UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	October 31, 2014

ENTERGY'S COMBINED ANSWER TO RIVERKEEPER'S PROPOSED NEW CONTENTION RK-10 AND PETITION TO SUSPEND FINAL LICENSE RENEWAL DECISION PENDING ISSUANCE OF WASTE CONFIDENCE "SAFETY" FINDINGS

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I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.309(i) and 2.323(c) and the Nuclear Regulatory Commission's ("NRC" or "Commission") October 7, 2014 Order,[1] Entergy Nuclear Operations, Inc. ("Entergy") files this combined Answer opposing both (1) the motion for leave to file a new contention ("Motion"), and (2) the petition to suspend the Commission's final license renewal decision ("Suspension Petition") filed by Riverkeeper, Inc. ("Riverkeeper") on October 3, 2014.[2] Riverkeeper requests that the Commission admit proposed new contention RK-10 ("Proposed Contention" or "RK-10") and suspend the issuance of the renewed operating licenses for Indian Point Units 2 and 3 ("IP2" and "IP3" or "Indian Point") due to the NRC's alleged failure to make "waste confidence safety findings" purportedly required by the Atomic Energy Act of 1954, as

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

2 *See* Riverkeeper's Consolidated Motion for Leave to File a New Contention and New Contention RK-10 Concerning the Absence of Required Waste Confidence Safety Findings (Oct. 3, 2014) ("Motion"), *available at* ADAMS Accession No. ML1476A505; Petition to Suspend Final Decision in Indian Point Relicensing Proceeding Pending Issuance of Waste Confidence Safety Findings (Oct. 3, 2014) ("Suspension Petition"), *available at* ADAMS Accession No. ML14276A506. Riverkeeper is among several environmental organizations that filed essentially identical contentions and petitions in numerous ongoing NRC licensing proceedings.

amended ("AEA").[3] Specifically, Riverkeeper asserts that the AEA requires the Commission to issue "predictive safety findings" regarding the safety of *permanent* spent nuclear fuel disposal in a repository before issuing any reactor licensing decision.[4] It further claims that the NRC's alleged failure to incorporate generic safety findings in its final Continued Storage Rule[5] divests the agency of any legal basis for issuing initial or renewed operating licenses for any reactor that rely on the Continued Storage Rule.[6] Riverkeeper thus contends 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]

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, as that rule is neither intended nor required to include AEA-based safety findings. To challenge a rule, Riverkeeper must submit a waiver petition pursuant to 10 C.F.R. § 2.335(b), but it has not done so here.[8] That alone is grounds for dismissal of the Proposed Contention.

Riverkeeper also inaccurately characterizes the Commission's Continued Storage Rule and associated Generic Environmental Impact Statement ("GEIS").[9] In doing so, Riverkeeper erroneously claims that: (1) the AEA requires the NRC to make Waste Confidence "safety" findings related to permanent spent fuel disposal at the time of reactor licensing, and (2) the NRC's previous Waste Confidence rulemakings included safety findings that the Commission has

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[3] Motion at 2, 5, 7, 10; Suspension Petition at 1, 3, 5, 6.

[4] Motion at 3-4; Suspension Petition at 5.

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

[6] Motion at 12; Suspension Petition at 1, 5-6.

[7] Suspension Petition at 6.

[8] *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).

[9] NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report, Vols. 1 & 2 (Sept. 2014) ("GEIS").

chosen not replace.[10] As neither assertion 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.

Additionally, the Proposed Contention is procedurally deficient because it does not satisfy the Commission's criteria in 10 C.F.R. § 2.309(c) for late-filed contentions. Specifically, RK-10 is not based on any information that is new and materially different from information available to Riverkeeper long ago. Indeed, the specific issue raised by Riverkeeper in RK-10 was resolved by the Commission and the courts over 35 years ago.

The Suspension Petition also should be summarily rejected, as it relies on the same flawed premises as the Proposed Contention.[11] Further, Riverkeeper entirely ignores the Commission's well-established criteria for evaluating suspension requests. In any event, a reasoned application of those criteria to the present facts reveals no basis for granting the extraordinary relief sought by Riverkeeper, which has identified no special circumstances unique to Indian Point.

II. BACKGROUND

A. Status of the Indian Point License Renewal Proceeding

The Indian Point license renewal application was docketed in 2007 and remains under review by the NRC Staff.[12] On November 27, 2013, the Atomic Safety and Licensing Board ("Board") issued a Partial Initial Decision (LBP-13-13) in the Indian Point license renewal proceeding.[13] Several parties, including Entergy and the NRC Staff, filed petitions for review of

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[10] *See* Motion at 2-4; Suspension Petition at 3-4.

[11] *Cf. Fermi*, CLI-14-09, slip op. at 3 (noting that "the petition to suspend licensing decisions and the proposed contention are inextricably linked"). It also bears emphasis that Riverkeeper asks the Commission to suspend its final license renewal decision, not the NRC Staff's ongoing review. But if the Proposed Contention is admitted, then the concurrently-filed Suspension Petition is irrelevant, because renewed licenses presumably would not issue until the contested hearing ends. Conversely, if the Proposed Contention is denied as inadmissible, then the Suspension Petition also is irrelevant for the same reason the contention is objectionable. Therefore, there is no independent legal need or basis for the Suspension Petition.

