

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	
FIRSTENERGY NUCLEAR OPERATING COMPANY)	Docket No. 50-346-LR
)	
(Davis-Besse Nuclear Power Station, Unit 1))	October 31, 2014
)	

**FIRSTENERGY NUCLEAR OPERATING COMPANY COMBINED RESPONSE TO
PROPOSED CONTENTION AND PETITION TO SUSPEND RELATED TO ALLEGED
NEED FOR ISSUANCE OF WASTE CONFIDENCE SAFETY FINDINGS**

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required by the Atomic Energy Act of 1954, as amended (“AEA”).⁴ Specifically, they assert that the AEA requires the Commission to issue “predictive safety findings” regarding the safety of permanent spent nuclear fuel (“SNF”) disposal before issuing any reactor licensing decision.⁵ They further claim that the NRC’s alleged failure to incorporate generic safety findings in its final Continued Storage Rule⁶ divests the agency of any legal basis for issuing initial or renewed operating licenses for any reactor.⁷ Intervenors thus contend 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.”⁸

As demonstrated below, the proposed contention should be rejected in its entirety. As a threshold matter, the proposed contention impermissibly challenges the Continued Storage Rule. Intervenors have not submitted a waiver petition pursuant to 10 C.F.R. § 2.335(b), much less made a *prima facie* showing that the “stringent” requirements for a waiver of the rule have been met.⁹ This alone is grounds for dismissal of the contention.

Intervenors also inaccurately characterize the Commission’s Continued Storage Rule and associated Generic Environmental Impact Statement (“GEIS”).¹⁰ In doing so, they rely on three plainly erroneous factual assertions: (1) they claim that the AEA requires the NRC to make Waste Confidence safety findings related to ultimate spent fuel disposal at the time of reactor licensing; (2) they claim that the now-vacated 2010 Waste Confidence Decision Update

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

⁵ Motion at 3-4; Suspension Petition at 7-8.

⁶ See Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (“Continued Storage Rule”).

⁷ Motion at 3-4, 13; Suspension Petition at 7-8.

⁸ Suspension Petition at 9; see also Motion at 5.

⁹ See 10 C.F.R. § 2.335(b)-(d); *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-13-7, 78 NRC 199, 207 (2013).

¹⁰ NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, Final Report (Sept. 2014) (“GEIS”).

contained “safety” findings; and (3) they claim that the Commission chose not to replace those findings in its Continued Storage Rule and supporting GEIS. As none of those assertions is correct, the proposed contention does not satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1) and should be rejected. Furthermore, the GEIS explicitly concludes that a repository is technically feasible, and it provides an analysis to support that conclusion.

Finally, the Suspension Petition also should be summarily rejected because it relies on the same flawed legal and factual premises as the proposed contention. Intervenors, moreover, completely ignore the Commission’s well-established criteria for evaluating suspension requests. Their failure to address those criteria further dictates dismissal of the Suspension Petition. In any event, a reasoned application of those criteria to the present circumstances reveals no basis for granting the extraordinary relief sought by Intervenors. In particular, Intervenors’ request to suspend final licensing decisions is irrelevant. Should the Commission admit the proposed contention, then a renewed license would not be issued until the admitted contention has been fully addressed. Similarly, if the Commission denies the proposed contention, then the Suspension Petition would be objectionable for the same reasons the contention is rejected.

II. BACKGROUND

A. Status of the Davis-Besse License Renewal Proceeding

1. The NRC’s Ongoing Review of the License Renewal Application

In August 2010, FENOC filed an application to renew the 10 C.F.R. Part 50 operating license for Davis-Besse for an additional 20-year term.¹¹ The NRC Staff published its Safety Evaluation Report (“SER”) with open items on July 31, 2012, and its final SER on September 3, 2013. The NRC Staff continues to review emergent technical issues and the Advisory

¹¹ License Renewal Application; Davis-Besse Nuclear Power Station at 1.0-1 (Aug. 2010). The current operating license for Davis-Besse expires on April 22, 2017.

