UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 52-012-COL
	)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC	)	
	)	
(South Texas Project Units 3 and 4)	)	October 31, 2014

NUCLEAR INNOVATION NORTH AMERICA LLC COMBINED RESPONSE TO PROPOSED CONTENTION AND PETITION TO SUSPEND RELATED TO ALLEGED NEED FOR ISSUANCE OF WASTE CONFIDENCE SAFETY FINDINGS

Steven P. Frantz
John E. Matthews
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

Counsel for Nuclear Innovation North America LLC

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 4

A. Status of the STP COL Proceeding 4

1. The NRC's Ongoing Review of the COL Application 4

2. The Related Adjudicatory Proceeding 4

B. Evolution of the Waste Confidence Rule and Continued Storage Rule 6

III. THE PROPOSED CONTENTION SHOULD BE REJECTED AS SUBSTANTIVELY AND PROCEDURALLY DEFICIENT 9

A. The Proposed Contention Is Substantively Deficient 9

1. The AEA Does Not Require the NRC to Make Findings Concerning the Safety of Ultimate Disposal of Spent Fuel as Part of a Reactor Licensing Action 10

2. The Commission's 2010 Waste Confidence Decision Addressed NEPA Requirements and Did Not Contain "AEA-Required Safety Findings" 16

3. The Commission Addressed the Waste Confidence Environmental Findings in Its Continued Storage Rule and GEIS 18

B. The Proposed Contention Is Inadmissible and Procedurally Deficient 22

1. The Proposed Contention Does Not Satisfy the Contention Admissibility Criteria in 10 C.F.R. § 2.309(f)(1) 23

2. The Proposed Contention Is Not Timely and Fails to Satisfy the Requirements for Untimely Contentions 26

IV. THE SUSPENSION PETITION SHOULD BE REJECTED AS SUBSTANTIVELY AND PROCEDURALLY DEFICIENT 27

V. THE MOTION TO REOPEN THE RECORD SHOULD BE REJECTED AS SUBSTANTIVELY AND PROCEDURALLY DEFICIENT 29

VI. CONCLUSION 31

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 52-012-COL 52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC	)	
(South Texas Project Units 3 and 4)	)	October 31, 2014

NUCLEAR INNOVATION NORTH AMERICA LLC COMBINED RESPONSE TO PROPOSED CONTENTION AND PETITION TO SUSPEND RELATED TO ALLEGED NEED FOR ISSUANCE OF WASTE CONFIDENCE SAFETY FINDINGS

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.309(i) and 2.323(c) and the Commission's October 7, 2014 Order,[1] Nuclear Innovation North America LLC ("NINA") files this combined Answer opposing (1) the Sustainable Energy and Economic Development ("SEED") Coalition, Inc.'s and Susan Dancer's ("Petitioners") motion for leave to file a new contention ("Contention Motion")[2]; (2) the petition to suspend final reactor licensing decisions, including the issuance of the combined licenses ("COLs") for South Texas Project ("STP") Units 3 and 4 ("Suspension Petition")[3]; and (3) Petitioners' motion to reopen the record in this proceeding ("Motion to Reopen") filed on September 29, 2014.[4] Petitioners' Contention Motion, Suspension Petition,

---

1 *DTE Elec. Co. et al.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-09, 80 NRC __, slip op. (Oct. 7, 2014).

2 *See* Petitioners' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at South Texas Project Units 3 & 4 Nuclear Power Plant (Sept. 29, 2014).

3 *See* Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014). Petitioners are among several environmental organizations that filed identical petitions in numerous ongoing Nuclear Regulatory Commission ("NRC") licensing proceedings.

4 Motion to Reopen the Record for South Texas Project 3 & 4 Nuclear Power Plant (Sept. 29, 2014).

and Motion to Reopen should be rejected because they lack substantive merit and are procedurally deficient.

As to substance, the Contention Motion relies on the erroneous assertion that the NRC is required by the Atomic Energy Act of 1954, as amended ("AEA"),[5] to make "predictive safety findings" regarding the safety of permanent spent nuclear fuel ("SNF") disposal before issuing any reactor licensing decision.[6] As discussed below, this argument has been repeatedly rejected by the Commission and the courts. Thus, Petitioners' contention that "[t]he NRC must either issue new generic Waste Confidence safety findings or it must address the same issues in individual reactor licensing proceedings"[7] is simply wrong as a matter of law. In any event, the findings that Petitioners allege were improperly eliminated were addressed by the Commission's Continued Storage Rule[8] and associated Generic Environmental Impact Statement ("GEIS")[9], and Petitioners' arguments to the contrary exalt form over substance. Accordingly, the filings lack a substantive basis in law or fact, and should be rejected.

The Contention Motion also fails to satisfy the Commission's contention admissibility requirements and is procedurally deficient. As a threshold matter, the proposed contention impermissibly challenges the Continued Storage Rule, and such challenges cannot be made in an adjudicatory proceeding absent a waiver, which Petitioners have not requested. The Contention Motion is therefore outside the scope of this proceeding. The proposed contention also fails to

---

5 Contention Motion at 1, 3-4; Suspension Petition at 7, 10.

6 Contention Motion at 3-4; Suspension Petition at 7-8.

7 Suspension Petition at 9; *see also* Contention Motion at 14.

8 *See* Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) ("Continued Storage Rule").

9 NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (Sept. 2014) ("GEIS").

satisfy other contention admissibility requirements because it does not raise any issue material to the findings the NRC must make in this proceeding and it fails to show that a genuine dispute exists with regard to a material issue of law or fact. The proposed contention also is untimely because it is not based on any information that is new and materially different from information previously available to Petitioners.

The Suspension Petition should be rejected because it relies on the same flawed legal and factual premises as the Contention Motion. Petitioners also fail to satisfy the Commission's well-established criteria for evaluating suspension requests. Moreover, Petitioners ask only to suspend final licensing decisions, not the ongoing reviews. Therefore, the Suspension Petition is pointless: if Petitioners' proposed contention is admitted, then a license would not be issued until the admitted contention has been fully addressed; and if their proposed contention is denied, then the Suspension Petition should be denied on the same grounds.

Finally, Petitioners' Motion to Reopen does not satisfy the NRC's strict standards for reopening a closed hearing record. It is not timely, it does not address a significant safety or environmental issue, and it does not demonstrate that a materially different result would have occurred had the contention been considered previously.

For these reasons, all three filings lack procedural and substantive merit, and they should be denied in their entirety.

II. BACKGROUND

A. Status of the STP COL Proceeding

1. The NRC's Ongoing Review of the COL Application

On September 20, 2007, the STP Nuclear Operating Company ("STPNOC") submitted a COL Application to the NRC under 10 C.F.R. Part 52 for STP Units 3 and 4.[10] The environmental review for STP Units 3 and 4 has long been complete. The NRC Staff published the Final Environmental Impact Statement in February 2011.[11] The NRC Staff published its Safety Evaluation Report ("SER") with open items in October 2010, but has not yet published the final SER or completed the Advisory Committee on Reactor Safeguards meetings.[12]

2. The Related Adjudicatory Proceeding

Petitioners filed a "Petition for Intervention and Request for Hearing" on April 21, 2009 that was subsequently granted by the Atomic Safety and Licensing Board ("Board").[13] The Board has completed evidentiary hearings on three contentions and issued decisions in favor of NINA.[14] A petition for review related to the decision on Contention FC-1 regarding foreign ownership, control, and domination remains pending before the Commission.