[12] IP2 is now operating in timely renewal under 10 C.F.R. § 2.109(b). The initial operating license for IP3 is due to expire on December 12, 2015.

[13] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-13-13, 78 NRC 246 (2013), *petitions for review pending* (petitions filed on February 14, 2014). In LBP-13-13, the Board resolved

certain portions of the Board's Partial Initial Decision in February 2014.[14] Those petitions are pending with the Commission.

There are three remaining admitted contentions for which hearings have not been held.[15] The Board has deferred the conduct of hearings on those contentions until the NRC Staff issues Supplement 2 to its safety evaluation report later this year.[16] Thus, the Track 2 hearings are not expected to occur until 2015. Additionally, two proposed contentions (CW-SC-4 and NYS-39/RK-EC-9/CW-EC-10) related to continued on-site spent fuel storage are pending before the Board. Riverkeeper filed its Motion with the Proposed Contention and Suspension Petition on October 3, 2014. Riverkeeper provided the following statement of its Proposed Contention:

> The NRC lacks a lawful basis under the [AEA] for renewing the operating licenses of Indian Point Units 2 and 3 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 the 20-year license renewal terms proposed in this proceeding for Indian Point nuclear Units 2 and 3 can be safely disposed of in a repository. The NRC must make and support these predictive safety findings in every reactor licensing decision, including in the Indian Point license renewal proceeding decision, in order to fulfill its statutory obligation under

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all nine remaining "Track 1" contentions. The parties settled admitted contentions NYS-24 (Containment Concrete Integrity) and RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks to Groundwater) before the Track 1 hearings. Also, on July 14, 2011, the Board issued LBP-11-17, granting summary disposition on Contention NYS-35/36 (implementation obligations and costs for severe accident mitigation alternatives ("SAMAs") identified as cost-beneficial) in favor of New York. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-11-17, 74 NRC 11 (2011), *petition for interlocutory review denied without prejudice*, CLI-11-14, 74 NRC 801 (2011), *petitions for review pending* (filed on February 14, 2014).

[14] *See* Applicant's Petition for Review of Board Decisions Regarding Contentions NYS-8 (Electrical Transformers), CW-EC-3A (Environmental Justice), and NYS-35/36 (SAMA Cost Estimates) (Feb. 14, 2014), *available at* ADAMS Accession No. ML14045A332; NRC Staff's Petition for Commission Review of LBP-13-13 In Part (Contentions NYS-8 and CW-EC-3A), and LBP-11-17 (Contention NYS-35/36) (Feb. 14, 2014), *available at* ADAMS Accession No. ML14045A088; State of New York Petition for Review of Atomic Safety and Licensing Board Decision LBP-13-13 With Respect to Consolidated Contention NYS-12C (Feb. 14, 2014), *available at* ADAMS Accession No. ML14045A414; Hudson River Sloop Clearwater, Inc. Petition for Review (Feb. 14, 2014), *available at* ADAMS Accession No. ML14045A417.

[15] Those contentions include NYS-25 (aging management program for reactor pressure vessels and internals), NYS-26B/RK-TC-1A (aging management program for metal fatigue/cumulative usage factors greater than 1.0), and NYS-38 (adequacy of license renewal commitments).

[16] *See* NRC Staff's Revised 32nd Status Report in Response to the [Board] Order of February 16, 2012 at 2-3 (Oct. 1, 2014).

> the AEA to protect public health and safety from the risks posed by irradiated reactor fuel generated during the reactor's license term.[17]

Thus, unlike the two pending contentions (CW-SC-4 and NYS-39/RK-EC-9/CW-EC-10) related to on-site spent fuel storage, newly-proposed contention RK-10 relates to permanent disposal of spent fuel in a federal repository. The Commission issued a Memorandum and Order (CLI-14-09) on October 7, 2014 to consolidate the issues before it in this and other proceedings and to establish a uniform briefing schedule.[18] Entergy has filed this Answer in accordance with that schedule.

B. History of the Waste Confidence Decision and Continued Storage Rule

Riverkeeper submitted the Proposed Contention in response to the NRC's recent issuance of the Continued Storage Rule, which replaces the NRC's 2010 Waste Confidence Decision Update and Temporary Storage Rule.[19] The history of the NRC's waste confidence policymaking and rulemaking activities is described in detail in Section I of the Statement of Considerations ("SOC") for the Continued Storage Rule, published by the NRC in the *Federal Register* on September 19, 2014.[20]

As discussed in Section I of the SOC, 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 to withhold actions on reactor licenses until such an affirmative determination was made.[21] The U.S. Court of

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17 Motion at 3-4 (citations omitted).

18 *See Fermi*, CLI-14-09, slip op. at 3.

19 *See* Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010) ("Temporary Storage Rule").

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

21 *Id.*

Appeals for the Second Circuit affirmed the NRC's denial of the rulemaking petition in *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978).

