

August 2, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
EXELON GENERATION COMPANY, LLC ) 50-352-LR/ 50-353-LR  
 )  
(Limerick Generating Station, Units 1 and 2) )  
 )

NRC STAFF'S RESPONSE TO NRDC'S MOTION FOR LEAVE TO FILE A NEW  
CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF  
NUCLEAR WASTE AT LIMERICK AND NRDC'S WASTE CONFIDENCE CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to the Natural Resources Defense Council's ("NRDC") Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12191A408) ("Motion") and Waste Confidence Contention (July 9, 2012) (ADAMS Accession No. ML12191A408) ("Contention"). The Motion raises a new contention largely based on the D.C. Circuit Court of Appeals' June 8, 2012 opinion in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, portions of the new contention would be admissible if the Atomic Safety and Licensing Board ("Board") rules on it after the D.C. Circuit issues the mandate for that decision. But, if the Board rules before the issuance of the mandate, then the Commission's existing regulations bar admission of the contention, and the Board should dismiss it without prejudice to timely refile upon issuance of the court's mandate.

Additionally, several portions of the Contention are unrelated to *State of New York* and raise claims that lack an adequate factual basis or are outside the scope of this proceeding. These claims are inadmissible regardless of when the mandate issues.

## BACKGROUND

### A. Procedural History

As relevant to the instant motion, this proceeding concerns the June 22, 2011, application of Exelon Generation Company, LLC (“Exelon”) to renew its operating licenses for Limerick Generating Station, Units 1 and 2.<sup>1</sup> NRDC has shown standing and been admitted as a party to this proceeding. *Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-08, 75 NRC \_\_, \_\_ (Apr. 4, 2011) (slip op. at 2). Currently, NRDC has one admitted contention pending in this proceeding. *Id.* at 40. The admitted contention challenges the adequacy of Exelon’s consideration of new and significant information regarding mitigation alternatives for severe accidents.<sup>2</sup> *Id.* On July 9, 2012, NRDC filed the instant Motion and Contention before the Board.

### B. The NRC’s Waste Confidence Decision

In the National Environmental Policy Act of 1969 (“NEPA”), Congress announced a national policy “to create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a). NEPA requires the NRC to prepare an environmental impact statement (“EIS”) to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an

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<sup>1</sup> Application for Renewed Operating Licenses (June 22, 2011) (ADAMS Accession No. ML11179A096); License Renewal Application, Limerick Generating Station, Units 1 and 2) (June 22, 2011) (ADAMS Accession No. ML11179A101).

<sup>2</sup> The Staff and Exelon filed appeals of this ruling that are currently pending before the Commission. NRC Staff’s Notice of Appeal of LBP-12-08 (Apr. 16, 2012) (ADAMS Accession No. ML12107A406); Exelon’s Notice of Appeal of LBP-12-08 (Apr. 16, 2012) (ADAMS Accession No. ML12110A468 ).

environmental report (“ER”) as part of a licensing application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor’s spent fuel after the licensed period of operation ends. *Minnesota v. NRC*, 602 F.2d 412, 414-15, 419 (D.C. Cir. 1979). In the past, “the Commission sensibly has chosen to address high-level waste disposal generically.” *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 345 (1999). The agency has most recently addressed issues pertaining to spent fuel storage and disposal in its “Waste Confidence Decision Update,” 75 Fed. Reg. 81,037 (Dec. 23, 2010) (“Waste Confidence Decision”) and a temporary storage rulemaking, “Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation,” Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) (“Temporary Storage Rule”).

The Waste Confidence Decision Update and the Temporary Storage Rule support generic findings in 10 C.F.R. § 51.23(a), regarding the impacts of spent fuel storage after the licensed period of operation. See Motion at 1; 10 C.F.R. § 51.23(a). The Commission rendered several findings in § 51.23(a). Two of those findings are (1) that spent fuel “can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation” and (2) that “there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary.” 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude “discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license” from any EIS, Environmental Assessment, or ER. 10 C.F.R. § 51.23(b).