In the interim, in 2012, SEED Coalition filed with the Board a motion to admit a new environmental contention that challenged the alleged failure of the Environmental Report to address the environmental impacts that may occur if a spent fuel repository does not become

---

[10] South Texas Project Nuclear Operating Company; Notice of Receipt and Availability of Application for a Combined License, 72 Fed. Reg. 60,394 (Oct. 24, 2007). NINA became the lead applicant in early 2011.

[11] NUREG-1937, Environmental Impact Statement for Combined Licenses (COLs) for South Texas Project Electric Generating Station Units 3 and 4 (Feb. 2011).

[12] *See* http://www.nrc.gov/reactors/new-reactors/col/south-texas-project/review-schedule.html.

[13] *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-09-21, 70 NRC 581 (2009).

[14] *Nuclear Innovation North America LLC* (South Texas Project, Units 3 & 4), LBP-11-38, 74 NRC 817 (2011); LBP-12-5, 75 NRC 227 (2012); LBP-14-03, 78 NRC __, slip op. (Apr. 10, 2014).

available.[15] The proposed contention was based on the U.S. Court of Appeals for the District of Columbia Circuit's decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012),[16] which invalidated and remanded the NRC's Waste Confidence Decision Update[17] and related final rule.[18] Following approval of the final Continued Storage Rule and the associated GEIS, the Commission ordered licensing boards to dismiss the proposed contention in this proceeding and similar contentions in other proceedings.[19] The Board in the STP COL proceeding dismissed the proposed contention and terminated this proceeding on September 19, 2014.[20]

On September 29, 2014, Petitioners filed their Contention Motion, Suspension Petition, and Motion to Reopen, all of which NINA herein opposes. Petitioners provided the following statement of their proposed contention:

> The NRC lacks a lawful basis under the Atomic Energy Act ("AEA") for issuing or renewing an operating license in this proceeding because it has not made currently valid findings of confidence or reasonable assurance that the hundreds of tons of highly radioactive spent fuel that will be generated during any reactor's 40-year license term or 20-year license renewal term can be safely disposed of in a repository. The NRC must make these predictive safety findings in every reactor licensing decision in order to fulfill its statutory obligation under the AEA to protect public health and safety from the risks posed by irradiated reactor fuel generated during the reactor's license term.[21]

---

15 *See* Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4 (July 9, 2012).

16 *See id.*

17 Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

18 Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

19 *See Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC __, slip. op at 12 (Aug. 26, 2014).

20 *See* Licensing Board Memorandum and Order (Dismissing Contention and Terminating Proceeding) (Sept. 19, 2014) (unpublished).

21 Contention Motion at 3-4 (citations omitted).

The Commission issued its Order CLI-14-09 on October 7, 2014 to consolidate these issues before it and to set a briefing schedule.

B. Evolution of the Waste Confidence Rule and Continued Storage Rule

The evolution of the waste confidence issues is set forth in detail in Section I of the Statement of Considerations ("SOC") for the Continued Storage Rule that was published by the NRC in the *Federal Register* on September 19, 2014.[22]

In 1977, the Commission denied a petition for rulemaking submitted by the Natural Resources Defense Council ("NRDC"), which requested that the NRC determine whether high-level radioactive wastes generated in nuclear power reactors can be permanently disposed of without undue risk to the public health and safety and withhold actions on reactor licenses until such an affirmative determination can be made.[23] The U.S. Court of Appeals for the Second Circuit affirmed the NRC's conclusion in *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978), holding that the AEA does not require findings as part of reactor licenses that high-level waste can be safely disposed.[24]

Shortly thereafter, following challenges to license amendments for spent fuel pool expansion, the U.S. Court of Appeals for the District of Columbia Circuit, in *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979), rejected the challenges raised by the petitioners and remanded to the Commission questions about whether an offsite storage solution would be available for spent fuel following completion of operation and, if not, whether spent fuel could be stored safely

---

[22] Continued Storage Rule, 79 Fed. Reg. at 56,240-241.

[23] *Id.*; *NRDC v. NRC*, 582 F.2d 166, 167 (1978).

[24] In describing the holding of *NRDC*, the NRC stated that "[t]he court found that the NRC was not required to make a finding under the AEA that SNF could be disposed of safely at the time a reactor license was issued." Waste Confidence Decision Update, 75 Fed. Reg. at 81,045.

onsite beyond that time.[25] In 1984, in response to the *Minnesota v. NRC* decision, the Commission issued its initial Waste Confidence Decision and Temporary Storage Rule, which added a new section (10 C.F.R. § 51.23) to its environmental regulations in 10 C.F.R. Part 51.[26] The 1984 Waste Confidence Decision included five findings under the National Environmental Policy Act ("NEPA"), including Findings 1 and 2 that are most relevant to the proposed contention:

> 1. The Commission finds reasonable assurance that safe disposal of high level radioactive waste and spent fuel in a mined geologic repository is technically feasible.
>
> 2. The Commission finds reasonable assurance that one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007-09, 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.[27]

The new 10 C.F.R. § 51.23 stated that the Commission had made a generic determination that for at least 30 years beyond the expiration of reactor operating licenses no significant environmental impacts will result from spent fuel storage, and thus no discussion of any environmental impacts from post-operation storage is needed in environmental licensing documents.[28]

---

[25] *Id.*

[26] *See Rulemaking on the Storage and Disposal of Nuclear Waste* (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 293 (1984); Final Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,658 (Aug. 31, 1984); Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984).

[27] Final Waste Confidence Decision, 49 Fed. Reg. at 34,658.

[28] Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. at 34,694.

The Commission first updated the Waste Confidence Decision and Temporary Storage Rule in 1990[29] and then again in 2010.[30] The updates did not change Finding 1, but did update Finding 2. The 2010 update to Finding 2 stated:

> 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.[31]

The Commission also updated the Temporary Storage Rule at 10 C.F.R. § 51.23 to be consistent with the changes to the findings, but retained the overall approach of a generic conclusion on the environmental impacts.[32]

Four States, an Indian community, and several environmental groups (but not Petitioners) challenged that 2010 rulemaking in the D.C. Circuit. On June 8, 2012, the D.C. Circuit issued a decision in *New York v. NRC*, vacating and remanding the Waste Confidence Decision and Temporary Storage Rule update.[33] The Court identified deficiencies with the NRC's NEPA evaluation related to (1) the Commission's conclusion that permanent disposal will be available "when necessary"; (2) consideration of spent fuel pool leaks in a forward-looking fashion; and (3) consideration of the consequences of potential spent fuel pool fires.