Committee on Reactor Safeguards has yet to meet on the final SER.¹² The Staff published the Draft Supplemental Environmental Impact Statement (“SEIS”) in February 2014, and anticipates that it will publish the Final SEIS in November 2014.¹³

2. The Related Adjudicatory Proceeding

On December 27, 2010, Intervenors petitioned to intervene in this proceeding, proffering four contentions.¹⁴ On April 26, 2011, the Atomic Safety and Licensing Board (“Board”) admitted contentions regarding renewable energy alternatives and FENOC’s severe accident mitigation alternatives (“SAMA”) analysis.¹⁵

FENOC appealed the Board’s ruling admitting the two contentions and, on March 27, 2012, the Commission reversed the Board’s admission of one contention, and reversed, in part, the Board’s admission of the other contention.¹⁶ FENOC later moved for summary disposition as to the remaining part of the latter contention, which concerned FENOC’s SAMA analysis.¹⁷

On January 10, 2012, Intervenors moved to admit another proposed contention concerning laminar concrete cracking in the Davis-Besse shield building.¹⁸ Subsequently, Intervenors submitted five motions to amend and/or supplement that proposed contention.

On November 5-6, 2012, the Board held oral argument on FENOC’s then-pending motion for summary disposition of the earlier admitted SAMA contention, the admissibility of

¹² See <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse.html>.

¹³ See Letter from Brian G. Harris, Counsel for the NRC Staff, to Administrative Judges (Oct. 30, 2014).

¹⁴ See Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010).

¹⁵ See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-11-13, 73 NRC 534, 588–89 (2011).

¹⁶ See generally *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), CLI-12-8, 75 NRC 393 (2012).

¹⁷ See *FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms)* (July 26, 2012).

¹⁸ See *Motion for Admission of Contention No. 5 on Shield Building Cracking* (Jan. 10, 2012).

the proposed cracking contention, and the five motions to supplement or amend the latter. On December 28, 2012, the Board granted summary disposition of the SAMA contention,¹⁹ and denied Intervenors' motions to admit and supplement the proposed cracking contention.²⁰

In the interim, Intervenors filed with the Board a motion to admit a new environmental contention that challenges the alleged failure of FENOC's Environmental Report to address the environmental impacts that may occur if a spent fuel repository does not become available.²¹ 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),²² which invalidated and remanded the NRC's Waste Confidence Decision Update²³ and related final rule.²⁴ 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.²⁵ The Board in the Davis-Besse license renewal proceeding dismissed the proposed contention on October 8, 2014.²⁶

Intervenors also filed another proposed contention on April 22, 2014,²⁷ raising challenges primarily related to three events regarding the Davis-Besse Shield Building. The Board rejected

¹⁹ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-12-26, 76 NRC 559 (2012).

²⁰ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-12-27, 76 NRC 583 (2012).

²¹ See Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear Power Station (July 9, 2012).

²² See *id.*

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

²⁴ Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

²⁵ 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).

²⁶ See Board Order (Denying Motion to File a New Contention Concerning Temporary Storage of Nuclear Waste) (Oct. 8, 2014) (unpublished).

²⁷ Motion for Admission of Contention No. 6 on Shield Building Concrete Void, Cracking and Broken Rebar Problems (dated Apr. 21, 2014).

that contention on July 25, 2014.²⁸ In early September 2014, Intervenors filed yet another newly-proposed contention related to aging management of the Davis-Besse Shield Building.²⁹ The parties have briefed that matter, which is now pending before the Board.

Intervenors filed their Motion with the proposed contention and the Suspension Petition, which FENOC herein opposes, on September 29, 2014. Intervenors provided the following statement of their proposed contention:

The NRC lacks a lawful basis under the Atomic Energy Act (“AEA”) for 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.³⁰

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, 2014.³¹

²⁸ Board Memorandum and Order (Denying Intervenors’ Motion for Admission of Contention No. 6 on Shield Building Concrete Void, Cracking and Broken Rebar Problems), at 9-17 (July 25, 2014) (unpublished).

²⁹ See Intervenors’ Motion for Admission of Contention No. 7 on Worsening Shield Building Cracking and Inadequate AMPs in Shield Building Monitoring Program (Sept. 2, 2014); Intervenors’ Motion to Amend and Supplement Contention No. 7 on Worsening Shield Building Cracking and Inadequate AMPs in Shield Building Monitoring Program (Sept. 8, 2014).

³⁰ Motion at 3-4 (citations omitted).

³¹ Continued Storage Rule, 79 Fed. Reg. at 56,240-241.

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.³² 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).³³

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 onsite beyond that time.³⁴ 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 51.³⁵ The 1984 Waste Confidence Decision included five findings, 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.