## DISCUSSION

### A. Portions of NRDC's Waste Confidence Contention Would Be Admissible if the Board Rules After the Mandate for *State of New York* Issues

NRDC based most of the proposed contention on the D.C. Circuit Court of Appeals' recent decision in *State of New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit's decision vacated the NRC's updated Waste Confidence Decision and its Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed contention states as follows:

The Environmental Report for Limerick relicensing fails to comply with the requirements of the National Environmental Policy Act and all relevant implementing regulations including but not limited to 10 C.F.R. §§ 51.20(b)(2), 51.45, 51.53(c)(1) and (2), 51.71(d), 51.90, 51.91(c), 51.95(c)(1), 51.95(c)(2), and 51.101(a) because it fails to include or incorporate a legally sufficient analysis of the environmental impacts of on-site storage of nuclear waste after the conclusion of the extended operating period, including the impacts in the event that no permanent repository is ever established, and fails to consider alternatives to mitigate those impacts; because there is no valid analysis of these issues, NRC may not reach a final decision on whether to renew Limerick's operating licenses until such a valid analysis has been completed in compliance with applicable Federal law and regulations.

Contention at 3. At root, the Motion asserts that because the generic findings in the Commission's rulemaking have been vacated, Exelon's ER "does not now include an analysis of the environmental impacts caused by the storage of nuclear waste at Limerick following the end of the requested operating license nor does it contain an analysis of the environmental effects of failing to establish a repository." Motion at 8.

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, NRDC asserts that it meets the standards of § 2.309(f)(2) for late-filed contentions. Motion at 2-6. Considering the holding of the D.C. Circuit and that the Motion was filed within 30 days of the ruling, the Staff agrees that NRDC has sufficiently demonstrated the timeliness of their filings under that regulation.

The Staff has previously discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. NRC Staff's Answer to Natural Resources Defense Council Petition to Intervene and Notice of Intention to Participate, at 4, 7 (Dec. 21, 2011) (ADAMS Accession No. ML11355A174) "NRDC recognizes that because the mandate has not yet issued in the Waste Confidence Decision, consideration of this contention may be premature." Motion at 1. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect . . ." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (citing *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id.* at 467. Moreover, licensing boards have typically found contentions premature, and therefore inadmissible, when those contentions relied on court decisions for which a mandate had not issued. *E.g., Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).<sup>3</sup> As the licensing board in *Perry* stated, "Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.<sup>4</sup> *Id.* at 205.

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<sup>3</sup> *But see Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because "the mandate of that case has not been issued . . . we have deferred our rulings on these requests").

<sup>4</sup> The Commission recognizes its responsibility to "act promptly and constructively in effectuating the decisions of the courts." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that "all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC[;] the eventual – legally required – issuance of the mandate is hardly an 'unanticipated event.'" *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court's mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, the Board cannot admit a contention that challenges an NRC regulation before a court of appeals issues its mandate striking down that regulation.

Under the Federal Rules of Appellate Procedure, a “court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate, whichever is later.” Fed. R. App. P. 41(b). On July 6, 2012, at the Commission’s request, the D.C. Circuit extended the time to file a petition for rehearing of *State of New York* to August 22, 2012. *State of New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing). As a result, under Rule 41(b), the mandate will not likely issue until at least August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require the Board to exclude NRDC’s contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the majority of the underlying contention depends on whether the mandate has issued when this Board rules on the Motion.<sup>5</sup>

If the D.C. Circuit’s mandate issues before the Board rules on the contention’s admissibility, upon the mandate’s issuance, the portions of the contention that are related to *State of New York* would satisfy each of the § 2.309(f)(1) criteria and would be admissible as a contention of omission. See Motion at 6-11. This determination, however, would remain subject to direction or action taken by the Commission in response to the D.C. Circuit’s ruling, including any generic rulemaking action and/or issuance of any Commission instruction with respect to how contentions based on the court’s ruling are to be addressed in individual NRC proceedings. For example, in the event that the Commission solely undertakes a generic rulemaking approach to address these issues, the contention may need to be dismissed. See, e.g., *Oconee*, CLI-99-11, 49 NRC at 345 (“Licensing Boards ‘should not accept in individual license proceedings contentions which are (or are about to become) the subject of general

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<sup>5</sup> See 10 C.F.R. § 2.335(a) (noting that unless a party seeks a waiver of Commission regulations, “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding”).

rulemaking by the Commission.’ ”).

If the D.C. Circuit’s mandate has not issued by the time the Board rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC NEPA documents a consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because the contention demands such a consideration, Contention at 3, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court’s mandate, the Board should reject the contention, subject to refiling without prejudice when, and if, the mandate issues. If NRDC refiles the contention after the court issues the mandate, it would be timely if filed within 30 days of the mandate’s issuance and the portion related to *State of New York* would be admissible provided the claims it raises do not become the subject of a generic rulemaking. 10 C.F.R. § 2.309(f)(2); *Oconee*, CLI-99-11, 49 NRC at 345.