The NRC subsequently decided that it would address the Court's decision, and the identified deficiencies with the NEPA evaluation, generically through rulemaking. The NRC

---

[29] Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 55 Fed. Reg. 38,472 (Sept. 18, 1990); Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990).

[30] Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

[31] Waste Confidence Decision Update, 75 Fed. Reg. at 81,038.

[32] Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. at 81,037.

[33] *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

published a proposed rule in the *Federal Register* (78 Fed. Reg. 56,776) on September 13, 2013. The NRC also prepared the Draft GEIS (NUREG-2157) to support the proposed rule.[34]

The Commission thereafter approved the final Continued Storage Rule and the associated GEIS on August 26, 2014.[35] The final Continued Storage Rule was published in the *Federal Register* on September 19, 2014. Although the current rule (10 C.F.R. § 51.23) does not list the previous Waste Confidence "Findings," it "codifies the environmental impact determinations reflected in the GEIS," which provides the technical and regulatory bases for the Continued Storage Rule.[36] As the SOC explains, "the GEIS address[es] the issues assessed in the previous five 'Findings' as conclusions regarding the technical feasibility and availability of a repository and conclusions regarding the technical feasibility of safely storing spent fuel in an at-reactor or away-from-reactor storage facility."[37]

III. THE PROPOSED CONTENTION SHOULD BE REJECTED AS SUBSTANTIVELY AND PROCEDURALLY DEFICIENT

As discussed below, the proposed contention is both substantively and procedurally deficient. As a result, it fails to satisfy both the NRC's contention admissibility and timeliness requirements. Accordingly, it should be rejected.

A. The Proposed Contention Is Substantively Deficient

Petitioners' contention lacks substantive merit with regard to both law and fact. First, the AEA does not require the NRC to make the findings Petitioners seek in this licensing

---

[34] *See* NUREG-2157, Waste Confidence Generic Environmental Impact Statement, Draft Report for Comment (Aug. 2013).

[35] *See* Staff Requirements – SECY-14-0072 – Final Rule, Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (Aug. 26, 2014). The Commission paper and its attachments can be found at ADAMS Accession No. ML14177A482 (package).

[36] Continued Storage Rule, 79 Fed. Reg. at 56,242; *see also id.* at 56,245 ("The analysis in the GEIS constitutes a regulatory basis for the rule at 10 CFR 51.23.").

[37] *Id.* at 56,244.

proceeding. Second, the Commission's waste confidence findings reflect its responsibilities under NEPA, not the AEA. Third, contrary to Petitioners' assertions, the NRC did address permanent disposal of SNF in the Continued Storage Rule and the GEIS.

1. The AEA Does Not Require the NRC to Make Findings Concerning the Safety of Ultimate Disposal of Spent Fuel as Part of a Reactor Licensing Action

The AEA does not require the NRC to make safety findings regarding the permanent disposal of spent fuel as part of a reactor licensing action. Petitioners' contrary assertion that "[t]he NRC has consistently interpreted the AEA to require the agency make waste confidence safety findings regarding the safety of ultimate spent fuel disposal before issuing a reactor license"[38] is simply wrong. The Commission has examined this exact argument and concluded that there is no such requirement, and the courts agree.

Petitioners cite no relevant support in the text of the AEA regarding disposal of spent fuel. Instead, Petitioners quote Section 182a. of the AEA,[39] but the relevant statutory language refers only to the "utilization and production" of special nuclear material, not to the disposal of such material. Thus, the cited section of the AEA provides no support for Petitioners' argument.[40]

The same argument advanced by Petitioners here was raised more than 35 years ago and was expressly rejected by the Commission and the courts at that time. Specifically, in July 1977, the Commission denied a rulemaking petition in which the NRDC contended that the NRC is

---

[38] Contention Motion at 2; *see also id.* at 3-11.

[39] *See id.* at 4 n.11, 5-6. Petitioners also state that AEA Section 103d. (42 U.S.C. § 2133(d)) prohibits issuance of reactor licenses that would be inimical to public health safety. *See id.* at 6-7, 11-12. However, Petitioners simply presuppose that the AEA requires such a finding with respect to spent fuel disposal at the time of initial licensing or relicensing. As explained below, that is not the case.

[40] *See* AEA Section 182a., 42 U.S.C. § 2232(a).

obligated to make a "definitive" finding that safe methods of high-level waste disposal are available before it can issue a reactor operating license.[41] In rejecting that argument, the Commission considered the applicable statutory requirements imposed by the AEA. For example, under a section entitled "Statutory Requirements," the Commission stated:

> It seems clear, however, that the statutory findings required by section 103 [of the AEA regarding licensing of nuclear power reactors] apply specifically to the "proposed activities" and "activities under such licenses." (42 U.S.C. 2133). These activities include some interim storage activities for spent fuel. They do not include the permanent disposal of high-level wastes though wastes are, in fact, generated by operation of the reactor.
>
> That detailed questions regarding the safety or permanent disposal of these wastes are to be addressed in connection with the licensing of an actual high-level waste disposal facility, rather than in connection with licensing of reactor operation, is clear from the statutory treatment of radioactive wastes. Historically, the Atomic Energy Act has provided that nuclear materials licensing proceedings involving possession or use of nuclear materials off-site from the facility, which include high-level radioactive waste disposal proceedings, are to be treated as separate and distinct from the facility licensing proceeding itself. . . .
>
> *The statutory provisions cited above . . . make it clear that no statutory requirement exists that the Commission determine the safety of ultimate high-level waste disposal activities in connection with licensing of individual reactors.*[42]

Beyond the language of the AEA, the Commission also considered the fact that Congress had ratified NRC's actions to license nuclear power reactors, despite that the problem of permanent disposal of high-level waste had not been solved. In that regard, the Commission found:

> In the instant case, Congress was clearly aware of the Commission's actions and the high-level waste disposal question, yet though major revisions of the legislation relating to the

[41] *See* Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391 (July 5, 1977), *pet. for rev. dismissed sub nom.*, *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978).

[42] *Id.* at 34,391-392 (footnotes omitted; emphasis added).

> Commission's authority were made Congress neither amended the statutes to require such a finding nor did it direct the Commission to stop licensing reactors pending resolution of the waste disposal problem. Such a course of conduct reinforces the conclusion reached above, based on the clear language of the statute, that *the Commission is not required to make a finding that radioactive wastes can be disposed of safely prior to the issuance of an operating for a reactor.*[43]

In summary, based on its review of the AEA, relevant legislative history, and NRC regulations, the Commission concluded that "no statutory requirement exists that the Commission determine the safety of ultimate high-level waste disposal activities in connection with licensing of individual reactors."[44] This conclusion squarely refutes Petitioners' legal basis for the proposed contention.

NRDC appealed the Commission's decision. The U.S. Court of Appeals for the Second Circuit affirmed the NRC's conclusion in *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). The Court stated:

> It is our conclusion that NRDC simply reads too much into the AEA. Indeed, if the AEC [Atomic Energy Commission] had interpreted the statute to require the affirmative determination regarding permanent disposal of high-level waste sought by NRDC, no commercial production or utilization facilities would be in operation today. We are satisfied that Congress did not intend such a condition. If it did, the silence from Capitol Hill has been deafening. It is incredible that AEC and its successor NRC would have been violating the AEA for almost twenty years with no criticism or statutory amendment by Congress, which has been kept well informed of developments.[45]

Accordingly, the Court held that the NRC is not required "to withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination

---

43 *Id.* at 34,393 (emphasis added).