³² *Id.*; *NRDC v. NRC*, 582 F.2d 166, 167 (1978).

³³ 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.

³⁴ *Id.*

³⁵ *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).

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.³⁶

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.³⁷

The Commission first updated the Waste Confidence Decision and Temporary Storage Rule in 1990³⁸ and then again in 2010.³⁹ 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.⁴⁰

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.⁴¹

³⁶ Final Waste Confidence Decision, 49 Fed. Reg. at 34,658.

³⁷ Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. at 34,694.

³⁸ 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).

³⁹ 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).

⁴⁰ Waste Confidence Decision Update, 75 Fed. Reg. at 81,038.

⁴¹ Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. at 81,037.

Four States, an Indian community, and several environmental groups 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.⁴² The Court identified deficiencies 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 generically through rulemaking. The NRC 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.⁴³

The Commission thereafter approved the final Continued Storage Rule and the associated GEIS on August 26, 2014.⁴⁴ 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.⁴⁵ 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

⁴² *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

⁴³ See NUREG-2157, Waste Confidence Generic Environmental Impact Statement, Draft Report for Comment (Aug. 2013).

⁴⁴ 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).

⁴⁵ 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.”).

and conclusions regarding the technical feasibility of safely storing spent fuel in an at-reactor or away-from-reactor storage facility.”⁴⁶

III. THE PROPOSED CONTENTION SHOULD BE REJECTED

A. Legal Standards for Contentions

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.⁴⁷

The purpose of these six criteria is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁴⁸ The NRC’s contention admissibility rules are

⁴⁶ *Id.* at 56,244.

⁴⁷ *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.

⁴⁸ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

“strict by design.”⁴⁹ Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.⁵⁰

B. The Proposed Contention Constitutes an Impermissible Challenge to the Continued Storage Rule and Therefore Does Not Satisfy Criterion (iii) of 10 C.F.R. § 2.309(f)(1)

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.⁵¹ That argument impermissibly challenges the Continued Storage Rule, and therefore should be rejected as outside the scope of this proceeding pursuant to 10 C.F.R. §§ 2.335 and 2.309(f)(1).⁵²

The argument raised by the proposed contention was also raised in comments on the GEIS for the Continued Storage Rule. For example, some commenters argued that the NRC must assess the availability of sufficient and safe spent fuel disposal capacity when it is necessary. Those comments were rejected by the NRC on their merits.⁵³ Thus, the proposed contention constitutes a challenge to the content of the Continued Storage Rule.

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.”⁵⁴

⁴⁹ *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).

⁵⁰ 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).

⁵¹ Motion at 2-4.

⁵² *See Exelon Generation Co.* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 76 NRC 377, 384 (2012).

⁵³ 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.

⁵⁴ 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

Intervenors have not requested a waiver, much less satisfied the stringent requirements governing such a waiver request. In order to seek waiver of a rule in a particular adjudicatory proceeding, a petitioner must submit a petition pursuant to 10 C.F.R. § 2.335. The requirements for a Section 2.335 petition are as follows:

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.⁵⁵

Further, such a 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.”⁵⁶ Intervenors have not submitted such an affidavit.

In accordance with NRC precedent, a Section 2.335 petition “can be granted only in unusual and compelling circumstances.”⁵⁷ The Commission decision in the *Millstone* case states the test for Section 2.335 petitions, under which the petitioner must demonstrate that it satisfies each of the following four criteria:

(i) the rule’s strict application “would not serve the purposes for which [it] was adopted”; (ii) the movant has alleged “special circumstances” that were “not considered, either explicitly or by

[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.

⁵⁵ 10 C.F.R. § 2.335(b).

⁵⁶ *Id.* (emphasis added).

