UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-352-LR
EXELON GENERATION COMPANY, LLC	)	50-353-LR
	)	
(Limerick Generating Station, Units 1 and 2)	)	August 2, 2012

EXELON'S ANSWER OPPOSING
NRDC'S NEW WASTE CONFIDENCE CONTENTION

I. INTRODUCTION

On July 9, 2012, the Natural Resources Defense Council, Inc. ("NRDC") filed a Motion with this Atomic Safety and Licensing Board ("Board") for leave to file a new contention, which was accompanied by Supplemental Contention 1 ("Proposed Contention").[1] Based on the recent D.C. Circuit *New York v. NRC* decision vacating and remanding the NRC's Waste Confidence Decision ("WCD") and Temporary Storage Rule ("TSR") update,[2] the Proposed Contention claims that the Limerick Generating Station Units 1 and 2 ("Limerick") License Renewal Application Environmental Report ("ER") is deficient because it omits a discussion of "the environmental impacts caused by the storage of nuclear waste at Limerick following the end of the requested operating license" and "the environmental effects of failing to establish a

[1] NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012) ("Motion"); NRDC's Waste Confidence Contention (July 9, 2012) ("Proposed Contention").

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

repository."[3] Other groups filed very similar contentions on the same day in numerous other licensing proceedings.

Pursuant to 10 C.F.R. § 2.309(h) and the Board's May 7, 2012 Initial Scheduling Order ("ISO"), Exelon Generation Company, LLC ("Exelon") timely files this Answer opposing the Motion for Leave and Proposed Contention. As demonstrated below, the Proposed Contention should be rejected as a threshold matter because NRDC fails to satisfy the Commission's requirements in 10 C.F.R. § 2.309(f)(2) for new contentions. The D.C. Circuit has not issued a mandate in *New York* and, therefore, the *New York* decision currently has no legal effect in this proceeding. Accordingly, NRDC cannot demonstrate that the information upon which the new contention is based is materially different than information previously available, as required by Section 2.309(f)(2)(ii).

In addition, the Proposed Contention should be rejected because NRDC fails to satisfy the Commission's 10 C.F.R. § 2.309(f)(1) contention admissibility requirements. Specifically, because the D.C. Circuit has not issued a mandate in *New York*, the Proposed Contention lacks a legal basis and constitutes an impermissible challenge to the TSR, contrary to 10 C.F.R. §§ 2.309(f)(1)(ii) to (iii) and 2.335(a). Additionally, even if the D.C. Circuit's mandate issues, the Proposed Contention should be rejected because longstanding Commission precedent holds that 10 C.F.R. § 2.309(f)(1)(iii) precludes the admission of a contention that concerns an issue that is, *or is about to become*, the subject of a rulemaking. The Commission's longstanding practice is to address long-term waste storage issues generically through rulemaking. To the extent any uncertainty exists on these issues, the Board should certify an appropriate question to

[3] Motion at 8; Proposed Contention at 3.

the Commission pursuant to 10 C.F.R. § 2.319(l), rather than admit the Proposed Contention or hold it in abeyance.

Finally, the Proposed Contention lacks legal basis because it demands analysis, including a site-specific environmental analysis, which is inconsistent with the *New York* holding or outside the scope of this proceeding, and is therefore contrary to 10 C.F.R. §2.309(f)(1)(ii) and (iii).

II. BACKGROUND

A. Limerick License Renewal

The current operating licenses ("OLs") for Limerick Units 1 and 2 run through October 26, 2024, and June 22, 2029, respectively.[4] On June 22, 2011, Exelon submitted its License Renewal Application ("Application"), requesting that the NRC renew the Limerick OLs for 20 additional years (*i.e.*, until October 26, 2044 and June 22, 2049).[5] The NRC accepted the Application as sufficient for docketing and published a Hearing Notice in the Federal Register on August 24, 2011.[6] Following a Petition to Intervene and Notice of Intention to Participate ("Petition to Intervene") and subsequent litigation, one contention regarding consideration of Severe Accident Mitigation Alternatives ("SAMAs") under the National Environmental Policy Act ("NEPA") remains admitted in this proceeding.[7]

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4 Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. NPF-39 and NPF-85 for an Additional 20-Year Period; Exelon Generation Co., LLC, Limerick Generating Station, 76 Fed. Reg. 52,992, 52,992 (Aug. 24, 2011) ("Hearing Notice").

5 *Id.*

6 *Id.* at 52,992-94.

7 *See generally Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), LBP-12-08, 75 NRC __, slip op. (Apr. 4, 2012), and case history cited therein. NRDC has not previously filed any contention related to spent fuel management in this proceeding.