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 but remanded to the Commission questions about whether an offsite storage solution would be available for spent fuel following completion of reactor operation and, if not, whether spent fuel could be stored safely onsite beyond that time.[22] 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.[23] The 1984 Waste Confidence Decision included five findings. Findings 1 and 2, which are most relevant to the Proposed Contention, stated as follows:

> 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.[24]

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

23 *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).

24 Final Waste Confidence Decision, 49 Fed. Reg. at 34,658. The other three findings relate to the Commission's findings of reasonable assurance that: (1) high-level radioactive waste and spent fuel will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all high-level radioactive waste and spent fuel; (2) if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating license at that reactor's spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations ("ISFSIs"); and (3) safe independent onsite or offsite spent fuel storage will be made available if such storage capacity is needed.

Based on these findings, 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.[25]

The Commission first updated the Waste Confidence Decision and Temporary Storage Rule in 1990[26] and then again in 2010.[27] 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.[28]

The Commission also updated 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.[29]

Four States, an Indian community, and several environmental groups (including Riverkeeper) 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 2010 Waste Confidence Decision Update and Temporary Storage Rule.[30] The Court identified deficiencies related to:

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

26 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).

27 Temporary Storage Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

28 Waste Confidence Decision Update, 75 Fed. Reg. at 81,038. The 2010 update revised Finding 2 (as stated above) but not Finding 1. It also revised Finding 4 to reflect the Commission's finding of reasonable assurance that, if necessary, spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) in a combination of storage in a spent fuel storage basin and either onsite or offsite ISFSIs.

29 Temporary Storage Rule, 75 Fed. Reg. at 81,037.

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

(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.[31]

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.[32]

The Commission subsequently approved the final Continued Storage Rule and the associated GEIS on August 26, 2014.[33] The final Continued Storage Rule was published in the *Federal Register* on September 19, 2014, and became effective on October 20, 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.[34] 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."[35]

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31 *Id.* at 477-82.

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

33 *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).

34 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.").

35 *Id.* at 56,244.

III. THE PROPOSED CONTENTION SHOULD BE REJECTED

As discussed below, the Proposed Contention is both substantively and procedurally deficient. As a result, RK-10 fails to satisfy both the NRC's contention admissibility and timeliness requirements and should be rejected in its entirety.

A. The Proposed Contention Does Not Satisfy the NRC's Admissibility Requirements

1. Legal Standards for Contentions

In addition to being timely, a 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." In addition, 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.[36]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[37] The NRC's contention admissibility rules are

[36] *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.

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

"strict by design."[38] Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[39]

2. The Proposed Contention Constitutes an Impermissible Challenge to the Continued Storage Rule

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.[40] That argument impermissibly challenges the adequacy of the Continued Storage Rule because, contrary to Riverkeeper's claim, the rule is neither intended nor required to include AEA-based "safety findings." Under 10 C.F.R. § 2.335(a), a proposed contention that challenges an NRC rule is outside the scope of the proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[41] As Riverkeeper has not submitted a waiver petition or otherwise requested a waiver of the rule, the Proposed Contention must be rejected as raising issues that are outside the scope of this proceeding.[42]

Notably, the Commission spoke directly to the issues raised in Riverkeeper's instant filings in the SOC for the Continued Storage Rule, wherein it explained (albeit in the context of continued on-site storage of spent fuel) that the rule and GEIS fulfill the NRC's National

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38 *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).

39 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).

40 Motion at 2-4.

41 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"); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999).

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

Environmental Policy Act ("NEPA") obligations rather than its AEA-related responsibilities. The Commission emphasized that "in adopting revised 10 CFR 51.23 and publishing the GEIS, *the NRC is not making a safety determination under the AEA* to allow for the continued storage of spent fuel."[43] It also noted that AEA safety determinations are made in connection with the licensing of specific facilities.[44] Finally, the Commission stated that "there is not any legal requirement for the NRC to codify a generic safety conclusion in the rule text."[45]

In responding to public comments on the draft GEIS that closely parallel Riverkeeper's arguments in RK-10,[46] the NRC Staff also addressed these crucial points.

> The comments conflate reasonable assurance findings made in past waste confidence proceedings with AEA safety determinations made in the licensing process. The NRC typically refers to these safety findings as "reasonable assurance" findings (see Section 185 of the AEA), but for the purposes of this discussion they will be referred to as safety determinations that the Commission makes in licensing facilities and activities. These AEA safety determinations should not be confused with environmental analysis under NEPA. While specific reasonable assurance findings were historically included in the waste confidence proceeding, *those findings are not appropriate for this GEIS and are not necessary*. Circumstances have evolved considerably since the inception of the waste confidence proceeding in the early 1980s. Since then, decades-long experience with the storage of spent fuel either in spent fuel pools or ISFSIs has demonstrated that spent fuel can be safely stored beyond the operating life of a reactor so long as that storage remains under the licensing and inspection processes currently in place.[47]

The Staff further explained that NRC regulations governing the licensing of storage facilities *and the licensing of a geologic repository* establish criteria and standards by which these facilities must

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43 Continued Storage Rule, 79 Fed. Reg. at 56,255 (emphasis added).

