

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-10-19

MEMORANDUM AND ORDER

Before us is a question certified by the Atomic Safety and Licensing Board in this license renewal proceeding.¹ The Board requests guidance on how to respond to a motion by intervenor Hudson River Sloop Clearwater, Inc. (Clearwater). Clearwater seeks leave to file two new contentions, a safety contention under the Atomic Energy Act (AEA) and an environmental contention under the National Environmental Policy Act (NEPA).² Both proposed contentions raise issues involving potential impacts of long-term spent fuel storage at reactor sites, either in spent fuel pools or in dry casks.³

¹ See Memorandum and Order (Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater's Motion for Leave to Admit New Contentions) (Feb. 12, 2010) (Board Certification Order). See also 10 C.F.R. §§ 2.319(l), 2.341(f)(1).

² See *Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add a New Contention Based Upon New Information* (Oct. 26, 2009) (corrected version filed Nov. 6, 2009) (Clearwater Motion). The AEA contention is designated SC-1 and the NEPA Contention EC-7.

³ See *id.* at 14-15.

“In the area of waste storage, the Commission largely has chosen to proceed generically” through the rulemaking process – that is, the Waste Confidence Rule, codified at 10 C.F.R. § 51.23 – instead of litigating issues case-by-case in adjudicatory proceedings.⁴ As the Board’s order highlights, it has been the “clear guidance, followed by all Boards, [] that challenges to the Waste Confidence Rule must be made in the context of a rulemaking, not in the context of an adjudicative proceeding.”⁵ The Board describes the history of the NRC’s waste confidence findings and its Waste Confidence Rule.⁶ It further outlines the NRC’s more recent rulemaking actions to update the waste confidence findings and rule.⁷ The Board’s key inquiry appears to be whether there is an “ongoing rulemaking’ that would preclude . . . consideration” of Clearwater’s proposed contentions regarding long-term onsite spent fuel storage.⁸ Contrary to Clearwater’s apparent understanding,⁹ there has been no halt in the rulemaking effort to update the Waste Confidence Rule. The waste confidence update remains under active review and is ongoing.

Under longstanding NRC policy, licensing boards “should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking

⁴ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 343 (1999) (Oconee); see also *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995) (regarding generic rulemaking to assess dry cask design).

⁵ See Board Certification Order at 22.

⁶ See *id.* at 18-19.

⁷ See *id.* at 19-22.

⁸ See *id.* at 26.

⁹ Clearwater’s motion and proposed contentions are largely based on its understanding of Commissioner comments made on Notation Votes on a proposed update of the waste confidence findings and rule. See Clearwater Motion at 2-4, 16-17, 34-35, 38, 40. Notation Votes do not constitute – nor did they here even suggest – final Commission action on waste confidence.

by the Commission.”¹⁰ The Commission has stated that “it would be counterproductive (and contrary to longstanding agency policy) to initiate litigation on an issue that by all accounts very soon will be resolved generically.”¹¹ The current waste confidence rulemaking already is examining the safety and environmental impacts of onsite storage of spent fuel in spent fuel pools or dry casks pending ultimate offsite disposal, rendering unnecessary and wasteful the litigation of similar issues in individual adjudicatory proceedings. If petitioners or intervenors “are dissatisfied with our generic approach to the problem, their remedy lies in the rulemaking process, not in this adjudication.”¹² We are continuing our deliberations on the waste confidence update, and in any event will not conclude action on the Indian Point license renewal application until the rulemaking is resolved.

Given the pending rulemaking update on waste confidence, we direct the Board to deny admission of Clearwater’s contentions SC-1 and EC-7.

IT IS SO ORDERED.¹³

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of July, 2010.

¹⁰ See *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)).

¹¹ See *id.* at 346.

¹² See *id.* at 345.

¹³ Commissioner Apostolakis did not participate in this matter.