B. NRDC’s Claims that Go Beyond the Holding in *State of New York* Are Inadmissible

NRDC recognizes “it would be premature at this time to predict how the Commission and the NRC Staff will resolve these matters” and claims that it will wait until the agency responds to the D.C. Circuit’s mandate before formulating “any further contentions on the merits of the resolution of these matters.” Contention at 12, ¶ 20. Nonetheless, NRDC provides a litany of additional issues that, in light of the remand, it believes that the “NRC Staff must now evaluate and examine, before a decision on Exelon’s license can be made.” *Id.* at 11, ¶ 18. However, many of these claims are unrelated to *State of New York* and are inadmissible as they (1) are outside the scope of this proceeding or (2) lack an adequate basis.

1. Several of NRDC’s Claims are Outside the Scope of This Proceeding

First, NRDC’s claim that the NRC must evaluate and examine the environmental effects of all reasonable alternatives for on-site and off-site storage of waste during the period of extended operation (“PEO”) is outside the scope of this proceeding. *Id.* at 10-11, ¶¶ 17-18. As

NRDC recognizes, the Generic Environmental Impact Statement (“GEIS”)<sup>6</sup> already analyzes the issue of spent fuel storage and disposal during the PEO. *Id.* at 10, ¶ 17.<sup>7</sup> This finding, codified in Table B-1 in Appendix B to 10 C.F.R. Part 51 (“Table B-1”) (“On-site Spent Fuel), was not vacated by *State of New York* and is not subject to challenge in this proceeding absent a waiver. 10 C.F.R. § 2.335. Because NRDC did not seek and receive a waiver, this issue is outside the scope of this proceeding.<sup>8</sup> 10 C.F.R. § 2.309(f)(1)(iii).

Similarly, although NRDC asserts that the NRC must assess the “offsite land, water, and air use impacts of continued operations,” these impacts are addressed in the GEIS and are not dependent on the TSR. GEIS at 6-81 to 6-86; Table B-1 (On-site Spent Fuel Storage). Therefore, these claims are also outside the scope of this proceeding.

Next, NRDC’s claim that the NRC must reevaluate the safety of long-term storage of spent fuel is also outside the scope of this proceeding. Contention at 11, ¶ 18. The D.C. Circuit’s ruling was limited to NEPA issues, and did not suggest that the NRC must reevaluate safety issues. *State of New York*, 681 F.3d at 483. Moreover, the Commission has repeatedly emphasized that NRC regulations limit the scope of safety issues in license renewal proceedings to questions of aging management. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 490-93 (2010). Consequently, NRDC’s suggestion that the NRC must consider the safety of on-site spent fuel

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<sup>6</sup> See NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants,” Final Report, at 6-81 to 6-86 (May 1996) (ADAMS Accession No. ML040690705) (“GEIS”) (comprehensive analysis of the impacts of spent fuel storage in both pools and dry-casks for the license renewal term).

<sup>7</sup> See *also* GEIS at 6-79 (“[The WCD] does not address the environmental impacts of storage during the additional 20 years of operation after license renewal.”); 6-86 (“The overall conclusion for on-site storage of spent fuel during the term of a renewed license is that the environmental impacts will be small for each plant. . . . On-site storage of spent fuel during the term of a renewed operating license is a Category 1 issue.”).

<sup>8</sup> This claim also lacks an adequate basis, as NRDC does not (1) cite any statement in the *State of New York* decision that this analysis is required on remand, or (2) reference any other facts or expert opinion to support this claim. Contention at 11, ¶ 18.

storage facilities is outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

Additionally, NRDC's assertion that the NRC must evaluate the "implications of on-site storage of waste for decommissioning" is outside the scope of this proceeding. Contention at 11, ¶ 18. First, the D.C. Circuit's opinion in *State of New York* does not discuss decommissioning in any way, much less require NRC to evaluate this issue on remand. *State of New York*, 681 F.3d at 471. Second, for purposes of license renewal, decommissioning is a Category 1 issue, outside the scope of this proceeding. Table B-1, Decommissioning (finding the impacts of license renewal on decommissioning activities will be small). Therefore, this claim is also inadmissible. 10 C.F.R. § 2.309(f)(1)(iii).

## 2. Other Claims by NRDC Lack an Adequate Factual Basis

NRDC also makes several claims that lack an adequate basis. For example, in addition to being out of scope, NRDC's claim regarding decommissioning lacks an adequate basis. The NRC's thorough consideration of the impacts of license renewal on decommissioning assumed that spent fuel would remain on site during, and potentially after, the decommissioning process. GEIS at 7-5 to 7-7. NRDC has not suggested, let alone provided, any basis to support a claim that this analysis is inadequate. Consequently, this claim also lacks an adequate basis. 10 C.F.R. § 2.309(f)(1)(v), (vi).