B. Waste Confidence

In 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,[8] the Commission issued its initial WCD and TSR.[9] The original WCD set forth five Waste Confidence Findings:

(1) safe disposal in a mine geologic repository is technically feasible;
(2) a geologic repository will be available by 2007 to 2009;
(3) waste will be managed safely until the repository is available;
(4) waste will be managed safely at nuclear plants for at least 30 years beyond the licensed life of each plant; and
(5) safe, independent storage will be made available if needed.[10]

Since that time, the TSR has made clear that spent fuel storage environmental impacts following the cessation of operations need not be addressed in any reactor licensing proceeding ER or environmental impact statement ("EIS").[11] The Commission has thus clearly and consistently chosen to address waste storage issues generically through the TSR instead of reviewing issues in individual licensing proceedings.[12]

In response to an October 2008 proposed revision to the WCD and TSR,[13] several non-parties submitted comments on the proposed revisions.[14] After considering public comments, the

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

9 *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) ("Spent Fuel Disposition Requirements").

10 Final Waste Confidence Decision at 34,659-60.

11 *Compare* Spent Fuel Disposition Requirements, 49 Fed. Reg. at 34,694, *with* 10 C.F.R. § 51.23(b).

12 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 99 (2010) (*quoting Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

13 Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008).

14 Comments by Texans for a Sound Energy Policy, Alliance for Nuclear Responsibility, Beyond Nuclear, Blue Ridge Environmental Defense League, C-10 Research and Education Foundation, Don't Waste Michigan, Environmental Coalition on Nuclear Power, Friends of the Earth, Friends of the Coast Opposing Nuclear Pollution, Grandmothers, Mothers and More for Energy Safety, New England Coalition, Nuclear Information and Resource Service, Nuclear Free Vermont by 2012, Nuclear Watch South, Pilgrim Watch, Public Citizen, San Luis Obispo Mothers for Peace, the Snake River Alliance, Southern Alliance for Clean Energy, and the

Commission issued the WCD and TSR revisions in December 2010.[15] Specifically, the Commission revised Finding 2 to state that a suitable permanent repository would be available "when necessary," rather than by a date certain.[16] The Commission also revised Finding 4, providing that spent nuclear fuel could be safely stored at plants for at least sixty years beyond the licensed life of a plant, instead of the original thirty years.[17]

Four states, an Indian community, and several environmental groups (including NRDC) challenged that 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 WCD and TSR update. No mandate, however, has issued and parties are still evaluating their options, including potentially seeking rehearing or rehearing en banc. In fact, the mandate will not issue, at the earliest, until late August 2012, if at all.[18] Notwithstanding the still-evolving developments in *New York*, on July 9, 2012, NRDC filed the instant Motion with the Proposed Contention.

Sustainable Energy and [Economic] Development Coalition Regarding NRC's Proposed Waste Confidence Decision Update and Proposed Rule Regarding Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operations (Feb. 6, 2009), *available at* ADAMS Accession No. ML090680891.

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

16 Consideration of Environmental Impacts of Spent Fuel, 75 Fed. Reg. at 81,038.

17 Waste Confidence Decision Update, 75 Fed. Reg. at 81,074.

18 *See* Fed. R. App. P. 41(b) (indicating that a mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate); *New York*, 681 F.3d 471 (No. 11-1045), Clerk's Order (July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc). In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

III. THE PROPOSED CONTENTION IS NOT ADMISSIBLE

A. The Proposed Contention Is Untimely Because It Fails to Satisfy the 10 C.F.R. § 2.309(f)(2) Timeliness Requirements

The ISO states that "[f]or purposes of this proceeding, as the parties have proposed, any contention filed within 30 days of the availability of the information upon which it is based shall be deemed 'timely' under 10 C.F.R. § 2.309(f)(2). Any contention filed later than that will be deemed 'nontimely' under 10 C.F.R. § 2.309(c)."[19] Because NRDC filed its contention within 30 days of the D.C. Circuit's decision, NRDC must meet the requirements of Section 2.309(f)(2). NRDC bears the burden of successfully addressing these "stringent" criteria.[20]

Section 2.309(f)(2) requires that a petitioner may submit a new contention only with leave of the presiding officer upon a showing that:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion[21] based on the availability of the subsequent information.

The D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. As discussed above, the mandate will not issue, at the earliest, until late August 2012, if at all.[22] Because it is the mandate that makes the decision effective, the *New York*

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19 ISO at 7.

20 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009); *see also Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, slip op. at 5 & n. 19 (Mar. 10, 2011).

