UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
EXELON GENERATION COMPANY, LLC	)	**Docket No. 50-352-LR**
	)	**Docket No. 50-353-LR**
(Limerick Generating Station, Units 1 and 2)	)	
		December 21, 2012

(License Renewal Application)

REPLY OF NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF PETITION, BY WAY OF MOTION, FOR WAIVER OF 10 C.F.R. § 51.53(c)(3)(ii)(L) AS APPLIED TO APPLICATION FOR RENEWAL OF LICENSES FOR LIMERICK UNITS 1 AND 2[1]

I. INTRODUCTION

In response to the Commission's remand of its November 22, 2011 Petition to Intervene and Request for Hearing, in which the Commission expressly directed the Board to consider a petition for "waiver of [10 C.F.R.] § 51.53(c)(3)(ii)(L) as it applies to the Limerick SAMDA analysis," CLI-12-19 (hereafter "Comm. Op.") at 15, the Natural Resource Defense Council ("NRDC") has filed a Waiver Petition. *See* NRDC Petition For Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) As Applied To Application For Renewal of Licenses For Limerick Units 1 and 2 ("NRDC Waiver Pet."). As the Petition explains, while NRDC disputes a waiver is necessary, it nonetheless meets all the criteria for waiver of Section 51.53(c)(3)(ii)(L), because precluding

[1] NRDC submits this Reply pursuant to the Board's November 27, 2012 Order expressly allowing NRDC to file a Reply in support of the Waiver Petition. ASLB No. 12-916-04-LR-BD) (Nov. 27, 2012).

NRDC from pursuing its Contentions – which concern new and significant information related to the SAMA analysis associated with the Limerick relicensing – would be contrary to the purpose for which the Commission adopted Section 51.53(c)(3)(ii)(L); the waiver request raises special circumstances that are unique to the Limerick relicensing; and the request concerns matters of significant environmental concern. *Id.* at 16-27.

NRC Staff ("Staff") and Exelon Generating Company, LLC ("Exelon") oppose the Waiver Petition. Staff Answer To NRDC Petition ("Staff Ans.") (Dec. 14, 2012); Exelon Response Opposing NRDC Petition ("Exelon Resp.") (Dec. 14, 2012). In their view, it is irrelevant whether there is new and significant information warranting further review of SAMAs for Limerick because, in promulgating its 1996 NEPA regulations for relicensing, the Commission intended that SAMAs would not need to be revisited during Limerick relicensing under *any* conceivable circumstances or timeframe. They further contend that the issues NRDC has raised do not qualify as "special circumstances," as "unique," or as raising a concern sufficiently "significant" to warrant a waiver.

As explained below, the Staff Answer and Exelon Response merely serve to further highlight why the Waiver Petition should be granted. Indeed, while one of their principal arguments is that NRDC's waiver petition is contrary to the "plain language" of Section 51.53(c)(3)(ii)(L), the sole purpose of a Waiver Petition is to obtain an exception from the plain terms of a regulation. Moreover, since the Staff and Exelon both acknowledge that NEPA requires that "new and significant information" *be considered in the relicensing process*, the narrow question here is whether an interested party is entitled to *challenge the adequacy* of that consideration when it relates to severe accident mitigation alternatives, as NRDC contends, or

whether, as Staff and Exelon contend, the purpose of Section 51.53(c)(3)(ii)(L) was to *deny that opportunity and leave that aspect of the NEPA process beyond challenge*. Since neither Exelon nor Staff even assert – let alone demonstrate – that this was the purpose of Section 51.53(c)(3)(ii)(L), their arguments must fail.

Exelon and Staff also argue that NRDC's Contentions do not raise issues serious enough to warrant consideration. However, given that the Board had *already concluded* that NRDC's Contentions warrant consideration before the Commission remanded the matter for consideration through a waiver petition, *see* Atomic Safety and Licensing Board's ("ASLB") April 4, 2012 Memorandum and Order (ASLBP No. 12-916-04-LR-BD01) (hereafter "ASLB Op."), there can be no question that NRDC has made a "*prima facie"* case concerning these matters, warranting Commission referral. 10 C.F.R. § 2.335(d); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527 (1993) (*prima facie* case burden may only "require[ ] production of enough evidence to raise an issue for the trier of fact"). As for the Commission, NRDC has submitted ample information to demonstrate that the waiver should be granted and its Contentions should be admitted, and, contrary to Staff and Exelon's arguments, NRDC is not required at this stage to demonstrate *either* that its Contentions will ultimately succeed, or that, if they do, they will necessarily lead Exelon to implement improved SAMAs for Limerick. *Cf. Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (explaining that for "procedural injury" cases, such as those under NEPA, the "plaintiffs suffer harm from the agency's failure to follow [the] procedures, compliance with

which *might have changed the agency's mind*") (emphasis added); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573, n.7 (1992)).[2]