44 *Id.* at 34,392.

45 *NRDC v. NRC*, 582 F.2d at 171.

that high-level radioactive wastes can be permanently disposed of safely."[46] Significantly, the *NRDC* decision was issued long before the Commission issued the findings contained in the Waste Confidence Decision. The Court thus permitted the continued licensing of nuclear power plants, even in the absence of the Waste Confidence findings now cited by Petitioners.[47] No subsequent Court or Commission decision has questioned this conclusion and Petitioners cite none.

The NRC has continued to maintain the position over the years that the AEA does not require a safety finding on the technical feasibility of a repository. For example, in response to the 2010 update to the Waste Confidence Rule, commenters argued that the AEA precludes the NRC from licensing any new nuclear power plant or relicensing any existing plant because the NRC has no well-documented safety findings supporting its conclusion that there is reasonable confidence that spent fuel can in due course be disposed of safely.[48] In response, the NRC reiterated the conclusions from *NRDC* and stated:

> The Commission will make the safety finding with respect to SNF disposal envisioned by the commenters in the context of a licensing proceeding for a geologic repository. The Commission

---

[46] *Id.* at 175; *see also id.* at 174 ("Congress expressly recognized and impliedly approved NRC's regulatory scheme and practice under which the safety of interim storage of high-level radioactive wastes at commercial nuclear power reactor sites has been determined separately from the safety of Government-owned permanent storage facilities which have not, as yet, been established."). The Court thus acknowledged the NRC's long-standing regulatory practice of issuing operating licenses with an implied finding. There is nothing in the Court's decision that would require the NRC to make the type of finding requested by the proposed contention.

[47] The SOC for the 2014 Continued Storage Rule notes that when the Commission denied NRDC's rulemaking petition in 1977, it stated that "as a matter of policy, it '. . . would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.'" Continued Storage Rule, 79 Fed. Reg. at 56,240 (quoting 42 Fed. Reg. at 34,393). The SOC further states that the Continued Storage Rule and GEIS do not pre-approve any particular waste storage or disposal site technology, and that individual licensees and applicants—including any applicant seeking to build and operate a high-level radioactive waste repository—are required to have a license from the NRC before storing or disposing of any spent fuel. *Id.* at 56,243. These statements reflect the Commission's continuing view that the AEA does not require it to determine the safety of ultimate high-level waste disposal activities in connection with the licensing of individual reactors.

[48] Waste Confidence Decision Update, 75 Fed. Reg. at 81,044.

> does make the safety findings with respect to storage of SNF envisioned by the commenters in the context of licensing proceedings for NPPs [nuclear power plants] and ISFSIs [independent spent fuel storage installations] for the terms of those licenses.[49]

The proposed contention attempts to discount *NRDC* on several grounds. None of those grounds has merit.

First, Petitioners argue that *NRDC* addressed the need for "definitive findings" regarding the safety of repository disposal of spent fuel, whereas the proposed contention is only requesting the NRC to make a "reasonable assurance" finding of safe disposal of spent fuel.[50] However, *NRDC* does not draw a distinction between a "definitive" finding and a "reasonable assurance" finding with respect to the requirements of the AEA.

Both the Commission and the Court referred to the NRC's "implied finding of reasonable assurance [of] safe permanent disposal" of spent fuel as part of its practice of issuing operating licenses for reactors.[51] However, neither the Commission nor the Court found that such an implied finding of reasonable assurance was required by the AEA. To the contrary, the Commission explicitly categorized such a finding under the heading of "Policy Considerations" rather than "Statutory Requirements."[52] Furthermore, the Commission rejected the concept that the AEA requires either a "definitive" finding or a "reasonable assurance" finding, stating:

> Even if, *contrary to the Commission's view, some kind of prior finding on waste disposal safety* were required under the statutory

---

[49] *Id.* at 81,045.

[50] Contention Motion at 10.

[51] *NRDC v. NRC*, 582 F.2d at 170; *see also* Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,391.

[52] *Cf.* Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,393 with Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,391. The NRC has continued to classify that statement as a policy consideration, not as a legal requirement under the AEA. *See* GEIS at D-30.

> scheme, such a finding would not have to be a definitive conclusion that permanent disposal of high-level-wastes can be accomplished safely at the present time.[53]

This passage clearly indicates that the Commission did not consider any finding, whether definitive or not, to be required by the statute.

Second, Petitioners argue that, "[b]y failing to promulgate new Waste Confidence findings after the Court of Appeals vacated the 2010 Waste Confidence Decision Update, the NRC has eliminated a necessary element of its AEA-required safety determination for this reactor."[54] However, while the text of the Continued Storage Rule does not include Findings 1 (technical feasibility of a geologic repository) and 2 (availability of a repository) from the Waste Confidence Decision, the Commission did not revoke the implicit finding of reasonable assurance that is discussed in *NRDC*. Significantly, *NRDC* was decided years before the Commission issued its 1984 findings in the Waste Confidence Decision.[55] In *NRDC*, the Commission and the Court permitted continued licensing of nuclear power plants, despite the fact that Findings 1 and 2 in the Waste Confidence Decision did not yet exist. Since *NRDC* was not predicated upon Findings 1 and 2 in the Waste Confidence Decision, the absence of such findings from the Continued Storage Rule has no bearing on whether the NRC is complying with its obligations under the AEA as determined in *NRDC*.

Third, Petitioners point to the subsequent Court decisions in *Minnesota v. NRC*[56] and *New York v. NRC*,[57] arguing that those cases are relevant to the licensing of nuclear power plants.

---

[53] Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,393 (emphasis added).

[54] Contention Motion at 11.

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

[56] *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

However, neither of those cases took any position that is inconsistent with the Commission's and the Court's conclusions in the *NRDC* case. To the contrary, in *Minnesota v. NRC* the Court did not require the NRC to go beyond *NRDC*. Instead, the Court remanded the issue to the NRC to consider whether there was reasonable assurance that a repository would be available by the time of expiration of the plant's operating license and, if not, whether there was reasonable assurance that spent fuel could be safely stored at the plant beyond those dates.[58] Thus, *Minnesota v. NRC* involved issues related to reasonable assurance of safe storage beyond the term of a plant's operating license, not reasonable assurance of safe disposal in a repository. Furthermore, *New York v. NRC* is not relevant at all to the AEA, since it deals with the NRC's obligations under NEPA.