21 For timeliness, as stated above, the ISO provides that "any contention filed within 30 days of the availability of the information upon which it is based shall be deemed 'timely' under 10 C.F.R. § 2.309(f)(2)." ISO at 7 (emphasis omitted).

22 *See* Fed. R. App. P. 41(b) (indicating that a mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate); *New York*, 681 F.3d 471 (No. 11-1045), Clerk's Order (July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for

decision has no legal effect on this proceeding. Accordingly, the Proposed Contention has not raised any materially-different information than was previously available and, therefore, fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii). For this reason, the Proposed Contention is premature and does not satisfy the Section 2.309(f)(2) requirements.

B. The Proposed Contention Does Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

In addition to the Section 2.309(f)(2) timeliness requirements, NRDC also must demonstrate that the Proposed Contention is admissible under 10 C.F.R. § 2.309(f)(1)(i) to (vi).[23] These requirements are discussed in detail in Exelon's December 20, 2011 Answer opposing NRDC's initial Petition to Intervene[24] and a brief discussion of the key contention admissibility requirements is set forth below.

The Commission's rules on contention admissibility are "strict by design."[25] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[26] Prior to the amended rule, "intervenors were able to trigger hearings after merely 'copying contentions from

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rehearing or rehearing en banc). In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

[23] That section specifies that each contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) 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 (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[24] *See* Exelon's Answer Opposing NRDC's Petition to Intervene at 5-10 (Dec. 20, 2011); *see also Limerick*, LBP-12-08, slip op. at 7-8.

[25] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (characterizing the contention admissibility rules as "strict by design").

[26] *Id.* (*citing Oconee*, CLI-99-11, 49 NRC at 334).

another proceeding involving another reactor,' even though many of these intervenors often had 'negligible knowledge' of the issues 'and, in fact, no direct case to present.'"[27]

The purpose of the six 10 C.F.R. § 2.309(f)(1) admissibility criteria is to focus litigation on concrete issues and thereby ensure a clear and focused record for decision.[28] The Commission has stated that it should not have to expend resources on the hearing process unless there is an issue that is susceptible to resolution in an NRC hearing.[29] Thus, a licensing proceeding is not the proper forum to attack an NRC rule or regulation.[30] Similarly, the Commission will "not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[31]

As discussed below, NRDC fails to satisfy the Commission's substantive admissibility requirements.

1. The Proposed Contention Lacks Legal Basis and Challenges the TSR, Contrary to 10 C.F.R. §§ 2.309(f)(1)(ii)-(iii) and 2.335(a)

Based on the D.C. Circuit's recent *New York* decision, NRDC claims that the Limerick ER improperly omits a required environmental evaluation of the impacts caused by the storage of nuclear waste at Limerick following the end of the requested operating licenses, and the effects of failing to establish a repository.[32] NRDC also asserts that the ER fails to include an analysis of the alternatives to mitigate these impacts.[33] As a result, NRDC contends that the Commission

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27 *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC __, slip op. at 4 (Mar. 27, 2012) (*quoting Oconee*, CLI-99-11, 49 NRC at 334).

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

29 *Id.*

30 *See, e.g.*, *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

31 *Oconee*, CLI-99-11, 49 NRC at 345 (*quoting Douglas Point*, ALAB-218, 8 AEC at 85).

32 Motion at 8.

33 *Id.*

may not reach a final decision on whether to renew Limerick's operating licenses until such analysis is complete.[34] However, as discussed above, the D.C. Circuit has not yet issued its mandate. Because it is the mandate that makes the decision legally-effective, no evaluation or other action is "required" by the *New York* decision at this time, contrary to NRDC's assertion.[35] Accordingly, the Proposed Contention lacks a legal basis, contrary to 10 C.F.R. § 2.309(f)(1)(ii). Indeed, the Commission has specifically held that it is premature for a party to request relief based upon a court decision before the mandate issues.[36]

Furthermore, because the mandate has not yet issued, the Proposed Contention constitutes an impermissible challenge to the TSR. The Proposed Contention demands a spent fuel storage environmental impact evaluation in this proceeding for the period after the cessation of operations.[37] The currently-effective regulation, however, makes clear that "no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license . . . for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis."[38] Unless and until the mandate issues, the current TSR remains in effect. Accordingly, the Proposed Contention constitutes an impermissible challenge to that regulation and should be rejected pursuant to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).

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34 *See id.* at 5; Proposed Contention at 12.

35 *See* Motion at 5 (asserting that the *New York* decision removes any legal bar on consideration of the impacts of onsite storage of nuclear waste in the post-operation period and the feasibility of ultimate disposal).

