claims under the cover of these contentions. Specifically, Petitioners identify a list of alleged “specific issues that site-specific and generic

³² *Id.*

³³ *Id.*

³⁴ The Declaration of Dr. Gordon R. Thompson in Support of Contentions Concerning Waste Storage and Disposal at Indian Point Submitted by Hudson River Sloop Clearwater, Inc. (Oct. 26, 2009) (“Thompson Declaration”) appears in ADAMS at Accession No. ML093080129. Petitioners do not resubmit the “cover” Thompson Declaration with the new proposed contentions. These facts render all of Clearwater and Riverkeeper’s new contentions totally unsupported and subject to dismissal on these grounds alone. The Licensing Board “should not be expected to sift unaided through . . . earlier briefs filed before the Presiding Officer in order to piece together and discern the Intervenor’s particular concerns or the grounds for their claims.” *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 15 (2001) (citing *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-4, 53 NRC 31, 46 (2001)).

³⁵ See generally Thompson Declaration. For example, the Thompson Declaration refers to Gordon R. Thompson, Environmental Impacts of Storing Spent Nuclear Fuel and High-Level Waste from Commercial Nuclear Reactors: A Critique of NRC’s Waste Confidence Decision and Environmental Impact Determination (Feb. 6, 2009) (“Thompson/TSEP Report”). Petitioners also mention this document on page 7 of their New Contentions and refer again to Dr. Thompson’s “many reports” on page 43, but, contrary to the Board’s Scheduling Order, do not provide an ADAMS citation. Therefore, it should “not be considered by the Board.” See Licensing Board Scheduling Order at 18 (July 1, 2010) (unpublished). The Thompson/TSEP Report appears to be available in ADAMS at ML090700781, included in a document submitted by various groups as comments in the recent waste confidence rulemaking.

safety analyses fail to address” including the alleged “potential for ongoing leaks of radioactivity from existing spent-fuel pools to get worse over the long term.”³⁶ The FSEIS, however, includes a substantial discussion of the status of spent fuel pool leakage, including potential environmental impacts, but Petitioners do not cite or challenge any of the information in the FSEIS.³⁷ The remaining items are addressed in Sections IV.A and IV.B, below, to the extent they can be understood to raise either safety or environmental issues.

Following Petitioners’ submittal of their New Contentions, the State of New York (“New York”) submitted a 23-page “Answer in Support of the Admission of Clearwater and Riverkeeper’s Proposed Waste Confidence Contentions”³⁸. Most of the issues raised in the New York Answer are not new. New York, however, for the first time refers to alleged problems associated with the presence of spent fuel from Indian Point, Unit 1 (“IP1”),³⁹ and that the findings in the Waste Confidence Rule will allegedly no longer apply to IP1 after 2034.⁴⁰ The environmental impacts of any spent fuel associated with IP1 (which is all now stored in an ISFSI), of course, are outside the scope of this proceeding regarding Entergy’s application to renew the licenses for IP2 and IP3. New York also claims that the NRC’s FSEIS for IPEC license renewal⁴¹ is deficient because it relies upon the prior Waste Confidence Rule rather than the amended rule,⁴² but this is not an allegation raised in Petitioners’ contention.⁴³

³⁶ New Contentions at 35.

³⁷ See FSEIS at 2-110 to -114, 4-56. Moreover, Petitioners both already have an admitted contention regarding spent fuel pool leaks. See *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3)*, LBP-08-13, 68 NRC 43, 188-91 (2008) (“LBP-08-13”) (admitting Riverkeeper EC-3); *id.* at 191-94 (admitting Clearwater EC-1).

³⁸ Feb. 10, 2011 (“New York Answer”). This document is not yet available in ADAMS.

³⁹ *Id.* at 4.

⁴⁰ See *id.* at 8.

⁴¹ NUREG -1437, Supp. 38, Generic Environmental Impacts Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 & 3 (Dec. 3, 2010) (“FSEIS”), available in ADAMS at Accession No. ML103350405.

⁴² See New York Answer at 17-18.

III. LEGAL STANDARDS GOVERNING ADMISSION OF NEW AND AMENDED CONTENTIONS

An intervenor may file new environmental contentions “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s documents.”⁴⁴ Absent such circumstances, an intervenor may file new contentions only with leave of the presiding officer upon a showing that the new or amended contention is based on information that was not previously available and is materially different than information previously available.⁴⁵ The Commission very recently reiterated that the publication of a new document, standing alone, does not meet this standard unless the information in that document is new and materially different from what was previously available.⁴⁶ Furthermore, the Petitioner must act promptly to bring the new or amended contention.⁴⁷ A new contention is not an occasion to raise additional arguments that could have been raised previously.⁴⁸

If an intervenor cannot satisfy the criteria of 10 C.F.R. § 2.309(f)(2), then a contention is considered nontimely, and the intervenor must successfully address the late-filing criteria in Section 2.309(c)(1)(i)-(viii).⁴⁹ The first factor identified in that regulation, whether “good cause”

⁴³ Nor is it raised in New York’s proposed amended Contention 17B. To the extent the New York Answer seeks to supplement or bolster the arguments in the State’s own January 24, 2010 filings, the New York Answer is untimely, unauthorized, and inappropriate.