⁵⁷ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988), *aff’d*, CLI-88-10, 28 NRC 573, 597 (1988), *recons. denied*, CLI-89-3, 29 NRC 234 (1989) (citation omitted).

necessary implication, in the rulemaking proceeding leading to the rule sought to be waived”; (iii) those circumstances are “unique” to the facility rather than “common to a large class of facilities”; and (iv) a waiver of the regulation is necessary to reach a “significant safety problem.”⁵⁸

If the petitioner fails to satisfy any of the factors of the four-part test, then the matter may not be litigated, and “the presiding officer may not further consider the matter.”⁵⁹ Even if they had submitted a waiver request, Intervenors have not identified any special circumstances with respect to Davis-Besse license renewal that would justify waiver of the Continued Storage Rule. Furthermore, given the generic nature of the proposed contention, there is no basis for any argument that special circumstances exist in this proceeding. Indeed, Intervenors concede that their “concerns are generic in nature.”⁶⁰

In summary, 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). Intervenors have not submitted a waiver request pursuant to 10 C.F.R. § 2.335(b), much less satisfied the operative test for the waiver of a rule, as established in *Millstone*. Nor could they, given the clear lack of any special circumstances that would support a waiver of the rule in this proceeding.

⁵⁸ *Millstone*, CLI-05-24, 62 NRC at 559-60 (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989)); see *Limerick*, CLI-13-7, 78 NRC at 207-09 (discussing the four *Millstone* factors); *Seabrook*, CLI-88-10, 28 NRC at 597; see also *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC at 444-49 (denying intervenor’s waiver request, filed contemporaneously with petition to intervene, for failure to show special circumstances at Diablo Canyon requiring site-specific analysis of the environmental impacts of spent fuel pool storage).

⁵⁹ 10 C.F.R. § 2.335(c); see also *Millstone*, CLI-05-24, 62 NRC at 560 (“The use of ‘and’ in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four* factors must be met.”).

⁶⁰ Suspension Petition at 3.

C. The Proposed Contention Does Not Satisfy Criterion (iv) of 10 C.F.R. § 2.309(f)(1)

The proposed contention does not satisfy Criterion (iv) of 10 C.F.R. § 2.309(f)(1) because the issues raised by the proposed contention are not material to the findings that the NRC must make in this proceeding.

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

Intervenors assert that “[t]he NRC has consistently interpreted the AEA to require the agency to make waste confidence safety findings regarding the safety of ultimate spent fuel disposal before issuing a reactor license.”⁶¹ Contrary to that claim, the AEA includes no such requirement, and the Commission has concluded that there is none.

Intervenors quote Section 182a. of the AEA,⁶² 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 Intervenors’ argument.⁶³

The same argument advanced by Intervenors here was raised more than 35 years ago and 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 obligated to make a “definitive” finding that safe methods of high-level waste disposal are available before it can issue a reactor operating license.⁶⁴ In rejecting that argument, the

⁶¹ Motion at 2; *see also id.* at 3-12.

⁶² *See id.* at 4 n.11, 5-6. Intervenors 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* Motion at 6-7, 12. However, Intervenors 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.

⁶³ *See* AEA Section 182a., 42 U.S.C. § 2232(a).

⁶⁴ *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).

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 regarding 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.*⁶⁵

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 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*

⁶⁵ *Id.* at 34,391-392 (footnotes omitted; emphasis added).

*wastes can be disposed of safely prior to the issuance of an operating for a reactor.*⁶⁶

In summary, based on its review of the AEA, its 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.”⁶⁷ This conclusion squarely refutes Intervenor’s 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.⁶⁸

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 that high-level radioactive wastes can be permanently disposed of safely.”⁶⁹ Significantly, the

⁶⁶ *Id.* at 34,393 (emphasis added).

⁶⁷ *Id.* at 34,392.

⁶⁸ *NRDC v. NRC*, 582 F.2d at 171.

⁶⁹ *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.

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 Intervenors.⁷⁰ No subsequent Court or Commission decision has questioned this conclusion and Intervenors 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.⁷¹ In response, the NRC reiterated the conclusions from the *NRDC* case 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 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.⁷²

⁷⁰ 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.

⁷¹ Waste Confidence Decision Update, 75 Fed. Reg. at 81,044.

⁷² *Id.* at 81,045.

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

First, Intervenor argues 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.⁷³ 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.⁷⁴ 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.”⁷⁵ 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 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.⁷⁶

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

⁷³ Motion at 10.

⁷⁴ *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.

⁷⁵ *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.

⁷⁶ Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,393 (emphasis added).

Second, Intervenor's 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.”⁷⁷ 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 the *NRDC* case. Significantly, *NRDC* was decided years before the Commission issued its 1984 findings in the Waste Confidence Decision.⁷⁸ 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 the *NRDC* case 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, Intervenor's point to the subsequent Court decisions in *Minnesota v. NRC*⁷⁹ and *New York v. NRC*,⁸⁰ arguing that those cases are relevant to the licensing of nuclear power plants. 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 under the National Environmental Policy Act (“NEPA”) 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

⁷⁷ Motion at 11-12.