44 *Id.*

45 *Id.*

46 Specifically, several commenters asserted that that the NRC is required under the AEA to make reasonable assurance "safety" findings regarding the safety of spent fuel storage after the licensed life of the reactor and the availability of a permanent repository for spent fuel disposal. Another commenter argued that without these safety findings (which it claimed could not be part of the GEIS), the NRC has no authority to issue licenses or license renewals. *See* GEIS, Vol. 2, App. D at D-28 to D-29.

47 *Id.* at D-29 to D-30 (emphasis added).

be designed, constructed, and operated, and that "[i]mplicit in these regulations is the confidence that they will be complied with and that sufficient enforcement tools will be available to prevent and address noncompliance."[48]

In short, both the SOC and the GEIS for the Continued Storage Rule explain that the rule is not intended or required to include AEA-based "safety findings" regarding the continued on-site storage of spent fuel or the permanent disposal of spent fuel in a repository, as such findings are made in the context of site- or facility-specific licensing proceedings.[49] Thus, they reinforce the conclusion that RK-10 inappropriately challenges the adequacy of the Continued Storage Rule, contrary to the requirements of 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).[50]

3. 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 it raises issues that are not material to the findings that the NRC must make in this license renewal proceeding.

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48 *Id.* at D-31.

49 As discussed further in Section III.A.5, *infra,* Section B.2 of GEIS Appendix B presents the NRC's 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. However, those conclusions are not (nor were they intended to be) AEA-based safety findings.

50 Pursuant to 10 C.F.R. § 2.335(b), a party can request that the Commission waive the application of a specified NRC rule or regulation, but Riverkeeper has not done so here. Further, a Section 2.335 waiver petition "can be granted only in unusual and compelling circumstances." *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). Under Commission precedent, a waiver petition must demonstrate the following: (1) the rule's strict application would not serve the purpose for which it was adopted; (2) there are special circumstances that were not considered, explicitly or implicitly, in the rulemaking proceeding; (3) those circumstances are "unique" to the facility and not common to a large class of facilities; and (4) a waiver is necessary to reach a significant safety problem. *See Limerick*, CLI-13-7, 78 NRC at 207-09 (discussing the four "Millstone" factors delineated in *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551 (2005)).

a. 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

Riverkeeper asserts that "[t]he NRC has consistently interpreted the AEA to require that the agency make waste confidence safety findings regarding the safety of ultimate spent fuel disposal before issuing a reactor license."[51] Contrary to that claim, the AEA includes no such requirement, and the Commission has found there to be none. For example, Riverkeeper quotes Section 182a. of the AEA,[52] but the relevant statutory language refers only to the "utilization and production" of special nuclear material, not to the disposal of such material. The cited section of the AEA therefore provides no support for its argument.[53]

(1) The Commission's 1977 Rulemaking Petition Denial

The same argument advanced by Riverkeeper here was raised more than 35 years ago and rejected by the Commission and the courts at that time. 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.[54] In rejecting that argument, the Commission considered the applicable statutory requirements imposed by the AEA and concluded as follows:

> 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

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

[52] *See id.* at 4 n.10, 6. Riverkeeper also states 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. However, Riverkeeper presupposes 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.

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

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

> 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.*[55]

The Commission also noted that Congress had impliedly approved the NRC's actions to license the operation of nuclear power reactors, despite the unavailability of a permanent repository for high-level radioactive waste:

> 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 wastes can be disposed of safely prior to the issuance of an operating license for a reactor.*[56]

Thus, based on its review of the AEA and its legislative history, 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."[57] That conclusion, as discussed below, has withstood judicial scrutiny, and undercuts the central legal premise of Riverkeeper's Proposed Contention.

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

[56] *Id.* at 34,393 (emphasis added).

[57] *Id.* at 34,392.

(2) The Second Circuit's 1978 *NRDC v. NRC* Decision

In *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978), the U.S. Court of Appeals for the Second Circuit upheld the NRC's decision to deny NRDC's petition for (1) a rulemaking proceeding to determine whether high-level radioactive waste from nuclear power reactors can be permanently disposed of without undue risk to the public health and safety, and (2) withholding of action on pending and future applications for reactor operating licenses until such time as a definitive safety finding has been made. In that decision, the court expressly affirmed the Commission reasoning and conclusions discussed above:

> 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.[58]

The Second Circuit unequivocally 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."[59] The Court thus permitted the continued licensing of nuclear power plants, even in the absence of the Waste Confidence Findings now cited by Riverkeeper.[60] No subsequent judicial or Commission decision has questioned that conclusion.[61] And Riverkeeper cites none.

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[58] *NRDC v. NRC*, 582 F.2d at 171. *See also id.* at 172 ("[W]e think it fair to read this history as a de facto acquiescence in and ratification of the Commission's licensing procedure by Congress.").

[59] *Id.* at 175; *see also id.* at 174. The Court thus acknowledged the NRC's long-standing regulatory practice of issuing operating licenses with an implied finding.

[60] 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

Riverkeeper attempts to distinguish the *NRDC* case, but to no avail. First, it argues that *NRDC* addressed the need for "definitive findings" regarding the safety of repository disposal of spent fuel, whereas the Proposed Contention requests only that the NRC make a "reasonable assurance" finding with respect to the safe disposal of spent fuel.[62] But the *NRDC* court drew no such distinction. Although both the Commission and the Second Circuit referred to the NRC's "implied finding of reasonable assurance that safe permanent disposal" of spent fuel as part of its practice of issuing operating licenses for reactors,[63] neither tribunal found that an implied finding of reasonable assurance was required by the AEA.