⁴⁴ 10 C.F.R. § 2.309(f)(2).

⁴⁵ *Id.* § 2.309(f)(2)(i)-(iii).

⁴⁶ *See, e.g., N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, slip op. at 13-18 (Sept. 30, 2010).

⁴⁷ *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573 & 579-80 (2006) (rejecting petitioner’s attempt to “stretch the timeliness clock” because its new contentions were based on information that was previously available and petitioners failed to identify precisely what information was “new” and “different”).

⁴⁸ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385-86 (2002). This Board has emphasized that that it “will not entertain contentions based on environmental issues that could have been raised when the original contentions were filed.” Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) at 3 (Feb. 4, 2009) (unpublished) (“Pre-Hearing Conference Order”).

⁴⁹ *See* Licensing Board Scheduling Order at 5-6; 10 C.F.R. § 2.309(c)(2) (“The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.”).

exists for the failure to file on time, is entitled to the most weight.⁵⁰ Without good cause, a “petitioner’s demonstration on the other factors must be particularly strong.”⁵¹

A proposed contention also “must satisfy, without exception, each of the criteria set out in 10 C.F.R. § 2.309(f)(1)(i) through (vi).”⁵² Failure to meet each of the criteria is grounds for dismissal of a proposed new or amended contention.⁵³ Among other things, the petitioner must demonstrate that the issue raised in the contention is within the scope of the proceeding, is *material* to the findings the NRC must make to support the action that is involved in the proceeding, and provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a *material* issue of law or fact.⁵⁴ A dispute is material if its resolution would make a difference in the outcome of the licensing proceeding.⁵⁵

Additionally, the Commission has held that a petitioner may not use an adjudicatory proceeding to attack generic rules or regulations.⁵⁶ Thus, a licensing proceeding is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.⁵⁷ A contention that collaterally attacks an NRC rule or regulation is not appropriate for litigation and must be rejected.⁵⁸ Similarly,

⁵⁰ See *New Jersey* (Dep’t of Law & Pub. Safety’s Requests Dated Oct. 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993).

⁵¹ *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

⁵² *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), LBP-10-06, slip op. at 3 (Mar. 17, 2010).

⁵³ See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004). See also *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁵⁴ See 10 C.F.R. § 2.309(f)(1)(iii)(iv) & (vi).

⁵⁵ See *Summer*, LBP-10-06, slip op. at 4 (quoting *Oconee*, CLI-99-11, 49 NRC at 333-34).

⁵⁶ 10 C.F.R. § 2.335(a); *Oconee*, CLI-99-11, 49 NRC at 334.

⁵⁷ See *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20, *aff’d in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). See also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 66 NRC 41, 57-58 (2007) (citing *Peach Bottom*, ALAB-216, 8 AEC at 20).

⁵⁸ See, e.g., *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003); *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974).

licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of a rulemaking by the Commission.⁵⁹

IV. THE NEW CONTENTIONS ARE INADMISSIBLE UNDER 10 C.F.R. § 2.309

A. Clearwater EC-8 (Riverkeeper EC-6) Is Inadmissible

1. The Commission Rejected these Same Challenges in CLI-10-19

CW EC-8/RK EC-6 claims that the existing NEPA review is inadequate because it does not evaluate the impacts of storing additional waste onsite or potential alternative storage methods.⁶⁰ In support, Petitioners rely upon the Thompson/TSEP Report, which, as noted above, is not attached or even directly referenced in the New Contentions.⁶¹

As noted above, Clearwater submitted essentially the same contention in October 2009, and the Commission rejected it in CLI-10-19.⁶² In that decision, the Commission reiterated its longstanding position that, “[i]n the area of waste storage, the Commission has largely chosen to proceed generically’ through the rulemaking process – that is, the Waste Confidence Rule, codified at 10 C.F.R. § 51.23 – instead of litigating issues case-by-case in adjudicatory proceedings.”⁶³ The Commission went on to clearly state that “challenges to the Waste Confidence Rule must be made in the context of a rulemaking, not in the context of an adjudicative proceeding.”⁶⁴ Because the then-ongoing rulemaking to update the Waste

⁵⁹ See *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Douglas Point*, ALAB-218, 8 AEC at 85).

⁶⁰ New Contentions at 17.