⁷⁸ Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,694 (Aug. 31, 1984).

⁷⁹ *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

⁸⁰ *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

at the plant beyond those dates.⁸¹ 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 Did Not Contain "AEA-Required Safety Findings"

Intervenors 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. Intervenors 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.⁸²

Intervenors 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 Confidence Decision and Rule are not licensing decisions or determinations.⁸³ 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."⁸⁴

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

⁸¹ *Minnesota v. NRC*, 602 F.2d at 418.

⁸² Motion at 1-5, 11.

⁸³ See Waste Confidence Decision Update, 75 Fed. Reg. at 81,044.

⁸⁴ *Id.* at 81,044-045.

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.⁸⁵

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.⁸⁶ 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.

Intervenors 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 AEA.”⁸⁷ However, *New York v. NRC* was a NEPA case, not an AEA case. Furthermore, the NRC’s brief in that case provides no basis for that proposition, and the Court never mentioned the AEA in its decision. In light of the lack of relevance of Intervenors’ statement to that case and the absence of any 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.”⁸⁸

⁸⁵ Continued Storage Rule, 79 Fed. Reg. at 56,241-242 (emphasis added). In this regard, Intervenors’ reliance on *New York v. NRC*, 681 F.3d at 474, is misplaced. The “generalized findings of reasonable confidence” to which Intervenors refer (Suspension Petition at 9) are fundamentally environmental findings made as part of the Waste Confidence proceedings, not AEA-mandated “predictive safety findings.” *Id.*

⁸⁶ Continued Storage Rule, 79 Fed. Reg. at 56,243.

⁸⁷ Motion at 8.

⁸⁸ *Id.* at 5 n.17.

However, Intervenor 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.⁸⁹

3. The Commission Did Not Abandon Pertinent Waste Confidence Environmental Findings in Its Continued Storage Rule and GEIS

Intervenor claim that the Commission has effectively abandoned its previous Waste Confidence findings.⁹⁰ That claim is substantively incorrect and, indeed, 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.⁹¹ 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.”⁹² 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.⁹³ Thus, Intervenor wrongly suggest that the NRC opted not to

⁸⁹ GEIS at D-9.

⁹⁰ See Motion at 3 (“In the Continued Storage Rule recently issued by the NRC on remand from the Court’s decision, the NRC chose not to replace the vacated Waste Confidence findings.”); see also *id.* at 11-12.

⁹¹ 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.”).

⁹² *Id.* at 56,244.

⁹³ 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.

“replace” the substantive findings made as part of its previous Waste Confidence proceedings in connection with its latest rulemaking.⁹⁴

Furthermore, to the extent that Intervenors 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,⁹⁵ and that practice has been upheld by the courts.⁹⁶

4. Summary Regarding Failure of Proposed Contention to Satisfy Criterion (iv)

In summary, the proposed contention is predicated on several 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 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 raises an issue that is not material and should be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(iv).⁹⁷

D. The Proposed Contention Does Not Satisfy Criterion (iii) of 10 C.F.R. § 2.309(f)(1)

The proposed contention does not satisfy Criterion (iii) of 10 C.F.R. § 2.309(f)(1) because the issue raised by the proposed contention is not within the scope of this proceeding.

⁹⁴ See Motion at 3.

⁹⁵ 42 Fed. Reg. at 34,393.

⁹⁶ *NRDC v. NRC*, *supra*.

⁹⁷ As discussed in this section, 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 reaches conclusions that are similar to—and, in fact, stronger than—the conclusions in the Waste Confidence Decision. For these reasons, the proposed contention is not based on materially different information that was previously unavailable. Therefore, the proposed contention should be viewed as untimely under 10 C.F.R. § 2.309(c).

Contentions are necessarily limited to issues that are germane to the specific application pending before the presiding officer.⁹⁸ The Commission has stated that “[a]djudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff’s review) necessarily examines only the questions our safety rules make pertinent.”⁹⁹ In this regard, the Commission has specifically limited its license renewal safety review to the matters specified in 10 C.F.R. §§ 54.21 and 54.29, which focus on the management of aging of certain systems, structures and components, and the review of time-limited aging analyses.¹⁰⁰ Indeed, the safety standards applicable to a license renewal proceeding are specified in 10 C.F.R. § 54.29(a). Those standards pertain to:

(1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under § 54.21(a)(1); and

(2) time-limited aging analyses that have been identified to require review under § 54.21(c).