Riverkeeper also argues 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 the relicensing of Indian Point Units 2 and 3."[64] As noted above, *NRDC* was decided years before the Commission issued its initial findings in the 1984 Waste Confidence Decision.[65] The Commission and the Court of Appeals thus permitted continued licensing of nuclear power plants before Waste Confidence Decision Findings 1 and 2 even existed. Therefore, because the *NRDC* court's

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Storage Rule, 79 Fed. Reg. at 56,240 (quoting NRDC Rulemaking Petition Denial, 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 (and legally sound) 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.

[61] Indeed, in its 2010 Waste Confidence Decision Update, the Commission reiterated that in *NRDC v. NRC*, the Second Circuit "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," and that "it was appropriate for the Commission to make this finding in considering a license application for a geologic repository." Waste Confidence Decision Update, 75 Fed. Reg. at 81,045.

[62] Motion at 10.

[63] *NRDC v. NRC*, 582 F.2d at 170; *see also* NRDC Rulemaking Petition Denial, 42 Fed. Reg. at 34,391.

[64] Motion at 11.

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

decision 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 AEA obligations, as construed by the Commission and the *NRDC* court.

(3) The D.C. Circuit's Subsequent *Minnesota* and *New York* Decisions

In another line of argument, Riverkeeper cites the D.C. Circuit's later decisions in *Minnesota v. NRC*[66] and *New York v. NRC*,[67] contending that those decisions support its argument that the NRC must make predictive findings concerning the safety of permanent spent fuel disposal as "a prerequisite to reactor licensing under the AEA."[68] However, the D.C. Circuit did not render such a holding in either of those cases, or take any position that is inconsistent with the Second Circuit's conclusions in *NRDC v. New York*.

The *Minnesota* decision arose from challenges to license amendments that permitted the expansion of spent fuel pool capacity at the Vermont Yankee and Prairie Island plants.[69] Importantly, the court did not stay or vacate the contested license amendments due to AEA-driven concerns about the availability of storage or disposal facilities at the end of licensed operation.[70] Instead, the Court remanded the issue to the NRC to consider, within the context of a NEPA-based generic rulemaking,[71] whether there was reasonable assurance that "an offsite storage solution" would be available by the dates on which the plants' operating licenses expired and, if not, whether there was reasonable assurance that the spent fuel "can be safely [stored] at the sites

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

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

68 *See* Motion at 10-11.

69 *Minnesota*, 602 F.2d at 414.

70 *See id.* at 418.

71 *See id.* ("[W]e think it appropriate in the interest of sound administration to remand to the NRC for further consideration in the light of its [10 C.F.R. Part 51, Table] S-3 proceeding and analysis."); *see also id.* at 419 n.10 ("The Commission may integrate the issues with the pending S-3 proceeding, designate a follow-on generic proceeding, or follow such other courses as it deems appropriate.").

beyond those dates."[72] Thus, *Minnesota* involved issues related to reasonable assurance of safe on-site *storage* beyond the term of a plant's operating license, as considered under NEPA, not reasonable assurance of safe *disposal* in a repository, as assessed under the AEA.

The other decision cited by Riverkeeper, *New York v. NRC*, also provides no support for Riverkeeper's argument. As discussed in Section II.B, *supra*, in *New York*, the D.C. Circuit vacated the 2010 Waste Confidence Decision Update and Temporary Storage Rule and remanded for further administrative proceedings consistent with "the Commission's obligations under NEPA."[73] The court did not, as Riverkeeper claims, hold that the Waste Confidence Decision "constitutes a licensing decision because it enables reactor licensing."[74]

b. The Commission's 2010 Waste Confidence Decision Update Did Not Contain "AEA-Required Safety Findings"

Riverkeeper also asserts that the 2010 Waste Confidence Decision Update contained "safety" findings that the Commission chose not to "replace" or "re-promulgate" in the 2014 Continued Storage Rule.[75] It further argues that the Commission must now make such findings in individual licensing proceedings, including the Indian Point license renewal proceeding.[76]

Riverkeeper is fundamentally mistaken in two respects. 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 Temporary Storage Rule were not licensing decisions or

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[72] *Id.* at 418.

[73] *New York*, 681 F.3d at 483 ("[A]s NEPA requires, the Commission must conduct a true [environmental assessment] regarding the extension of temporary storage.").

[74] Motion at 11.

[75] *Id.* at 3-5, 11; Suspension Petition at 5.

[76] Motion at 1-5, 12; Suspension Petition at 5-6.

determinations.[77] 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 [spent nuclear fuel] after the end of reactor operation."[78]

The SOC for the Continued Storage Rule also makes clear that the new rule (like the earlier Waste Confidence Decision) does not supplant individual licensing actions—including the licensing of a high-level radioactive waste repository—that include site-specific NEPA and safety analyses.[79] 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 permanent spent fuel disposal.[80]

Riverkeeper also cites the NRC's brief in *New York v. NRC* for the proposition that the findings in the Waste Confidence Decision "fulfill[ed] NRC's important responsibilities under the AEA."[81] As explained above, 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 Riverkeeper's claim that the Waste Confidence Decision embodied AEA-based safety findings. Thus, Riverkeeper's claim is groundless and entitled to no weight.