⁶¹ Notably, Petitioners do not claim that anything in the Thompson Declaration or the Thompson/TSEP Report qualifies as “new” information or information that was “previously unavailable.” Nor could they, as other licensing boards have found that a similar Dr. Thompson declaration attaching this *same* report does not contain significant new factual information. See *Progress Energy Fla., Inc.* (Combined License Application for Levy Cnty. Nuclear Power Plants, Units 1 & 2), LBP-09-10, slip op. at 102 (July 8, 2009) (“Indeed, Dr. Thompson’s Declaration (which deals with the risks associated with the high density storage and racking of spent nuclear fuel in pools), covers information and grounds that a 2006 licensing board characterized as ‘well trod.’”).

⁶² Slip op. at 2-3.

⁶³ *Id.* at 2 (quoting *Oconee*, CLI-99-11, 49 NRC at 343).

⁶⁴ *Id.*

Confidence Rule was already examining the very issues Clearwater sought to litigate, it would be “unnecessary and wasteful” to admit its proposed contentions.⁶⁵ As a result, the Commission directed the Board to deny Clearwater’s proposed contentions.⁶⁶

The Commission and its Boards have also rejected similar contentions in numerous other recent proceedings.⁶⁷ The only difference is that the current proposed contention challenges the outcome of the NRC’s recent rulemaking, contrary to 10 C.F.R. § 2.335, rather than the previously-existing rule. Proposed contention CW-EC8/RK-EC-6 remains inadmissible for the reasons set forth in CLI-10-19.

2. *Clearwater EC-8 (Riverkeeper EC-6) Remains Inadmissible As It Challenges the NRC’s Generic Findings Codified in the Amended Waste Confidence Rule, Under 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a)*

Although the Commission has amended the Waste Confidence Rule since CLI-10-19, CW-EC8/RK-EC-6 remains an inadmissible challenge to the rule, as Clearwater and Riverkeeper readily admit. As stated above, the Commission has unequivocally stated that “no discussion of *any environmental impact*” from spent fuel storage “for the period *following the term of the reactor operating license*” is required in “*any*” environmental impact statement.⁶⁸ In fact,

⁶⁵ See *id.* at 3.

⁶⁶ See *id.*

⁶⁷ See, e.g., *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Plant, Units 2 & 3), LBP-08-21, 68 NRC at 554, 587 (2008) (holding that a contention seeking reconsideration of the Waste Confidence Rule and alleging it is inapplicable to new plants was an impermissible challenge to regulations and noting that “[a]t least seven other licensing boards have considered identical matters and have squarely rejected” it), *aff’d* CLI-10-09, slip op. at 37-38 (Mar. 11, 2010); *Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-09-26, slip op. at 45-47 (Nov. 19, 2009) (rejecting contention as impermissible challenge to the subject matter of a pending rulemaking); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, slip op. at 16-19 (July 31, 2009) (rejecting a similar challenge to the Waste Confidence Rule on similar grounds); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 415-16 (2008) (rejecting a challenge on similar grounds, including the claim that the rule “should be reconsidered given the uncertainty about the availability of the second geologic repository” that would allegedly be needed for spent fuel from new reactors). See also Licensing Board Order (Ruling on New York State’s New and Amended Contentions) at 16 (June 16, 2009) (unpublished) (“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”) (emphasis in original, internal quotations omitted).

⁶⁸ 10 C.F.R. § 51.23(b) (emphasis added).

Petitioners concede that the Waste Confidence Rule does “not contemplate the assessments that Petitioners contend are missing”⁶⁹

Despite the plain language of the amended and controlling Waste Confidence Rule, Petitioners nevertheless claim that Entergy or the NRC Staff should have performed a site specific assessment of the environmental impacts of spent fuel storage *after* the period of extended operation.⁷⁰ It is well established, however, that absent a waiver, no rule or regulation of the Commission is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding.⁷¹ Here, Petitioners make no attempt to satisfy the requirements for waiver. Therefore, CW-EC8/RK-EC-6 must be rejected in accordance with 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).

3. *To the Extent Petitioners Seek to Raise a NEPA-Terrorism Claim Under Clearwater EC-8 (Riverkeeper EC-6), Such Claims Have Been Uniformly Rejected Before In This and Other Proceedings*

According to Petitioners, one example of an issue they seek to litigate under CW-EC8/RK-EC-6 is the question of whether “long-term wet storage of spent-fuel in high-density racks does not meet the NRC requirements for adequate protection and renders the plant excessively vulnerable to terrorism.”⁷² To the extent this allegation seeks to raise terrorism-related claims under NEPA, such claims are outside the scope of this proceeding for the reasons set forth in Commission decisions in the *Oyster Creek* and *Pilgrim* license renewal

⁶⁹ New Contentions at 41.

⁷⁰ *Id.* at 19-20 (asserting the need for a NEPA assessment of the long term or indefinite storage of spent fuel). The Commission has explained that the Waste Confidence Rule “applies only to the storage of spent fuel *after* a reactor ceases operation.” *Turkey Point*, CLI-01-17, 54 NRC at 23 n.14. Nonetheless, to the extent that Petitioners challenge the environmental impacts of spent fuel storage *during* the license renewal term for IP2 and IP3, such challenges are barred by 10 C.F.R. Part 51 and its underlying Generic Environmental Impact Statement. *See id.* at 22-23.