Thus, the “potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs” are the issues that define the scope of the safety review in license renewal proceedings.¹⁰¹

The issues raised by the proposed contention do not pertain to any of those safety issues that fall within the scope of a license renewal proceeding. To the contrary, the proposed contention addresses whether the AEA requires “currently valid findings of confidence or

⁹⁸ See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998); see also *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) (holding that any contention that falls outside the specified scope of the proceeding must be rejected).

⁹⁹ *Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 10 (2001); see also Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,482 n.2 (May 8, 1995).

¹⁰⁰ See *Turkey Point*, CLI-01-17, 54 NRC at 7-8; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 (2002).

¹⁰¹ *Turkey Point*, CLI-01-17, 54 NRC at 7. Detrimental aging effects can result from, for example, metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage. See *id.* at 7-8.

reasonable assurance that the hundreds of tons of highly radioactive spent fuel that will be generated during any reactor's . . . 20-year license renewal term can be safely disposed of in a repository."¹⁰² It further claims that "[t]he 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."¹⁰³ These issues do not relate to the potential detrimental effects of aging as specified in 10 C.F.R. Part 54.

Accordingly, the proposed contention is outside the scope of this proceeding and should be dismissed for failing to satisfy 10 C.F.R. § 2.309(f)(1)(iii).

E. The Proposed Contention Does Not Satisfy Criterion (vi) of 10 C.F.R. § 2.309(f)(1)

The proposed contention does not satisfy Criterion (vi) of 10 C.F.R. § 2.309(f)(1) because it does not show that a genuine dispute exists on a material issue of law or fact.

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.¹⁰⁴

¹⁰² Motion at 3-4.

¹⁰³ *Id.* at 4 (citations omitted).

¹⁰⁴ Continued Storage Rule, 79 Fed. Reg. at 56,244.

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:

- 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.”¹⁰⁵

Contrary to the allegations in the proposed contention, these conclusions are not deficient. First, Intervenor’s argue that the conclusions in the GEIS and the SOC are insufficient because they are made “without any level of assurance.”¹⁰⁶ 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 conclusions in the GEIS are based in part upon information that was not available for the last update of the Waste

¹⁰⁵ *Id.* at 56,254.

¹⁰⁶ Motion at 13.

Confidence Decision, including information developed during NRC’s review of the Yucca Mountain repository and by the Blue Ribbon Commission.

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.¹⁰⁷ 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.¹⁰⁸

In summary, the proposed contention is based upon a mischaracterization of the rulemaking record for the Continued Storage Rule. Contrary to the arguments of Intervenors, the rulemaking record for the 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.¹⁰⁹ 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.

¹⁰⁷ *Id.* § III.B.3.

¹⁰⁸ *See id.* at 13 n.47.

¹⁰⁹ *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).

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

A. The Suspension Petition Relies Entirely on Erroneous Legal and Factual Premises

As a threshold matter, the Suspension Petition rests on several patently erroneous factual premises that render the Petition devoid of any foundation in law or in fact. This fact alone warrants dismissal of the Suspension Petition.

First, Intervenors assert that “the NRC has consistently interpreted the AEA to require that at the time of reactor licensing, the NRC must make Waste Confidence safety findings regarding the safety of ultimate spent fuel disposal.”¹¹⁰ As discussed above in Section III.C.1, the AEA includes no such requirement, and the Commission has concluded that there is none.¹¹¹ This same argument was rejected by the NRC and the courts more than 35 years ago.¹¹²

Second, Intervenors 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.¹¹³ As discussed above in Section III.C.2, Intervenors are mistaken. There simply is no factual basis for the central premise underlying the Suspension Petition; *i.e.*, that the Commission’s previous Waste Confidence Decision Update contained “safety” findings related to the feasibility and safety of spent fuel disposal.

¹¹⁰ Suspension Petition at 6.