36 *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-23, 64 NRC 107, 109 (2006) (denying premature motion seeking procedural relief in advance of an appellate court's mandate).

37 *See* Motion at 9.

38 10 C.F.R. § 51.23(b).

Recognizing that the Motion lacks a legal basis, "NRDC requests that consideration of the contention be held in abeyance pending issuance of that mandate."[39] An abeyance, however, would be inconsistent with NRC case law. In the *Indian Point* proceeding, the Commission directed the Board to deny two waste confidence contentions notwithstanding a similar request by an intervenor to hold the contention admissibility ruling in abeyance pending future potential action.[40] Licensing boards also have rejected requests to admit previous waste confidence contentions and hold them in abeyance pending prospective later developments.[41] Likewise, NRDC's abeyance request should be rejected.

NRDC also fails to address the considerable uncertainty underlying the Motion's central assumptions, including when (and whether) the mandate will issue. An admissible contention cannot be based on such speculative guesswork. As discussed above, the Commission refuses to admit contentions "based on little more than speculation."[42] This speculation provides an additional basis for rejecting the Proposed Contention and not holding it in abeyance.

2. The Proposed Contention Raises Issues that Are Likely to Become the Subject of Rulemaking, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

Even if the mandate were to issue, Commission precedent clearly dictates the Board cannot admit a contention that raises an issue that is, or is about to become, the subject of a rulemaking.[43] As the Commission made clear in *Indian Point*, its longstanding practice has been

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39 Motion at 2.

40 *See Indian Point*, CLI-10-19, 72 NRC at 100; *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Answer of the State of New York to Hudson River Sloop Clearwater, Inc.'s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-Level Radioactive Waste at Indian Point at 16 (Nov. 19, 2009), *available at* ADAMS Accession No. ML100820028.

41 *See, e.g.*, *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 977 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 251 (2009); *Luminant Generation Co.* (Comanche Peak Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 341 (2009).

42 *Davis-Besse*, CLI-12-08, slip op. at 4 (*quoting Oconee*, CLI-99-11, 49 NRC at 334).

43 *See Indian Point*, CLI-10-19, 72 NRC at 100; *Oconee*, CLI-99-11, 49 NRC at 345.

to address long-term waste storage issues generically through rulemaking rather than litigating issues case-by-case in individual adjudicatory proceedings.[44] The Commission does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.[45] Thus, if the mandate issues, the Proposed Contention would still be inadmissible because it may reasonably be expected that the Commission will continue this practice and institute a rulemaking addressing the issues on remand.

The *New York* decision rejected the notion that the Commission must examine each site individually and allows the Commission to continue its traditional generic approach.[46] Moreover, the issues identified by the D.C. Circuit are eminently suitable for generic resolution, as the Commission has consistently done for this issue. NRDC presents no basis to believe that risks from spent fuel storage differ significantly from site to site, or that there is anything unique about Limerick Units 1 and 2. Thus, unless and until the Commission directs otherwise, *Indian Point* governs, and the Board should presume the Commission will proceed generically through rulemaking. Accordingly, the Board should deny the Proposed Contention pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

Exelon recognizes that the Commission has not yet announced how it intends to address the issues identified in the *New York* decision. Therefore, to the extent the Board has any uncertainty concerning whether the Commission will proceed with a generic rulemaking, the Board should certify a question to the Commission pursuant to 10 C.F.R. § 2.319(l) for its

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44 *See Indian Point*, CLI-10-19, 72 NRC at 99 (*citing Oconee*, CLI-99-11, 49 NRC at 343).

45 *See id.* at 100.

46 *New York*, 681 F.3d at 483.

determination.[47] Such certification also would avoid the potential for inconsistent treatment with the various other proceedings in which similar contentions have been filed.

3. The Proposed Contention Lacks Legal Basis Because It Demands Action Inconsistent with the *New York* Holding, Contrary to 10 C.F.R. § 2.309(f)(1)(ii)

NRDC contends that the Limerick ER and the Commission Staff's supplemental EIS for Limerick must include a discussion of the environmental impacts of on-site storage and disposal of nuclear waste in the post-operation period "as directed" by the D.C. Circuit.[48] However, as discussed above, the *New York* decision explicitly rejected the notion that the Commission must examine each site individually.[49] In holding that the Commission's revisions to Findings 2 and 4 were not sufficiently supported, the D.C. Circuit stated that "we do not require, as petitioners would prefer, that the Commission examine each site individually."[50] Indeed, the D.C. Circuit acknowledged a generic approach and noted that "the Commission is currently conducting an EIS regarding the environmental impacts of [spent fuel] storage beyond the sixty-year post-license period at issue in this case, and some or all of the problems here may be addressed in such a rulemaking."[51]