⁷¹ 10 C.F.R. § 2.335(a).

⁷² New Contentions at 36.

proceedings,⁷³ and in the Board's earlier decision in this proceeding.⁷⁴ Specifically, the Commission has concluded that NEPA "imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor license renewal applications."⁷⁵ Regardless, in the GEIS, the NRC performed a discretionary analysis of intentional acts in connection with license renewal, and concluded that "the core damage and radiological release from such acts would be no worse than the damage and release expected from internally initiated events."⁷⁶ Thus, any NEPA-terrorism allegation that might be considered as part of proposed contention EC8/RK-EC-6 is also outside the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii).

4. *To the Extent Petitioners Seek to Challenge the Analysis of the No-Action Alternative in the FSEIS, Such Claims Fail to Raise a Genuine Dispute*

Contention EC8/RK-EC-6 also asserts that the "environmental analysis carried out to assess the potential impacts of relicensing Indian Point Units 2 and 3 is inadequate because it provides an insufficient analysis of . . . potential alternatives to additional waste storage on the site, including the no-action alternative."⁷⁷ Petitioners, however, must "read the pertinent portions" of, in this case, the FSEIS, and explain why they disagree with the analysis in that document.⁷⁸ Here, Petitioners do not reference or explain their challenge to any of the information in the FSEIS regarding the no action alternative,⁷⁹ so CW EC8/RK-EC-6 fails to

⁷³ See *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, slip op. at 36-37 (June 17, 2010); *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007), *aff'd sub nom. N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132, 137-44 (3rd Cir. 2009).

⁷⁴ LBP-08-13, 68 NRC at 140-43 (rejecting NYS-27 as inadmissible).

⁷⁵ *Pilgrim*, CLI-10-14, slip op. at 37 (quoting *Oyster Creek*, CLI-07-8, 65 NRC at 129).

⁷⁶ *Id.* (quoting *Oyster Creek*, CLI-07-8, 65 NRC at 131).

⁷⁷ New Contentions at 17.

⁷⁸ See Final Rule, Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Millstone*, CLI-01-24, 54 NRC at 358.

⁷⁹ See FSEIS § 8.2 (No-Action Alternative).

raise a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

B. Clearwater SC-2 (Riverkeeper TC-3) Is Inadmissible

1. Clearwater SC-2 (Riverkeeper TC-3) Is Untimely, Under 10 C.F.R. § 2.309(f)(2) and (c)

Although Petitioners are permitted, with leave of the Board, to file new contentions based on new and materially different information, Petitioners fail to meet the mandatory requirements for such new contentions as defined in 10 C.F.R. § 2.309(f)(2)(i)-(iii) with respect to Contention CW SC-2/RK TC-3. The only purportedly “new” information that Clearwater points to is the amended Waste Confidence Rule.⁸⁰ Petitioners do not claim that anything in the Thompson Declaration or the Thompson/TSEP Report qualifies as “new” information or information that was “previously unavailable.”⁸¹

In this new safety contention, Petitioners challenge whether Entergy’s LRA provides adequate aging management for the spent fuel pools at IPEC and the plant’s ISFSI. Petitioners, however, do not identify what safety regulation, old or new, Entergy’s LRA allegedly violates. Further, the Commission’s amendment of its *environmental* regulations in 10 C.F.R. § 51.23 simply does not provide any new information that might support the admission of this proposed *safety* contention, and Petitioners point to none. Petitioners also point to no amendment to the LRA that might have changed Entergy’s relevant AMPs and no other new safety analysis that might serve as the trigger for an amended safety contention. Indeed, the relevant aspects of Entergy’s LRA, discussed in Section IV.B.4, below, were included in the initial LRA filed by

⁸⁰ See New Contentions at 3-7, 11, 40-41, 44-47.

⁸¹ See *supra* note 61.

Entergy on April 23, 2007.⁸² As a result, CW SC-2/RK TC-3 is untimely under 10 C.F.R. § 2.309(f)(2).

Because Petitioners have not satisfied the criteria in 10 C.F.R. § 2.309(f)(2), they must satisfy the test set forth in 10 C.F.R. § 2.309(c)(1). Petitioners assert that the first and most important factor of “good cause” weighs in their favor because their contentions are timely.⁸³ As explained above, they are not, so Section 2.309(c)(1)(i) weighs against admission of the New Contentions for the same reasons they fail to satisfy Section 2.309(f)(2).⁸⁴

Nor have Petitioners made a “compelling showing” as to any of the remaining factors under Section 2.309(c)(1) to outweigh the lack of good cause.⁸⁵ While Petitioners assert that factors 2 through 4 (nature and extent of petitioners’ right to be made a party, their property or financial interests in the proceeding, the possible effect of any order on petitioners’ interests) weigh in their favor,⁸⁶ these factors do not relate to the pending New Contentions, because Petitioners are already parties to this proceeding.⁸⁷ The fifth and sixth factors (availability of other means to protect petitioners’ interest and the extent to which petitioners’ interests will be represented by existing parties)⁸⁸ weigh against admission of the New Contentions because, contrary to Petitioners’ assertions,⁸⁹ many of the concerns raised in the New Contentions are either addressed in Petitioners’ admitted contentions on alleged spent fuel pool leakage, or relate

⁸² See LRA Tables 3.5.2-3, 3.3.2-1-IP2, 3.3.2-1-IP2 (Apr. 23, 2007), available at ADAMS Accession No. ML071210517.