Finally, the Proposed Contention asserts that the GEIS for the Continued Storage Rule recognizes that the safety finding must "be made as part of the individual licensing actions."[82] However, Riverkeeper has taken the GEIS statement out of context. That statement clearly applies

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

78 *Id.* at 81,044-045. *See also* Continued Storage Rule, 79 Fed. Reg. at 56,241-242. In this regard, Riverkeeper's reliance on *New York v. NRC* is misplaced. The "generalized findings of reasonable confidence" to which Riverkeeper refers (Suspension Petition at 6) are environmental findings made as part of the Waste Confidence proceedings, not AEA-mandated "predictive safety findings." *Id.*

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

80 *See*, *e.g.*, Motion at 9 ("Thus, the Waste Confidence findings issued between 1977 and 2010 included both general safety findings and purported supporting technical analyses.").

81 Motion at 8.

82 *Id.* at 5 n.16 & 14 n.50 (quoting GEIS, Vol. 2, App. D at D-9).

to determinations regarding "continued storage of spent fuel" at a reactor site, not to a safety finding regarding the technical feasibility of a repository for permanent spent fuel disposal.[83]

* * *

In summary, contrary to Riverkeeper's claim, the AEA does not require the NRC to make Waste Confidence safety findings related to ultimate spent fuel disposal at the time of reactor licensing. Controlling Commission and judicial precedent are clear on this point. Furthermore, as the regulatory history makes clear, the NRC's Waste Confidence Decision (including its various updates) never included AEA-based safety findings. Inasmuch as the Proposed Contention asserts otherwise, it raises issues that are not material to the NRC's license renewal decision, and should be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(iv).

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

The Proposed Contention also fails to satisfy criterion (iii) of 10 C.F.R. § 2.309(f)(1), because it raises issues that are outside the scope of this license renewal proceeding. Section 2.309(f)(1)(iii) reflects the Commission's longstanding position that contentions should be limited to issues that are germane to the specific pending application.[84] In the case of license renewal, the Commission has limited its safety review to the matters specified in 10 C.F.R. §§ 54.21 and 54.29, which focus on managing the effects of aging (during the period of extended operation) on the functionality of structures and components that perform license renewal-intended functions, and on the review of time-limited aging analyses.[85] These issues or areas of inquiry define the scope

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83 GEIS, Vol. 2, App. D at D-9.

84 *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).

85 *See Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7-8 (2001); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 (2002).

of the Staff's license renewal safety review,[86] and also the scope of any contested adjudication on the license renewal application.[87]

The Proposed Contention raises issues that do not fall within the scope of the NRC Staff's license renewal safety review and, consequently, this proceeding. In particular, Riverkeeper asserts that the AEA requires "currently valid findings of confidence or reasonable assurance that the hundreds of tons of highly radioactive spent fuel that will be generated during the 20-year license renewal term … can be safely disposed of in a repository."[88] Without question, that issue is unrelated to managing aging effects during the period of extended operation—the focus of the safety component of this Part 54 license renewal proceeding.

In conclusion, because the Proposed Contention raises issues that are outside the scope of this proceeding, it should be rejected as contrary to 10 C.F.R. § 2.309(f)(1)(iii).

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

The Proposed Contention also fails to satisfy criterion (vi) of 10 C.F.R. § 2.309(f)(1), because it does not establish a genuine dispute on a material issue of law or fact. Riverkeeper argues that the NRC's decision not to include Findings 1 and 2 of the Waste Confidence Decision in the text of the Continued Storage Rule means that NRC has made no finding on the technical feasibility of a repository. That argument, however, incorrectly characterizes the Continued Storage Rule. The GEIS addresses the issues assessed in the previous five Findings as conclusions regarding the technical feasibility and availability of a repository, and conclusions

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86 *Turkey Point*, CLI-01-17, 54 NRC at 7.

87 *See id.* at 10 ("Adjudicatory 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."). *See also* Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,482 n.2 (May 8, 1995).

88 Motion at 3.

regarding the technical feasibility of safely storing spent fuel in an at-reactor or away-from-reactor storage facility.[89]

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

- The Commission consistently has 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 states that "the NRC has determined that a repository is technically feasible."[90]

Riverkeeper claims that the foregoing conclusions are flawed. First, it argues that the conclusions in the GEIS and the SOC are insufficient because they are made "without any level of assurance."[91] However, unlike the NRC's previous findings (which referred to "reasonable assurance" of technical feasibility), the current GEIS and SOC provide an unqualified determination with respect to the technical feasibility of deep geologic disposal. As discussed in Section B.2.1 of the GEIS, the NRC's current findings are, in significant part, based upon information that was not available during the last update of the Waste Confidence Decision,

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89 *See* Continued Storage Rule, 79 Fed. Reg. at 56,244. As discussed in Sections III.A.2 and A.3 *supra*, the GEIS discussion of the technical feasibility of continued at-reactor or away-from-reactor storage of spent fuel and the permanent disposal of spent fuel in a repository is not intended to constitute an AEA-based safety determination.