2. The Commission's 2010 Waste Confidence Decision Addressed NEPA Requirements and Did Not Contain "AEA-Required Safety Findings"

Petitioners also claim that the now-vacated 2010 Waste Confidence Decision Update contained "safety" findings that the Commission failed to "replace" or "re-promulgate" in the 2014 Continued Storage Rule. Petitioners then argue that the Commission must now make such findings in individual licensing proceedings because the Continued Storage Rule does not contain such a finding.[59]

Petitioners are mistaken. First, the 2010 Waste Confidence Decision Update findings on the technical feasibility of a repository were *not* safety findings made under the AEA. Instead, they were *environmental* findings made under NEPA. The Commission was explicit on this point in the Waste Confidence Decision Update, stating that the NRC's update to the Waste

---

57 *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

58 *Minnesota v. NRC*, 602 F.2d at 418.

59 Contention Motion at 1-5, 11.

Confidence Decision and Rule are not licensing decisions or determinations.[60] Rather, "[t]he revised findings and generic determination are conclusions of the Commission's environmental analyses, under NEPA, of the foreseeable environmental impacts stemming from the storage of SNF after the end of reactor operation."[61]

The SOC for the Continued Storage Rule further reflects the NEPA underpinnings of the NRC's previous Waste Confidence proceedings and findings:

> Historically, the Commission's Waste Confidence proceeding represented the Commission's generic determination and generic *environmental* analysis that spent fuel could be stored safely and without significant environmental impacts for a period of time past the licensed life for operation of a reactor. This generic *environmental* determination was reflected in 10 CFR 51.23, which addressed the NRC's NEPA obligations with respect to the continued storage of spent fuel.[62]

The SOC also makes clear that the new Continued Storage Rule (like the predecessor Waste Confidence Decision) is not a substitute for licensing actions—including the licensing of a high-level radioactive waste repository—that typically include site-specific NEPA and safety analyses.[63] As such, there simply is no factual basis for the central premise underlying the proposed contention; *i.e.*, that the Commission's previous Waste Confidence Decision Update contained "safety" findings related to the feasibility and safety of spent fuel disposal.

Petitioners also cite to the NRC's brief in *New York v. NRC* for the proposition that the findings in the Waste Confidence Decision "fulfill NRC's important responsibilities under the

---

[60] *See* Waste Confidence Decision Update, 75 Fed. Reg. at 81,044.

[61] *Id.* at 81,044-045.

[62] Continued Storage Rule, 79 Fed. Reg. at 56,241-242 (emphasis added). In this regard, Petitioners' reliance on *New York v. NRC*, 681 F.3d at 474, is misplaced. The "generalized findings of reasonable confidence" to which Petitioners refer (Suspension Petition at 9) are fundamentally environmental findings made as part of the Waste Confidence proceedings, not AEA-mandated "predictive safety findings." *Id.*

[63] Continued Storage Rule, 79 Fed. Reg. at 56,243.

AEA."[64] However, *New York v. NRC* was a NEPA case, not an AEA case. Furthermore, the NRC's brief in that case did not explain, or otherwise provide, any basis for that proposition, and the Court never mentioned the AEA in its decision. In light of the lack of relevance of NRC's statement to the case and the absence of any explanation or support for that statement, it is not entitled to any weight in this proceeding.

Finally, the proposed contention argues that the GEIS for the Continued Storage Rule recognizes that the safety finding must "be made as part of individual licensing actions."[65] However, Petitioners have quoted that statement out of context. In context, the quoted statement applies to safety determinations regarding "continued storage of spent fuel" at the reactor site, not a safety finding regarding the technical feasibility of a repository.[66]

3. The Commission Addressed the Waste Confidence Environmental Findings in Its Continued Storage Rule and GEIS

Petitioners' claim that the Commission has effectively abandoned its previous Waste Confidence findings is factually incorrect and is contrary to Commission statements in the SOC for the Continued Storage Rule.

As discussed above, the current rule (10 C.F.R. § 51.23) does not list the previous Waste Confidence "Findings." However, it "codifies the environmental impact determinations reflected in the GEIS," which provide the technical and regulatory bases for the Continued Storage Rule.[67] As the SOC explains, "the GEIS address[es] the issues assessed in the previous five 'Findings' as conclusions regarding the technical feasibility and availability of a repository and conclusions

---

64 Contention Motion at 8.

65 *Id.* at 5 n.17.

66 GEIS at D-9.

67 Continued Storage Rule, 79 Fed. Reg. at 56,242; *see also id.* at 56,245 ("The analysis in the GEIS constitutes a regulatory basis for the rule at 10 CFR 51.23.").

regarding the technical feasibility of safely storing spent fuel in an at-reactor or away-from-reactor storage facility."[68] Particularly relevant here, the issue of the technical feasibility of a geologic repository (Waste Confidence Finding 1) is now discussed in Section B.2.1 of the GEIS, and the availability of a repository (Waste Confidence Finding 2) is now discussed in Section B.2.2 of the GEIS.[69] Thus, Petitioners wrongly suggest that the NRC opted not to "replace" the substantive findings made as part of its previous Waste Confidence proceedings in connection with its latest rulemaking.[70]

The proposed contention argues that, because Findings 1 and 2 from the Waste Confidence Decision are not contained in the Continued Storage Rule, the NRC has not made a finding regarding the technical feasibility of a repository. However, the proposed contention mischaracterizes the rulemaking proceeding for the Continued Storage Rule. As the SOC for the Continued Storage Rule explains, the GEIS addresses the issues assessed in the previous five Findings as conclusions regarding the technical feasibility and availability of a repository, and conclusions regarding the technical feasibility of safely storing spent fuel in an at-reactor or away-from-reactor storage facility.[71]

In particular, Section B.2 of the GEIS for the Continued Storage Rule includes an analysis of the technical feasibility of a repository explicitly and concludes that a repository is technically feasible. For example, page B-2 of the GEIS includes the following conclusions:

---

[68] *Id.* at 56,244.

[69] *See id.* GEIS Section B.2.1 states: "Based on the national and international research, proposals, and experience with geologic disposal, the NRC concludes that a geologic repository continues to be technically feasible." GEIS at B-5. GEIS Section B.2.2 states: "In sum, based on experience in licensing similarly complex facilities in the United States and national and international experience with repositories already in progress, the NRC concludes a reasonable period of time for the development of a repository is approximately 25 to 35 years." *Id.* at B-9.

[70] *See* Contention Motion at 3.

[71] Continued Storage Rule, 79 Fed. Reg. at 56,244.

- The Commission has consistently determined that current knowledge and technology support the technical feasibility of deep geologic disposal.

- Today, the consensus within the scientific and technical community engaged in nuclear waste management is that safe geologic disposal is achievable with currently available technology (see, e.g., Blue Ribbon Commission on America's Nuclear Future [BRC 2012], Section 4.3).

- Since 1984, the technical feasibility of a geological repository has moved significantly beyond a theoretical concept.

- Ongoing research in both the United States and other countries supports a conclusion that geological disposal remains technically feasible and that acceptable sites can be identified.