⁸³ See New Contentions at 46.

⁸⁴ See *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163 (2005) (finding that the requirements for a good cause showing under 10 C.F.R. § 2.309(c)(1)(i) “are analogous to the requirements of Sections 2.309(f)(2)(i) (information not previously available) and (f)(2)(iii) (submitted in a timely fashion)”).

⁸⁵ See *Commonwealth Edison Co.* (Braidwood Nuclear Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

⁸⁶ See New Contentions at 47.

⁸⁷ See 10 C.F.R. § 2.309(c)(1)(ii)-(iv) (addressing the nature of petitioners’ right to be made a party, nature and extent of petitioners’ property, financial, or other interests, and the effect of any order on such interests).

⁸⁸ 10 C.F.R. § 2.309(c)(1)(v)-(vi)

⁸⁹ See New Contentions at 47.

to the IPEC ISFSI, which is subject to separate licensing and regulatory processes under 10 C.F.R. Part 72 that offer appropriate opportunities for public involvement.⁹⁰

As to the seventh factor (potential to broaden the issues and delay the proceeding), Petitioners assert that delay is “preferable to violating NEPA.”⁹¹ But Petitioners’ *safety* contentions are not even covered by this allegation. Factor seven, therefore, also cuts against Petitioners because the introduction of such new issues at this late stage of the proceeding will unnecessarily broaden the issues and may delay the proceeding, contrary to Section 2.309(c)(1)(vii). Further, contrary to Petitioners’ assertion that the record is insufficient, the proposed new safety contentions are fundamentally unsupported and the allegations in them have been previously considered and uniformly rejected in the recent Waste Confidence Rulemaking and in other proceedings,⁹² so litigation of them would be unlikely to assist in developing a sound record, contrary to Section 2.309(c)(1)(viii). Thus, Petitioners would not assist in the development of a sound record. Accordingly, a balancing of the factors in 10 C.F.R. § 2.309(c)(1) strongly weighs against admission of the New Contentions.

2. *Clearwater SC-2 (Riverkeeper TC-3) Does Not Specifically State the Issue of Law or Fact to Be Raised and Fails to Explain the Basis and Support for the Contention, As Required By 10 C.F.R. § 2.309(f)(1)(i), (ii), and (v)*

CW SC-2/RK TC-3 claims that there is an “insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site in the long term”⁹³ However, other than a few general references to aging of dry casks and spent fuel pools, Clearwater and Riverkeeper fail to identify the particular issues of law or fact to be

⁹⁰ See Section IV.C, below.

⁹¹ New Contentions at 47.

⁹² See Section IV.B.2, below.

⁹³ New Contentions at 18.

raised in this proceeding.⁹⁴ Specifically, Petitioners provide no basis for any safety concerns—either by way of references to Entergy’s LRA or to any potentially applicable regulations—that are sufficient to warrant admission of an issue for hearing. Rather, without any further analysis or expert support, Petitioners simply state that an aging management plan is necessary because the spent fuel casks and pools are long-lived, passive components.⁹⁵ Petitioners do provide a statement attributed to a Mr. Arnold Gunderson in one footnote, explaining his alleged experience in the design and fabrication of “nuclear fuel racks” using “boroflex neutron absorber sandwiched between stainless steel.”⁹⁶ Mr. Gunderson claims that, between 1981 and 1990, manufacturers of such items did not account for “long term degradation of the boron neutron absorber.”⁹⁷ His statements, however, refer to his experience many years ago as “Vice President of Nuclear Energy Services”, not any analysis done by Entergy in support of its license renewal application.⁹⁸ Further, there is no declaration or affidavit of any sort from Mr. Gunderson attached to Petitioners’ pleading.

It is fundamental that an “admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].”⁹⁹ Therefore, Petitioners’ unsupported, bare-bones assertions regarding the aging management of dry casks

⁹⁴ See *id.* at 34 (“because the casks and pools in which some of the spent fuel is already stored . . . along with ancillary equipment like the fuel cladding and the flexible boron wrapping, are long lived passive components that the licensee cannot assume will require no inspection of maintenance [sic] the Applicant must provide an adequate aging management plan”), 35 (“long term degradation of the Boraflex or other wrapping around the fuel assemblies in the spent fuel pool”); 36 (“long-term wet storage of spent-fuel in high-density racks does not meet [unspecified] NRC requirements for adequate protection and renders the plant excessively vulnerable to terrorism”); 42 (“the safety contention raises issues about the aging of long-lived passive components, which are at the heart of the relicensing safety review”), 43 (“Entergy has . . . failed to put forward any aging management plan for the spent fuel storage casks, for the spent fuel pools themselves, and for associate components, such as the boron wrapping of the fuel assemblies”).