¹¹¹ In *Minnesota v. NRC*, the Court stated that “Congress has chosen to rely on the NRC’s (and its predecessor’s) assurances of confidence that a solution will be reached,” and that staying the license amendments necessary for re-racking “would effectively shut down the plants”—a result the Court found unnecessary under the circumstances. *Minnesota*, 602 F.2d at 418-19.

¹¹² Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,392 (concluding 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”); *NRDC v. NRC*, 582 F.2d at 175 (holding 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 that high-level radioactive wastes can be permanently disposed of safely”).

¹¹³ Suspension Petition at 7.

Third, as discussed above in Section III.C.3, Intervenor’s claim¹¹⁴ that the Commission has effectively abandoned its previous Waste Confidence findings is substantively incorrect and, indeed, is contrary to Commission statements in the SOC for the Continued Storage Rule. Section B.2 of the GEIS includes an analysis and conclusions related to the technical feasibility of a repository. Thus, Intervenor suggests,¹¹⁵ incorrectly, 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.

In summary, the Suspension Petition is predicated on several faulty premises. As none of those premises is correct, the Suspension Petition is unwarranted and should be summarily rejected.

B. The Suspension Petition Does Not Provide an Adequate Basis to Suspend the NRC’s Davis-Besse License Renewal Decision

The Suspension Petition also should be rejected for failing to include adequate bases and justification for suspension of the Davis-Besse license renewal decision. Conspicuously, Intervenor fails even to identify—much less satisfy—the well-established criteria that govern requests to suspend licensing actions. That failure is especially egregious given Intervenor’s representation by counsel and the Commission’s explicit application of those criteria in a recent Memorandum and Order (CLI-14-07) rejecting another suspension request filed by the same petitioners.¹¹⁶

In *Fermi*, the Commission reiterated that the suspension of licensing proceedings or decisions is a “drastic action” that is warranted only when there are “immediate threats to public

¹¹⁴ See *id.* (“In the final Rule recently issued by the NRC on remand from the Court’s decision, the NRC chose not to replace the vacated Waste Confidence findings.”).

¹¹⁵ See *id.*

¹¹⁶ See *DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3)*, CLI-14-07, 80 NRC ___, slip op. at 8-11 (July 17, 2014).

health and safety” or other compelling reasons.¹¹⁷ 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.”¹¹⁸ As demonstrated below, none of these criteria has been satisfied here.

1. Proceeding with Issuance of the Renewed License Will Not Jeopardize Public Health and Safety

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 repository¹¹⁹—issues that are separate and distinct from any issue material to issuance of the Davis-Besse renewed license. The ultimate disposal of any spent fuel generated by Davis-Besse 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. Intervenors thus fail to show that issuance of the renewed license, before resolution of the issues they raise, poses “an imminent risk to public health and safety.”¹²⁰

Furthermore, as demonstrated above, Intervenors’ claims regarding the need for “Waste Confidence safety findings” are without merit. The Commission has made clear that it “will

¹¹⁷ *Id.* at 8 (quoting *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011)).

¹¹⁸ *Callaway*, CLI-11-5, 74 NRC at 158-59 (quoting *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001)). NRC regulations also address stays in 10 C.F.R. §§ 2.342 and 2.1213, but those regulations are not applicable in this situation. Even if these regulations did apply, Intervenors have not addressed the factors for a stay. For example, Intervenors have not demonstrated that they will prevail in this proceeding or that they will be irreparably injured if the licensing decisions were to move forward.

¹¹⁹ 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).

¹²⁰ See *Callaway*, CLI-11-5, 74 NRC at 163, 166.

make the safety finding with respect to SNF disposal envisioned by [Intervenors] in the context of a licensing proceeding for a geologic repository.”¹²¹ No such finding is required as part of initial licensing or license renewal for a nuclear power plant.

Finally, Intervenors incorrectly claim that the NRC has not considered the “technical feasibility” of spent fuel disposal.¹²² In fact, the NRC’s Continued Storage Rule and GEIS indicate precisely the opposite. As stated in the SOC, the GEIS “does address the technical feasibility of a repository in Appendix B of the GEIS and concludes that a geologic repository for spent fuel is technically feasible,” and that the same analysis applies to the feasibility of geologic disposal for high-level waste.¹²³ As discussed in GEIS Section B.2.1, “the consensus within the scientific and technical community engaged in nuclear waste management is that safe geologic disposal is achievable with currently available technology.”¹²⁴

Therefore, Intervenors have presented no information or argument to suggest that the first *Callaway* criterion is satisfied; *i.e.*, that issuance of the Davis-Besse renewed license (or any other nuclear power plant licensing action for that matter) will jeopardize public health and safety.