Additionally, the SOC for the Continued Storage Rule explicitly states that "the NRC has determined that a repository is technically feasible."[72]

Contrary to the allegations in the proposed contention, these conclusions are not deficient. First, Petitioners argue that the conclusions in the GEIS and the SOC are insufficient because they are made "without any level of assurance."[73] However, unlike NRC's previous findings, the current GEIS and SOC provide an unqualified determination of technical feasibility. Because the statements in the GEIS and SOC are presented as absolutes, their conclusions regarding the technical feasibility are actually stronger than NRC's previous findings in the Waste Confidence Decision, which only found that there was "reasonable assurance" of technical feasibility. As the NRC discussed in Section B.2.1 of the GEIS, the findings in the GEIS are based in part upon information that was not available for the last update of the Waste Confidence Decision, including information developed during NRC's review of the Yucca Mountain repository and by the Blue Ribbon Commission.

---

[72] *Id.* at 56,254.

[73] Contention Motion at 12.

The proposed contention also argues that the NRC's current views on technical feasibility of a repository are not supported by an environmental impact statement or an environmental assessment.[74] That argument is patently frivolous, since the proposed contention itself refers to the discussion on technical feasibility in Section B.2 of the GEIS for the Continued Storage Rule.[75]

Furthermore, to the extent that Petitioners may be complaining that the Commission has altered the form of its findings, they point to nothing that would suggest that the Commission's findings must be in any particular form. In that regard, as stated in the *NRDC* case, the Commission has long issued licenses for nuclear power plants with an "implicit finding" of reasonable assurance that safe permanent disposal would be available,[76] and that practice has been upheld by the courts.[77]

In summary, the proposed contention is predicated on faulty premises regarding the NRC's responsibilities under the AEA, the purpose of the Waste Confidence rulemaking, and the conclusions reached by the Continued Storage Rule and the GEIS. Contrary to those faulty premises, the NRC is not required by the AEA or case law to make a safety finding regarding the technical feasibility of ultimate geologic disposal before licensing a nuclear power reactor; the Waste Confidence Decision did not include AEA safety findings; and the GEIS for the Continued Storage Rule includes a discussion of the technical feasibility of a geologic repository. Accordingly, the proposed contention should be rejected because it is legally and factually meritless.

---

[74] *Id.* § III.B.3.

[75] *See id.* at 12 n.47.

[76] 42 Fed. Reg. at 34,393.

[77] *NRDC v. NRC*, *supra.*

B. The Proposed Contention Is Inadmissible and Procedurally Deficient

The legal and factual shortcomings in Petitioners' contention discussed above also render it inadmissible and procedurally deficient. First, the contention fails to satisfy the legal standards for admissibility of contentions in 10 C.F.R. § 2.309(f)(1). Second, because the facts Petitioners rely on have been known for many years, the proposed contention is untimely. Accordingly, the contention is inadmissible and should be rejected.

In addition to being timely, a newly–proposed contention must meet the strict admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi). Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." Further, each contention must:

(1) provide a specific statement of the legal or factual issue sought to be raised;

(2) provide a brief explanation of the basis for the contention;

(3) demonstrate that the issue raised is within the scope of the proceeding;

(4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;

(5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and

(6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[78]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[79] The NRC's contention admissibility rules are

---

[78] *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi). The seventh contention admissibility requirement—10 C.F.R. § 2.309(f)(1)(vii)—is only applicable to proceedings arising under 10 C.F.R. § 52.103(b) and, therefore, has no bearing on the admissibility of proposed contentions in this proceeding.

[79] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

"strict by design."[80] Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[81]

1. The Proposed Contention Does Not Satisfy the Contention Admissibility Criteria in 10 C.F.R. § 2.309(f)(1)

Petitioners' proposed contention fails to meet the contention admissibility criteria in 10 C.F.R. § 2.309(f)(1). First, the proposed contention impermissibly challenges the Continued Storage Rule, and therefore should be rejected as outside the scope of this proceeding.[82] Second, because the AEA does not require the findings Petitioners seek, the contention is not material to the findings the NRC must make regarding STP Units 3 and 4. Third, the proposed contention fails to show that any genuine dispute exists with regard to a material issue of law or fact.

The proposed contention, by its terms, challenges the adequacy of the Continued Storage Rule and, as such, should be rejected as outside the scope of this proceeding in accordance with 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a). The proposed contention alleges that the Continued Storage Rule is inadequate because it does not include Findings 1 and 2 of the previous Waste Confidence Decision.[83] The same argument was also raised in comments on the GEIS for the Continued Storage Rule. For example, some commenters argued that NRC must assess the availability of sufficient and safe spent fuel disposal capacity when it is necessary. Those

---

80 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-1, 55 NRC 1 (2002).

81 Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

82 *See Exelon Generation Co.* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 76 NRC 377, 384 (2012). Notably, numerous licensing boards have rejected previous contentions as improper challenges to the generic Commission determinations codified in 10 C.F.R. § 51.23. Indeed, in this proceeding, the Board held that "to the extent [a proposed contention] amounts to an attack on . . . 10 C.F.R. § 51.23(a), which addresses the long-term storage of spent fuel and high-level waste generated by nuclear reactors, we are compelled to conclude it is inadmissible." *S. Tex. Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-09-21, 70 NRC 581, 598-99 (2009). The Board further stated that, as in this case, "Petitioners have not requested a waiver, nor do they allege that any 'special circumstances' warrant such a waiver." *Id.* at 599.

83 Contention Motion at 2-4.

comments were rejected by the NRC on their merits.[84] Thus, the proposed contention constitutes a challenge to the content of the Continued Storage Rule.

As provided in 10 C.F.R. § 2.309(f)(1)(iii), Petitioners must demonstrate that the proposed contention is within the scope of the proceeding. As provided in 10 C.F.R. § 2.335(a), a proposed contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[85]

Petitioners have not submitted a waiver request pursuant to 10 C.F.R. § 2.335(b).[86] Accordingly, the proposed contention is inadmissible because it is outside the scope of this proceeding.

---

[84] GEIS at D-28 to D-32. Additionally, the SOC for the Continued Storage Rule directly explains why the rulemaking no longer includes Findings 1 and 2 regarding a geological repository. Continued Storage Rule, 79 Fed. Reg. at 56,254-255.

[85] The Commission consistently has affirmed licensing boards' rejections of proposed contentions that challenge generically-applicable rulemaking determinations, including those codified in 10 C.F.R. § 51.23. *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 100 (2010) (directing the board, upon certification of the issue, to deny admission of proposed contention due to the NRC's then-pending rulemaking on waste confidence issues); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station) & *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 20 (2007), *reconsid. denied*, CLI-07-13, 65 NRC 211 (2007) (holding that "any contention on a [license renewal] 'Category 1' issue amounts to a challenge to our regulation that bars challenges to generic environmental findings"); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 39 (2004) (finding that an intervenor impermissibly challenged the NRC's "rulemaking-associated determinations" that spent fuel cladding, once encased in a canister, is no longer important to safety); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995) ("Intervenors are, in essence, contending that those regulatory provisions are themselves insufficient to protect the public health and safety. This assertion constitutes an improper collateral attack upon our regulations."); *see also Limerick*, CLI-12-19, 76 NRC at 384.