⁹⁵ *Id.* at 35-36 & n.7.

⁹⁶ *Id.* at 35-36 n.7.

⁹⁷ *Id.* at 36 n.7.

⁹⁸ See *id.*

⁹⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 359-60 (2001).

and spent fuel pools should be denied for not providing a specific statement of the issue of law or fact to be controverted, and for failing to provide any explanation of the basis of or alleged facts or expert opinion support for the matters they seek to raise, as required by 10 C.F.R. § 2.309(f)(1)(i), (ii), and (v).

3. Clearwater SC-2 (Riverkeeper TC-3) Raises Issues That Are Beyond the Scope of this Proceeding, Under 10 C.F.R. § 2.309(f)(1)(iii)

Petitioners' allegation that the LRA contains an "insufficient analysis of the aging management of the *dry casks*"¹⁰⁰ raises issues outside the scope of a license renewal proceeding under 10 C.F.R. Part 54.¹⁰¹ ISFSIs are licensed and regulated under 10 C.F.R. Part 72 of the NRC's regulations, which provides for two types of ISFSI licenses, site specific licenses and general licenses.¹⁰² The IPEC ISFSI operates pursuant to a general license under 10 C.F.R. § 72.210.¹⁰³ Importantly, Part 72 contains its own license renewal provisions for ISFSIs separate and distinct from Part 54.¹⁰⁴ Based on this separate and distinct licensing process, the Commission has ruled that issues related to ISFSIs are outside the scope of Part 54 power reactor license renewal proceedings.¹⁰⁵ Specifically, in the *Palisades* license renewal proceeding, the Commission addressed this issue directly:

[T]he dry cask storage facility, or independent spent fuel storage installation ("ISFSI"), is licensed separately from the reactor. The current proceeding concerns the renewal of the reactor operating license pursuant to 10 C.F.R. Parts 51 and 54, and not the ISFSI,

¹⁰⁰ New Contentions at 18 (emphasis added).

¹⁰¹ See 10 C.F.R. § 72.210.

¹⁰² Compare 10 C.F.R. § 72.40 (providing for site specific ISFSI licenses), with *id.* § 72.210 (providing for general licenses for ISFSI located at nuclear power plants using NRC-approved casks).

¹⁰³ See Letter from J.E. Pollock, Entergy, to NRC Document Control Desk, "Indian Point Energy Center Registration of Unit 2 Spent Fuel Cask Use" at 1 (Feb. 5, 2008), available at ADAMS Accession No. ML080440312 (Entergy Contention NYS-17B Att. 6).

¹⁰⁴ See 10 C.F.R. §§ 72.42(b) (license renewal for site-specific licenses), 72.212(a)(3) (extension of general licenses).

¹⁰⁵ See *Nuclear Mgmt. Co. (Palisades Nuclear Plant)*, CLI-06-17, 63 NRC 727, 733 (2006); *Oconee*, CLI-99-11, 49 NRC at 344 n.4 ("the Commission handles as a separate licensing matter [from license renewal] any applications for an onsite ISFSI. ISFSI licenses are granted under 10 C.F.R. Part 72").

which is licensed pursuant to 10 C.F.R. Part 72. Issues involving the ISFSI are, quite simply, separate licensing matters.¹⁰⁶

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

4. *Clearwater SC-2 (Riverkeeper TC-3) Raises No Genuine Dispute Regarding Entergy's Spent Fuel Pool AMPs, As Required By 10 C.F.R. § 2.309(f)(1)(vi)*

CW SC-2/RK TC-3 also alleges that the LRA contains an "insufficient analysis of the aging management of the . . . spent fuel pools."¹⁰⁷ In order to support such a challenge, the Commission has stated that a petitioner must "read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.¹⁰⁸ Thus, a contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.¹⁰⁹

CW SC-2/RK TC-3 is inadmissible because the LRA *contains* AMPs related to the spent fuel pools. Specifically, Entergy's LRA includes AMPs for spent fuel pool structural components, including liner plates and gates;¹¹⁰ concrete structures, including floor slabs, interior walls, and ceilings;¹¹¹ spent fuel storage racks;¹¹² and neutron absorbers.¹¹³ By failing to challenge or even reference any of these AMPs, Clearwater fails to directly controvert the LRA.

¹⁰⁶ *Palisades*, CLI-06-17, 63 NRC at 733 (citation omitted). See also 10 C.F.R. § 72.212(a) (permitting general ISFSI licensees to store spent fuel in approved casks for up to 20 years, a period which can be extended through reapproval).