Additionally, NRDC alleges that the NRC must consider the impacts of "the storage of additional spent fuel on real estate values in the surrounding areas."<sup>9</sup> Contention, at 11, ¶ 18. But, the NRC has already determined, based on a study of several facilities, that the overall impacts of license renewal on nearby land values will be small. GEIS, at 4-103 (considering the impacts of license renewal on land value in the housing impacts section); Table B-1, Housing

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<sup>9</sup> While petitioners before the D.C. Circuit alleged that the NRC did not adequately consider the impacts of on-site storage on land values, the court determined that those claims were not raised before the agency. *State of New York*, 681 F.3d at 482. The Court noted that the "petitioners will have the opportunity to properly raise and clarify these concerns on remand." *Id.* Nonetheless, NRDC has not properly raised the land value claim here because it is not adequately supported. 10 C.F.R. § 2.309(f)(1)(v).

Impacts (“Housing Impacts are expected to be of small significance at plants located in a medium or high population area . . .”). While the Board in the *Indian Point* proceeding admitted a contention that challenged the impacts of license renewal on adjoining land values, that contention was supported by an expert affidavit. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 115-116 (2008). Because NRDC has not provided any similar support for its assertion that the agency must consider the impacts of spent fuel storage on nearby property values, this claim is inadmissible for want of an adequate factual basis. *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 414 (2007).

Likewise, NRDC’s claims that the NRC must evaluate and analyze (1) “the comparative impacts of spent fuel storage in [spent fuel] pools versus in dry casks” and (2) “alternatives to mitigate these impacts, among others” are also inadmissible. Contention, at 11, ¶18. These claims lack an adequate basis, as NRDC does not point to any statement in the *State of New York* decision that these analyses are required on remand or give any other facts or expert support for these claims. Bare assertions are insufficient to support an admissible contention. *Palisades*, CLI-07-18, 65 NRC at 414.

Further, NRDC’s claim that the ER is legally deficient because it does not consider “the environmental effects of a [high level waste] repository” is inadmissible. Contention at 9, ¶ 16. Notably, NRDC brought this claim before the D.C. Circuit, but the court declined to address this argument. See Brief of Petitioners Natural Resources Defense Council, *State of New York v. NRC*, No. 11-1045, at 20-23 (D.C. Cir. Feb. 7, 2012), *State of New York*, 681 F.3d at 478. Sound NEPA principles support the Court’s declination: building a repository is a separate federal action that will require its own NEPA analysis. *Jackson Cnty., N.C. v. F.E.R.C.*, 589 F.3d 1284, 1290 (D.C. Cir. 2009) (setting forth the standard for when two federal projects are so intertwined they must be considered in the same EIS). NRDC provides no basis for its claim that the NRC should nonetheless speculate in a current EIS on the possible environmental impacts of a repository of unknown location, design, and completion date. Hence, this portion of

NRDC's claim is also inadmissible. 10 C.F.R. § 2.309(f)(v), (vi).

Finally, NRDC's claim that "[m]any of these issues appear to be site-specific and cannot be dealt with generically" is inadmissible. Contention at 11, ¶ 18. The D.C. Circuit specifically refrained from requiring the NRC to address issues on remand on a site-specific basis: "we do not require, as petitioners would prefer, that the Commission examine each site individually." *State of New York*, 681 F.3d at 483. Consequently, NRDC has not provided any basis for the claim that the NRC must proceed on a site-specific basis on remand.

Therefore, the Staff objects to those claims that are unrelated to the court's holding in *State of New York* and are outside the scope of this proceeding or unsupported by an adequate factual basis.

#### CONCLUSION

For the foregoing reasons, the Staff agrees with NRDC that the portions of the contention related to *State of New York* would be admissible upon issuance of the D.C. Circuit's mandate. However, if the Board rules before that time, the entire contention must be rejected as an impermissible challenge to NRC regulations. Moreover, the admission of part of this contention is subject to any further action by the Commission, including commencement of a generic rulemaking to address these matters, and/or the issuance of instructions as to how the contention should be addressed. Finally, the portions of the contention that are outside the scope of this proceeding or lack an adequate basis are inadmissible regardless of when the mandate issues.

**/Signed (electronically) by/**

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff's Response To NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick and NRDC's Waste Confidence Contention" in the above captioned proceeding have been served upon the following by the Electronic Information Exchange, this 2nd day of August, 2012:

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