[86] Section 2.335(b) states in part: "The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted." Section 2.335(b) also states that a waiver petition "must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted," and "must state with particularity the special circumstances alleged to justify the waiver or exception requested." Petitioners have not submitted a waiver petition, have not submitted an affidavit, and have not identified any special circumstances showing that application of the rule would not serve the purposes for which the rule was adopted. Furthermore, given the generic nature of the proposed contention, there is no

Second, the proposed contention is inadmissible because the issues it raises are not material to the findings that the NRC must make in this proceeding. In particular, as discussed above, the AEA does not require the NRC to make the findings Petitioners seek in their proposed contention in power reactor licensing proceedings. Thus, the proposed contention does not satisfy 10 C.F.R. § 2.309(f)(1)(iv) because it does not raise an issue material to the findings the NRC must make with respect to licensing STP Units 3 and 4, and the proposed contention should be rejected.

Third, as discussed above, the proposed contention is based upon a mischaracterization of the rulemaking record for the Continued Storage Rule and therefore fails to show that any genuine dispute exists. Contrary to the arguments of Petitioners, the rulemaking record for the Continued Storage Rule, including the GEIS, contains an analysis and conclusions regarding the technical feasibility of a repository. It has long been held that mischaracterizations of the record are not sufficient to establish that a genuine dispute exists on a material issue of law or fact.[87] Because the proposed contention is based upon a mischaracterization of the rulemaking record, it does not satisfy 10 C.F.R. § 2.309(f)(1)(vi) and should be rejected.[88]

---

basis for any argument that special circumstances exist in this proceeding. Indeed, Petitioners concede that their "concerns are generic in nature." Suspension Petition at 3.

[87] *See, e.g.*, *Crowe Butte Res. Inc.* (In Situ Leach Facility, Crawford, Neb.), CLI-09-9, 69 NRC 331, 363 (2009) (affirming a licensing board's dismissal of a proposed safety contention as lacking adequate support and failing to demonstrate a genuine dispute, in part because petitioners "mischaracterize" the application); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plants Units 3 & 4), LBP-08-16, 68 NRC 361, 401 (2008) (stating that a mischaracterization of the Environmental Report does not establish a genuine issue of material fact); *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 & 2), LBP-10-7, 71 NRC 391, 425 (2010) (finding that "the foundational support for the contention is either inaccurate or inadequate to establish that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention"); *Exelon Generation Co. LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 179 n.182 (finding a contention inadmissible because an "inaccurate comparison cannot be deemed to create a genuine dispute") (citation omitted).

[88] In addition to the criteria discussed above, Petitioners admit that the contention is not based upon "factual arguments." Contention Motion at 16. Therefore, the proposed contention also could be viewed as failing to satisfy Criterion (v) of 10 C.F.R. § 2.309(f)(1).

2. The Proposed Contention Is Not Timely and Fails to Satisfy the Requirements for Untimely Contentions

In addition to its failure to satisfy several of the criteria in 10 C.F.R. § 2.309(f)(1), Petitioners' filings should be rejected for failure to satisfy requirements for an untimely contention.

10 C.F.R. § 2.309(c) states:

> Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:
>
> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

A petitioner bears the burden of successfully addressing the "stringent" late-filing standards.[89]

The proposed contention does not satisfy any of these criteria. As discussed above in Section III.A, it has long been known that the findings in the Waste Confidence Decision are environmental findings, not safety findings. This was not new information that arose from the publication of the Continued Storage Rule in September 2014. Furthermore, as discussed above, the GEIS includes an analysis of the technical feasibility of a repository, and that analysis

---

[89] *See, e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

reaches conclusions that are similar to—and, in fact, stronger than—the conclusions in the Waste Confidence Decision.[90]

Therefore, (i) the information upon which the filing is based was previously available; (ii) the information upon which the filing is based is not materially different from information previously available; and (iii) the filing has not been submitted in a timely fashion based on the availability of the subsequent information. Accordingly, the proposed contention should be rejected for failure to satisfy 10 C.F.R. § 2.309(c).

In summary, the Contention Motion should be rejected because the proposed contention lacks substantive and procedural merit.

IV. THE SUSPENSION PETITION SHOULD BE REJECTED AS SUBSTANTIVELY AND PROCEDURALLY DEFICIENT

The Suspension Petition should be rejected because it is substantively and procedurally deficient. First, the Suspension Petition relies on the same erroneous legal and factual premises discussed above in Section III.A regarding the proposed contention. For the sake of brevity, those arguments are not repeated here. Second, and critically, Petitioners fail to identify any imminent risk to the public health and safety that would justify suspending this proceeding. Third, and in any event, the Suspension Petition is inconsequential because if the proposed contention is denied, there is no basis to suspend the proceeding, and if the proposed contention were admitted, no license would issue until after the admitted contention is fully addressed on its merits. Thus, the Suspension Petition should be rejected.

---

[90] Petitioners claim in their Motion to Reopen that the proposed contention satisfies the requirements of 10 C.F.R. § 2.309(c) because they filed it within 30 days of the September 19, 2014 publication of the Continued Storage Rule and that Rule does not include the safety findings from prior versions of the Waste Confidence Decision. Motion to Reopen at 5-6. As demonstrated above, the Waste Confidence Decision never included safety findings. Therefore, the September 19 publication was not the trigger date for the proposed contention.

Petitioners fail to satisfy the Commission's criteria for suspending a licensing proceeding because they have not identified any imminent risk to public health and safety.[91] The suspension of licensing proceedings or decisions is a "drastic action" that is warranted only when there are "immediate threats to public health and safety" or other compelling reasons.[92] The issues raised in the Suspension Petition relate solely to the *future* safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository[93]—issues that are separate and distinct from any issue material to issuance of the STP COLs. The ultimate disposal of any spent fuel generated by STP Units 3 and 4 during operation would occur many years in the future, and the safety of such disposal would be the subject of a separate NRC licensing action. Thus, Petitioners fail to show that issuance of the STP COLs poses an imminent risk to public health and safety, and the petition should be rejected.

The Suspension Petition should be rejected as irrelevant because it would not accomplish anything not already addressed by Petitioners' proposed contention. The Commission will address the admissibility of the proposed contention as part of the ongoing adjudicatory proceeding. No final action on the COLs can occur until the NRC sufficiently addresses all pending contentions, including Petitioners' pending proposed contention. Accordingly, there is

---

91 The Commission's criteria for suspending a licensing proceeding are well-established. *See DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-07, 80 NRC __, slip op. at 8-11 (July 17, 2014); *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158–59 (2011). As discussed in *Fermi* and *Callaway*, the Commission applies three criteria in determining whether to suspend an adjudication or licensing decision: (1) whether moving forward "will jeopardize the public health and safety"; (2) whether continuing the review process will "prove an obstacle to fair and efficient decisionmaking"; and (3) whether going forward will "prevent appropriate implementation of any pertinent rule or policy changes that might emerge from [the NRC's] . . . ongoing evaluation." Conspicuously, Petitioners fail even to identify—much less satisfy—the well-established criteria that govern requests to suspend licensing actions.

92 *Fermi*, CLI-14-07, slip op. at 8 (quoting *Callaway*, CLI-11-5, 74 NRC at 158).