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47 *See* 10 C.F.R. §§ 2.319(l), 2.341(f)(1). The mandate would invalidate the 2010 WCD and TSR update. According to precedent, the old WCD and TSR may remain effective because the D.C. Circuit has not undertaken review or issued a decision vacating the old TSR. *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757-58 (D.C. Cir. 1987) (holding that a decision vacating an agency rule "necessarily reinstated" the previous rule); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that vacating an agency rule has the "effect of reinstating the rules previously in force"); *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 238-39 (D.D.C. 2011) (holding that once the court vacated an agency rule for failing to conduct a NEPA review prior to finalizing the rule, the prior rule would be reinstated despite the argument that the prior rule suffered from the same legal flaws because the prior rule was not before the reviewing court). To the extent any uncertainty exists concerning this issue, the Board can likewise certify such a question to the Commission for its determination.

48 Motion at 5.

49 *See New York*, 681 F.3d at 483.

50 *Id.*

51 *Id.*

Contrary to NRDC's assertion, the D.C. Circuit did not direct the Commission to take any specific action in or to suspend any ongoing licensing proceeding, including the Limerick license renewal proceeding. The Proposed Contention demands an environmental evaluation that is inconsistent with the *New York* holding.[52] Therefore, the Proposed Contention lacks a legal basis, contrary to 10 C.F.R. § 2.309(f)(1)(ii).

4. The Proposed Contention Requests Analyses Which Are Outside the Scope of a License Renewal Proceeding, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

NRDC includes in its allegation of omission, a series of analyses which it suggests Exelon must incorporate into its ER. These include an evaluation of the environmental effects of all reasonable alternatives of on- and off-site storage of waste during the period of extended operation;[53] offsite land, water, and air use impacts of continued operations;[54] re-evaluation of the safety of long-term storage of spent fuel;[55] and the implications of on-site storage of waste for decommissioning.[56]

These analyses are not within the scope of any license renewal proceeding and, thus, cannot be part of an admissible contention. An evaluation of the environmental effects of all reasonable alternatives of on- and off-site storage of waste during the period of extended operation is covered by 10 C.F.R. Part 51, Appendix B, Table B-1, which is not affected by the

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[52] Further underscoring the Proposed Contention's inadmissibility, NRDC misconstrues the *New York* decision in several other respects. For example, the Proposed Contention is based, in part, on NRDC's erroneous conclusion that the D.C. Circuit held that the environmental impacts of onsite storage of spent fuel following the cessation of operations are significant. *See* Proposed Contention at 9, 11 (demanding a "required" evaluation of all reasonable alternatives for avoiding, reducing and mitigating spent fuel storage and disposal environmental impacts and risks during and beyond the extended license term). To the contrary, the D.C. Circuit held that the WCD rulemaking is a major federal action requiring either an EIS or a finding of no significant impact that sufficiently explains why the proposed action will not have a significant environmental impact. *See New York*, 681 F.3d at 477, 480 (rejecting petitioners' arguments that the WCD must be reversed on the ground that it lacks an EIS and that a site-by-site analysis is necessary to assess the risk of TSF).

[53] Proposed Contention at 10-11.

[54] *Id.* at 11.

[55] *Id.*

[56] *Id.*

D.C. Circuit's *New York* decision. Offsite land, water, and air use impacts of continued operations also are not affected by the Court's decision, and are addressed in the GEIS (*see* 6-81 to 6-86) and Table B-1. The Court's decision was limited to NEPA, yet the NRDC now raises a concern about the safety of long-term storage of spent fuel. Nor is the *safety* of long-term storage of spent fuel an item for which an applicant must address through aging management. Finally, Table B-1 also demonstrates that the implications of on-site storage of waste for decommissioning are a Category 1 issue under NEPA for license renewal, which is unaffected by the court's decision. These issues are outside the scope of this proceeding and should be rejected.

IV. CONCLUSION

As discussed above, NRDC fails to satisfy the standards for timely contentions in 10 C.F.R. § 2.309(f)(2). The Proposed Contention also fails to meet the Commission's contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). For both of these reasons, the Proposed Contention should be denied in its entirety.

Respectfully submitted,

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

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Dated in Washington, DC
this 2nd day of August 2012

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(Limerick Generating Station, Units 1 and 2)	)	August 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Exelon's Answer Opposing NRDC's New Waste Confidence Contention" was served by the Electronic Information Exchange on the following recipients:

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