90 *Id.* at 56,254.

91 Motion at 12.

including information developed during the NRC Staff's review of the Department of Energy's Yucca Mountain repository license application and by the Blue Ribbon Commission.

Riverkeeper also argues that the NRC's current views on the technical feasibility of a repository are not supported by an environmental impact statement or an environmental assessment.[92] That argument is frivolous on its face, given that the Proposed Contention itself refers to the detailed technical feasibility discussion contained in Section B.2 of the GEIS.[93]

In summary, the Proposed Contention mischaracterizes the Continued Storage Rule and the supporting GEIS. Contrary to Riverkeeper's assertions, the GEIS contains a detailed technical analysis that supports the NRC's conclusion that "a geologic repository continues to be technically feasible."[94] Riverkeeper's mischaracterizations of the rulemaking record are not sufficient to establish a genuine dispute on a material issue of law or fact.[95] Therefore, RK-10 should be rejected as contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

B. The Proposed Contention Also Fails to Satisfy the Requirements for Late-Filed Contentions in 10 C.F.R. § 2.309(c)

The Proposed Contention also should be rejected because it is untimely. Given the advanced stage of this proceeding, 10 C.F.R. § 2.309(c) requires that Riverkeeper show "good cause" for the filing of its Proposed Contention by demonstrating that: (1) the information upon which the filing is based was not previously available; (2) the information upon which the filing is

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92 *Id.* § III.B.3.

93 *See* Motion at 12 n.43.

94 Continued Storage Rule, 79 Fed. Reg. at 56,251.

95 *See, e.g.*, *Crowe Butte Res. Inc.* (In Situ Leach Facility, Crawford, Nebraska), 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 and 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 (2005) (finding a contention inadmissible because an "inaccurate comparison cannot be deemed to create a genuine dispute").

based is materially different from information previously available; and (3) the filing has been submitted in a timely fashion based on the availability of the subsequent information. Like all petitioners, Riverkeeper bears the burden of meeting the "stringent" late-filing standards.[96]

Riverkeeper has not met the Section 2.309(c) late-filing criteria. The gist of Riverkeeper's argument in RK-10 is that the Continued Storage Rule does not "re-promulgate" the NRC's previous "generic Waste Confidence safety findings," in alleged contravention of the AEA. However, as discussed in Section III.A.3 above, the Waste Confidence findings cited by Riverkeeper were environmental findings made under NEPA, not AEA-based safety findings. This fact has long been known, and negates the Proposed Contention's core premise. Riverkeeper thus cannot credibly argue that the Proposed Contention is based on new information that is materially different from information previously available to it (or any member of the public). Accordingly, the Proposed Contention also should be rejected for failing to satisfy 10 C.F.R. § 2.309(c).

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

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

Like the Proposed Contention, the Suspension Petition relies on patently erroneous assertions that render the Petition devoid of any foundation in law or in fact. This alone warrants dismissal of the Suspension Petition.

First, Riverkeeper erroneously asserts 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."[97] As discussed in Section III.A.3.a

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

[97] Suspension Petition at 3.

above, the AEA includes no such requirement, and the Commission has found none. In fact, the same argument was rejected by the Commission and the U.S. Court of Appeals courts more than 35 years ago in the proceedings arising from NRDC's rulemaking petition.[98]

Second, Riverkeeper claims 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.[99] For the reasons discussed in Section III.A.3.b above, that argument is factually incorrect. The Commission's Waste Confidence Decision has never contained AEA-based "safety" findings related to the safety of spent fuel disposal.

Finally, as discussed in Section III.A.3.c above, Riverkeeper's claim that the Commission has effectively abandoned its previous Waste Confidence findings is factually incorrect and contrary to the Commission's statements in the SOC for the Continued Storage Rule.[100] Section B.2 of the GEIS discusses the technical feasibility of a repository in detail and concludes that disposal of spent fuel in a geologic repository is technically feasible.

B. The Suspension Petition Does Not Provide an Adequate Basis to Suspend the NRC's License Renewal Decision for Indian Point

The Suspension Petition also should be rejected for failing to include adequate bases and justification for suspension of the license renewal decision. Conspicuously, Riverkeeper fails even to identify—much less satisfy—the well-established criteria that govern requests to suspend licensing actions. That failure is especially egregious given the Commission's explicit application

[98] *See* Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,392; *NRDC v. NRC*, 582 F.2d at 174-75.

[99] Suspension Petition at 4-5.

[100] *See id.* at 4 ("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.").

of those criteria in a recent Memorandum and Order (CLI-14-07) rejecting a previous suspension request filed by another intervenor in this proceeding.[101]

Specifically, 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 health and safety" or other compelling reasons.[102] 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."[103] As demonstrated below, none of these criteria has been satisfied here.