¹⁰⁷ New Contentions at 18 (emphasis added).

¹⁰⁸ Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Millstone*, CLI-01-24, 54 NRC at 358.

¹⁰⁹ See *Oconee*, CLI-99-11, 49 NRC at 342.

¹¹⁰ LRA Table 3.5.2-3.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* Tables 3.3.2-1-IP2, 3.3.2-1-IP3.

CW SC-2/RK TC-3 is similar to the Town of Cortlandt's earlier attempt to challenge AMPs for spent fuel pools. The Board correctly rejected this proposed contention and explained:

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

....

. . . . In this proceeding, Cortlandt must identify specific deficiencies in the AMP in order to secure a hearing on the issue.¹¹⁴

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

C. Clearwater EC-9 (Riverkeeper EC-7) and Clearwater SC-3 (Riverkeeper TC-4) Do Not Cure the Defects in Petitioners' First Set of Contentions

Recognizing the defects in their first set of proposed contentions, Petitioners proffer two additional contentions intended to cover their "rule valid" scenario.¹¹⁵ Both alternative contentions, CW EC-9/RK EC-7 and CW SC-3/RK TC-4, essentially address the same purported environmental and safety issues raised in CW EC-8/RK EC-6 and CW SC-2/RK TC-3, respectively.¹¹⁶ The difference for these contentions is that Petitioners focus on the period commencing 60 years after the date that the license will expire for each IPEC unit.¹¹⁷

¹¹⁴ *Indian Point*, LBP-08-13, 68 NRC at 211-12.

¹¹⁵ *New Contentions* at 18. Petitioners refer to their first two contentions as covering the "rule invalid" scenario. *Id.* at 17.

¹¹⁶ *See id.* at 17-18.

¹¹⁷ *See, e.g., id.* at 33.

1. *Petitioners' Alternative Contentions Suffer From the Same Deficiencies As the Initial Set*

Both of these alternative contentions suffer from the same deficiencies as the initial set of contentions. Importantly, the limited supporting information Petitioners provide does not distinguish between the initial set of safety and environmental contentions and this “alternative” set and therefore, the alternatives are inadmissible for the reasons set forth in response to CW EC-9/RK EC-7 and CW SC-3/RK TC-4, above. Specifically, in the case of CW EC-9/RK EC-7, Petitioners’ claims are barred by CLI-10-19, because they impermissibly challenge the amended Waste Confidence Rule, seek to raise NEPA-terrorism claims that are similarly outside the scope of this proceeding, and fail to raise a genuine dispute with the FSEIS.¹¹⁸ As to CW SC-3/RK TC-4, Petitioners’ claims are untimely, equally barred by CLI-10-19, fail to adequately state the issues raised, fail to provide basis or support for the contention, raise issues beyond the scope of this proceeding, and fail to raise a genuine dispute.¹¹⁹

2. *There Is No Regulatory Gap Regarding Impacts More than 60 Years Beyond Licensed Life, and to the Extent Any Perceived Gap May Exist, It Is the Subject of An Ongoing Commission Rulemaking*

Petitioners assert that under amended Waste Confidence Rule, “the Commission’s generic findings with respect to onsite fuel storage in both wet pools and dry casks relate only to the period 60 years beyond the expiration of a plant’s operating license.”¹²⁰ Based on this, Petitioners assert that CW EC-9/RK EC-7 and CW SC-3/RK TC-4—which seek to litigate

¹¹⁸ See Section IV.A, above.

¹¹⁹ See Section IV.B, above.

¹²⁰ New Contentions at 33 (citing 75 Fed. Reg. at 81,033, 81,040). New York echoes these claims in its answer. See New York Answer at 18-22. The key case cited by New York is *Natural Resources Def. Council, Inc. v. NRC*, 539 F.2d 824 (2d Cir. 1976), vacated & remanded, sub nom. *Allied-Gen. Nuclear Servs. v. Natural Res. Def. Council*, 434 U.S. 1030 (1978). In that case, all parties conceded that the draft generic environmental impact statement at issue did not properly address all of the environmental impacts the proposed action. See *id.* at 842 (“it is apparent that [the draft generic EIS] did not fully address alternatives to plutonium recycle or the special problems of theft, diversion and sabotage”). The Waste Confidence Rule, however, *does* address the environmental impacts of spent fuel storage, and the Commission’s conclusion in that regard is not subject to challenge in this proceeding.

environmental and safety issues that relate to the “period commencing 60 years after” the end of the period of extended operation¹²¹—are within the scope of this proceeding.¹²² In effect, Petitioners claim that there is an apparent regulatory gap because impacts beyond 60 years have not been analyzed by this Commission.