2. Suspending the Issuance of the Davis-Besse Renewed License Would Frustrate Fair and Efficient Decisionmaking

The Suspension Petition fares no better with respect to the second *Callaway* criterion. The suspension of licensing actions runs counter to the Commission’s long-standing commitment to efficient and expeditious processing of applications and associated hearings.¹²⁵ The unnecessary postponement of licensing adjudications and decisions “contravenes the

¹²¹ Waste Confidence Decision Update, 75 Fed. Reg. at 81,045.

¹²² Suspension Petition at 4, 9.

¹²³ Continued Storage Rule, 79 Fed. Reg. at 56,250.

¹²⁴ *Id.* at 56,251.

¹²⁵ See, e.g., *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 18, 24 (1998).

Commission’s interest in ‘regulatory finality’ and ‘sound case management.’”¹²⁶ Indeed, staying licensing actions in these circumstances would frustrate—not advance—the Commission’s objective of promoting expeditious decision-making and regulatory certainty.¹²⁷

As discussed above, the issues raised by Intervenors relate to the disposal of spent fuel in a geologic repository that would not occur for many years, and which would be the subject of a separate NRC licensing proceeding. Although the siting and licensing of such a facility are complex endeavors that involve many variables, the SOC for the Continued Storage Rule plainly reflects the Commission’s view that the deployment of a repository is technically feasible within the timeframes discussed therein.¹²⁸ Thus, suspending this or other NRC licensing decisions would not advance fair and efficient decision making.

Furthermore, in addition to the Suspension Petition, Intervenors have submitted a proposed contention that raises the same issue; *i.e.*, the alleged need to reinstate the Waste Confidence “safety findings.” The Commission will address the admissibility of the proposed contention as part of the ongoing adjudicatory proceeding. Accordingly, no final action on the renewed license can occur until the NRC sufficiently addresses all pending contentions, including Intervenors’ pending proposed contention. Thus, suspension of a licensing decision is entirely unnecessary.

¹²⁶ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390-91 (2001) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 24); *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001)).

¹²⁷ See *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC 1, 4 (2011) (“Absent extraordinary cause, however, seldom do we interrupt licensing reviews or our adjudications—particularly by an indefinite or very lengthy stay as contemplated here—on the mere possibility of change. Otherwise, the licensing process would face endless gridlock.”).

¹²⁸ See Continued Storage Rule, 79 Fed. Reg. at 56,251.

3. Moving Forward with the Renewed License Will Not Hamper Implementation of Any Potential Rule or Policy Changes

Intervenors also fail to explain why suspension of the license renewal decision is necessary under the third *Callaway* criterion, which concerns the effect of the licensing action on the NRC's ability to implement possible rule or policy changes. There is time for the Commission to review the proposed contention and to determine whether any actions are needed, without the need to suspend licensing at this time.¹²⁹ More fundamentally, Intervenors provide no reason to conclude that issuance of the renewed license 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).

In summary, Intervenors have failed to demonstrate that suspending the Davis-Besse license renewal decision is necessary to protect the public health and safety, facilitate fair and efficient decisionmaking, or ensure implementation of any pertinent rule or policy changes. Accordingly, the Suspension Petition must be rejected.

V. CONCLUSION

As demonstrated above, the proposed contention should be rejected in its entirety. First, the proposed contention constitutes an impermissible challenge to the Continued Storage Rule under 10 C.F.R. § 2.335. Second, the proposed contention is based on faulty assertions, and as such, does not satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).

Additionally, suspending the NRC's final Davis-Besse license renewal decision is an extraordinary remedy. Intervenors have not substantiated that such extraordinary relief is

¹²⁹ See *Callaway*, CLI-11-5, 74 NRC at 174-75; *Petition to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399-400 (2008); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 277 (2003).

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.

Respectfully submitted,

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

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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)	
FIRSTENERGY NUCLEAR OPERATING COMPANY)	Docket No. 50-346-LR
(Davis-Besse Nuclear Power Station, Unit 1))	October 31, 2014
)	

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of “FirstEnergy Nuclear Operating Company 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.

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