93 *See* Suspension Petition at 1 (asserting that the NRC lacks a legal basis under the AEA to issue operating licenses or license renewals until it makes valid findings of confidence or reasonable assurance that the spent fuel that will be generated during any reactor's license term can be safely disposed of in a repository).

no need to suspend the proceeding to facilitate fair and efficient decisionmaking. Furthermore, Petitioners provide no reason to conclude that issuance of the COLs would preclude implementation of any rule or policy changes regarding whether a repository can safely accommodate the disposal of spent fuel and high-level waste (if the Commission were ever to consider making such changes). Thus, suspension of a licensing decision in this proceeding would serve no purpose, and the Suspension Petition should be rejected.

V. THE MOTION TO REOPEN THE RECORD SHOULD BE REJECTED AS SUBSTANTIVELY AND PROCEDURALLY DEFICIENT

The Motion to Reopen should be rejected because it is procedurally and substantively deficient. First, regarding substance, the Motion to Reopen does not address a significant safety or environmental issue. Second, the Motion does not demonstrate that a materially different result would be likely if the information in the contention had been considered previously. Third, and in any event, the Motion is not timely. Because the Motion thus fails to satisfy the requirements of 10 C.F.R. § 2.326(a), it should be rejected.

Motions to reopen the record are governed by 10 C.F.R. § 2.326(a), which requires such motions to "address a significant safety or environmental issue," to show that a "materially different result would be or would have been likely had the newly proffered evidence been considered initially," and to be timely. Those requirements have not been satisfied in this case.[94]

First, the Motion to Reopen does not address a significant safety or environmental issue. As the proposed contention itself states, Petitioners are raising a legal issue and not a significant safety or environmental issue.[95] Although Petitioners make the conclusory statement in the

[94] In codifying this standard, the Commission emphasized "the heavy burden involved" and characterized these requirements as "high" and "stringent." Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

[95] Contention Motion at 16 ("This contention primarily makes legal arguments rather than factual arguments.").

Motion to Reopen that they are raising a "significant safety issue that the NRC has made no currently valid findings of confidence or reasonable assurance," they do not actually identify any safety issue stemming from the alleged failure to make safety findings.[96] Furthermore, as discussed above in Section III.A, the Commission has found that a repository is technically feasible, and has also concluded that it is "technically feasible to safely store the spent fuel" pending disposal in a repository.[97] Therefore, the Motion to Reopen does not address a significant safety or environmental issue and accordingly should be denied.

Second, the Motion to Reopen does not demonstrate that a materially different result would have occurred if the information in the contention had been considered previously.[98] As discussed above, the NRC is not required to make a safety finding on the technical feasibility of a repository, and therefore the proposed contention does not raise an issue that is material to licensing. Accordingly, the Motion to Reopen should be denied for failure to demonstrate that a materially different result would have occurred if the proposed contention had been considered previously.

Third, and finally, the Motion to Reopen is not timely. Contrary to Petitioners' arguments, the findings in the previous Waste Confidence Decision regarding the technical feasibility of a repository were not safety findings; they were environmental findings.[99] In fact, Petitioners could have raised their safety contention years ago (at least as early as 2010 when the Commission stated the findings in question were environmental findings under NEPA and not

---

[96] Motion to Reopen at 3.

[97] Continued Storage Rule, 79 Fed. Reg. at 56,254; *see also* GEIS Section B.2.

[98] *See* Motion to Reopen at 3-4.

[99] *See, e.g.*, Waste Confidence Decision Update, 75 Fed. Reg. at 81,044-045.

safety findings under the AEA).[100] Accordingly, contrary to Petitioners' claims,[101] the alleged absence of those findings in the Continued Storage Rule[102] should not be viewed as a trigger point for the filing of a safety contention and the Motion to Reopen. Therefore, the proposed contention and the Motion to Reopen are untimely, and the Motion to Reopen should be rejected.[103]

In summary, the Motion to Reopen does not satisfy any of the three requirements for reopening of the record. Accordingly, the Motion to Reopen should be denied for failure to satisfy 10 C.F.R. § 2.326(a).[104]

VI. CONCLUSION

As demonstrated above, the proposed contention should be rejected in its entirety as both substantively and procedurally defective. The proposed contention is based on faulty legal and factual assertions. As such, it does not satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). It also constitutes an impermissible challenge to the Continued Storage

---

[100] *Id*. For a reopening motion to be timely, the movant must show that the issue sought to be raised could not have been raised earlier. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (1984), *aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff'd on reh'g en banc*, 789 F.2d 26 (1986).

[101] Motion to Reopen at 2-3.

[102] In fact, Section B.2 of the GEIS includes conclusions similar to the previous findings in the Waste Confidence Decision regarding the technical feasibility of a repository. Thus, contrary to Petitioners' allegations, the Continued Storage Rule does not represent a significant change in NRC's position on the technical feasibility of a repository.

[103] In one example, the Appeal Board concluded that a motion to reopen was untimely when it was based on information that had been available almost a year. *Metro. Edison Co*. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985).

[104] Although Petitioners provide two declarations that they claim support the Motion to Reopen as required by 10 C.F.R. § 2.326(b), those two declarations suffer from the same deficiencies discussed above for why the Motion to Reopen fails to satisfy the requirements of 10 C.F.R. § 2.326(a). Declaration of Dr. Arjun Makhijani in Support of Motions to Reopen the Record of NRC Reactor Licensing and Re-Licensing Proceedings (Sept. 29, 2014); Declaration of Mark Cooper in Support of Motions to Reopen the Record of NRC Reactor Licensing and Re-Licensing Proceedings (Sept. 29, 2014). Namely, they are based on the faulty premise that the NRC must make waste confidence safety findings.

Rule under 10 C.F.R. § 2.335. Furthermore, the proposed contention is untimely. For each of these reasons, the Contention Motion should be rejected.

Additionally, suspending the NRC's final STP COL decision is an extraordinary remedy. Petitioners have not substantiated that such extraordinary relief is warranted in this proceeding, as their Suspension Petition is marred by the numerous substantive and procedural deficiencies discussed above. For all of these reasons, the Suspension Petition should be denied in its entirety.

Finally, the Motion to Reopen should be rejected because it is procedurally and substantively deficient. The Motion fails to satisfy the requirements of 10 C.F.R. § 2.326(a), because it does not address a significant safety or environmental issue, it does not demonstrate that a materially different result would be likely if the information in the contention had been considered previously, and it is not timely.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

/s/ *Steven P. Frantz*
Steven P. Frantz
John E. Matthews
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 31st day of October 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 52-012-COL
	)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC	)	
	)	
(South Texas Project Units 3 and 4)	)	October 31, 2014
	)	

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the "Nuclear Innovation North America LLC Combined Response to Proposed Contention and Petition to Suspend Related to Alleged Need for Issuance of Waste Confidence Safety Findings" was submitted through the NRC's E-filing system.

Signed (electronically) by Stephen J. Burdick
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-5059
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

Counsel for Nuclear Innovation North America LLC

DB1/ 80973858