As a threshold matter, of course, this Part 54 proceeding governs license renewal, including the environmental impacts associated with continued operation for only *an additional 20 years* (i.e., until 2033 for IP2 and 2035 for IP3). The environmental impacts of spent fuel storage *beyond 2093 or 2095* are beyond the scope of this proceeding.¹²³

Moreover, there is no “regulatory gap.” The plain text of the amended Section 51.23(a) states that spent fuel “can be stored safely and without significant environmental impacts for *at least 60 years* beyond licensed life for operation,” and goes on to state the Commission’s belief that sufficient repository capacity will be available “when necessary.”¹²⁴ Read together, it is clear from the plain text of the rule that the existing analysis, which extends to at least 60 years beyond the licensed life for operation, is sufficient to address the impacts of spent fuel storage.¹²⁵

With respect to future actions:

[T]he Commission has confidence that *either* a repository will be available before the expiration of the 60 years post-licensed life discussed in Finding 4 *or* that the Waste Confidence Decision and Rule will be updated and revised if the expiration of the 60-year

¹²¹ New Contentions at 18.

¹²² See *id.* at 20 (“Petitioners have presented alternative contentions that are valid, even if the rules established by the [2010 Waste Confidence Decision] are valid.”).

¹²³ New York suggests that the NRC Staff’s Safety Evaluation Report (“SER”) is required, under the Atomic Energy Act (“AEA”) (42 U.S.C. § 2232(a), to make a definitive finding that storing spent fuel at IPEC for more than 60 years “is safe and can be done with adequate protection for the public health and safety. New York Answer at 15. This is incorrect. See *Natural Res. Def. Council v. NRC*, 582 F.2d 166, 175 (2d Cir. 1978) (holding that under the AEA, “NRC is not required . . . to withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level radioactive wastes can be permanently disposed of safely”).

¹²⁴ Emphasis added.

¹²⁵ And as the Commission has previously explained, “the Court decision that led to the Waste Confidence Proceeding did not require NRC to determine when a repository would be available.” Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474, 38,477 (Sept. 18, 1990) (citing *Minnesota v. NRC*, 602 F.2d 412 (DC Cir.1979)).

period approaches without an ultimate disposal solution for the HLW and SNF.¹²⁶

Thus, contrary to Clearwater and Riverkeeper's contentions, there is simply no regulatory gap beyond 60 years after plant shutdown. The Commission has already held that *if* it becomes necessary to conduct this evaluation, it has sufficient time to do so over the next 80 years or more.

The NRC has in fact already initiated this evaluation, again following its previous generic approach. As explained in the 2010 Waste Confidence Decision,

The Commission, as a separate action, has directed the staff to develop a plan for a longer-term rulemaking and Environmental Impact Statement (EIS) to assess the environmental impacts and safety of long-term SNF and HLW storage beyond 120 years (SRM-SECY-09-0090; ADAMS Accession Number ML102580229). This analysis will go *well beyond* the current analysis that supports at least 60 years of post-licensed life storage with eventual disposal in a deep geologic repository.¹²⁷

In other words, the long-term environmental impacts of long-term spent fuel storage, well beyond the term covered by the amended Waste Confidence Rule, is now the subject of a Commission rulemaking initiative. As the Commission recently reiterated in this proceeding, “[u]nder longstanding NRC policy, licensing boards ‘should not accept in individual license proceedings contentions which are (*or are about to become*) the subject of general rulemaking by the Commission.’”¹²⁸ Thus, Petitioners’ desire to litigate its perceived gap in the new 10 C.F.R. § 51.23(a) is well outside the scope of this proceeding and must be dismissed.

¹²⁶ 2010 Waste Confidence Decision, 75 Fed. Reg. at 81,043 (emphasis added).

¹²⁷ *Id.* at 81,040 (emphasis added).

¹²⁸ CLI-10-19, slip op. at 2-3 (*quoting Oconee*, CLI-99-11, 49 NRC at 345) (emphasis added). In *Oconee*, the Commission held that, although the topic petitioners sought to raise was not governed by a current rule, the issuance of a Staff Requirements Memorandum (“SRM”) for the NRC Staff to initiate a rulemaking on the topic was sufficient to preclude the topic from litigation in individual licensing proceedings. See 49 NRC at 345-56. The rulemaking on the very long-term impacts of spent fuel storage is currently at the same stage. See 2010 Waste Confidence Decision, 75 Fed. Reg. at 81,040.

Accordingly, for this additional reason CW EC-9/RK EC-7 and CW SC-3/RK TC-4 are outside the scope of this proceeding and must be dismissed.

V. CONCLUSION

For the reasons set forth above, Clearwater and Riverkeeper's new contentions are inadmissible and should be dismissed in their entirety.

CERTIFICATION OF COUNSEL UNDER 10 C.F.R. § 2.323(b)

Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving parties, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Respectfully submitted,



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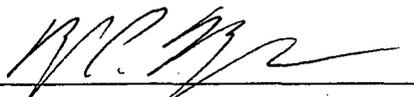
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