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

The Suspension Petition raises issues that relate solely to the *future* safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository[104]—issues that are separate and distinct from any issue material to the issuance of the Indian Point renewed licenses. The ultimate safe disposal of any spent fuel generated by IP2 and IP3 would be the subject of a

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101 *See DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-07, 80 NRC __, slip op. at 8-11 (July 17, 2014) (denying, among other suspension petitions, Hudson River Sloop Clearwater. Inc.'s Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014)).

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

103 *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, Riverkeeper has not addressed the factors for a stay. For example, Riverkeeper has not shown that it will prevail in this proceeding or that it will be irreparably injured if the license renewal decisions were to move forward.

104 *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).

separate NRC licensing action. Riverkeeper fails to show that issuance of the IP2 and IP3 renewed operating licenses, before resolution of the issues it raises in RK-10, poses "an imminent risk to public health and safety."[105]

Furthermore, as demonstrated above, Riverkeeper's claims regarding the need for "Waste Confidence safety findings" lack merit. The Commission has made clear that it "will make the safety finding with respect to [spent nuclear fuel] disposal envisioned by [Riverkeeper] in the context of a licensing proceeding for a geologic repository."[106] No such finding is required as part of initial licensing or license renewal for a nuclear power plant.

Finally, as in its Proposed Contention, Riverkeeper incorrectly claims that the NRC has not considered the "technical feasibility" of spent fuel disposal.[107] In fact, the NRC's Continued Storage Rule and GEIS indicate exactly 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."[108] And, 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."[109]

In short, Riverkeeper has presented no information or argument to suggest that the first *Callaway* criterion is satisfied; *i.e.*, that renewal of the IP2 and IP3 licenses (or any other nuclear power plant licensing action for that matter) will jeopardize public health and safety.

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[105] *See Callaway*, CLI-11-5, 74 NRC at 163, 166.

[106] Waste Confidence Decision Update, 75 Fed. Reg. at 81,045.

[107] Suspension Petition at 3, 6.

[108] Continued Storage Rule, 79 Fed. Reg. at 56,250.

[109] *Id.* at 56,251.

2. Suspending the Issuance of the Indian Point Renewed Operating Licenses 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.[110] The unnecessary postponement of licensing adjudications and decisions "contravenes the Commission's interest in 'regulatory finality' and 'sound case management.'"[111] Indeed, staying licensing actions in these circumstances would frustrate—not advance—the Commission's objective of promoting expeditious decision-making and regulatory certainty.[112]

Again, the issues raised by Riverkeeper relate to the permanent disposal of spent fuel and would be the subject of a separate NRC licensing proceeding. Thus, suspending this or other NRC licensing decisions would not advance fair and efficient decision making.

Additionally, Proposed Contention RK-10 raises the same issue as the Suspension Petition. The Commission will address the admissibility of the Proposed Contention as part of the ongoing adjudicatory proceeding. Accordingly, no final action on the IP2 and IP3 license renewal application is likely to occur until the NRC dispositions all pending contentions, including RK-10. Thus, suspension of the license renewal decision is entirely unnecessary.[113]

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

[111] *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)).

[112] *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.").

[113] In recent years, various petitioners have filed—and the Commission has rejected—numerous petitions to suspend final NRC licensing decisions (often across multiple dockets). *See Fermi*¸ CLI-14-07, slip op. at 11-12; *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 372-75 (2012), *petitions for review denied*, *Massachusetts v. NRC*, 708 F.3d 63 (1st Cir. 2013); *Callaway*, CLI-11-5, 74 NRC at 174-76; *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 4-6; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484-85 (2008). Given the substantial applicant/licensee, NRC Staff, and Commission resources involved in

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

Riverkeeper also fails to explain why suspension of the Indian Point 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. As noted, issuance of the IP2 and IP3 renewed operating licenses is not imminent due to the ongoing administrative and adjudicatory activities mentioned above. There is ample time for the Commission to review the Proposed Contention and to determine whether any actions are needed, without the need to suspend license renewal at this time.[114] More fundamentally, Riverkeeper provides no reason to conclude that issuance of the renewed licenses 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, Riverkeeper has failed to demonstrate that suspending the Indian Point 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 under controlling Commission precedent.

V. CONCLUSION

For the above reasons, Proposed Contention RK-10 should be rejected in its entirety. The Proposed Contention impermissibly challenges the Continued Storage Rule, in contravention of 10 C.F.R. § 2.335. It also relies on erroneous factual and legal assertions that stem from Riverkeeper's misreading of the Continued Storage Rule and controlling legal precedent. As a

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dispositioning these recurring petitions, Entergy respectfully suggests that further Commission guidance regarding the propriety of such petitions may be warranted.

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

result, the Proposed Contention fails to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). Further, the Proposed Contention fails to satisfy the late-filing criteria in 10 C.F.R. § 2.309(c) because it is not based on any new and materially different information. Finally, Riverkeeper's Suspension Petition provides no basis for suspending the NRC's license renewal decision—now or at any future time.

Respectfully submitted,

<u>*Signed (electronically) by Paul M. Bessette*</u>

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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	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	October 31, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of "Entergy's Combined Answer to Riverkeeper's Proposed New Contention RK-10 and Petition to Suspend Final License Renewal Decision Pending Issuance of Waste Confidence 'Safety' Findings" was submitted through the NRC's E-filing system.

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