Exelon and Staff's arguments that the Waiver sought here is unnecessary because the Commission (and Exelon) have fully and fairly considered SAMAs in other contexts also must fail. While it is true that the Commission has discretion in determining how it will carry out its responsibilities under NEPA, that discretion simply does not extend to substituting *other* processes for NEPA, where Congress specifically directed that agencies take a "hard look" at all of the environmental impacts of their actions, along with appropriate alternatives, through a public participation process. *E.g., Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729 (3d Cir. 1989) (rejecting argument that other processes can substitute for consideration of SAMAs in the NEPA process).

Accordingly, the Board should certify the Waiver Petition to the Commission, where the Petition should be granted.

---

[2] Exelon also complains about the evidence reflecting new and significant information NRDC has submitted through expert Declarations in its original Request for Hearing and its Waiver Petition. As explained below, *see infra* at 12, n.7, however, Exelon's effort to exclude this information is baseless, as the Board and Commission may and should consider *both* Declarations, which were both submitted with the Waiver Petition and which amply demonstrate the new and significant information that warrants consideration during the Limerick relicensing NEPA review process.

II. ARGUMENT

At the outset, in light of Staff and Exelon's arguments it is critical to clarify that in order to grant a waiver here the Board and Commission do not need to consider the *merits* of NRDC's Contentions. The only question at this stage is whether NRDC meets the waiver standards. The Board *already determined* that two of the three Contentions at issue here should be admitted, and the Commission's remand specifically invited NRDC to raise the third. Thus, irrespective of what *future* proceeding could be appropriate to further consider the propriety of NRDC's Contentions, the criteria for contention admissibility is not at issue here, Staff and Exelon's arguments to the contrary notwithstanding. *E.g.* Staff Ans. at 22, 39 (claiming NRDC must, at this stage, show "plainly better" methodologies and a "substantial reduction in risk of severe accidents").

A. Neither Exelon Nor Staff Demonstrate That It Would Be Consistent With The Purposes Of Section 51.53(c)(3)(ii)(L) To Preclude Consideration Of New And Significant Information Concerning SAMAs For Limerick.

Staff and Exelon contend that denying NRDC a Waiver to permit consideration of its Request for Hearing concerning new and significant information related to SAMA's for Limerick would be consistent with the purposes of Section 51.53(c)(3)(ii)(L) because, (a) the plain language of the regulation precludes NRDC's request, and (b) the Commission considered this question in promulgating the regulation. Staff Ans. at 12-26; Exelon Resp. at 19-27. Neither of these arguments should succeed.

1. The Waiver Cannot Be Denied On The Grounds That It Is Inconsistent With The Plain Language Of The Regulation.

Both Staff and Exelon argue that NRDC cannot satisfy the first waiver criteria because allowing NRDC to raise new and significant information concerning SAMAs during the Limerick Relicensing would be contrary to the plain language of Section 51.53(c)(3)(ii)(L), which expressly states that further SAMA analysis need not be conducted if conducted in earlier NEPA review. *E.g.* Exelon Resp. at 20; NRC Staff Resp. at 16 (arguing the Commission may not interpret the regulation in "conflict[ ] with its 'plain language'"). This argument must fail.

If NRDC's Contentions were consistent with the plain language of Section 51.53(c)(3)(ii)(L), *no waiver would be required*. Indeed, that is what the Board originally ruled – *i.e.*, that it would not be inconsistent with the plain language of Section 51.53(c)(3)(ii)(L) to permit NRDC to pursue its Contentions. ASLB Op. at 21. However, it is precisely because the Commission has ruled that pursuit of the Contentions would be *contrary to the language of Section 51.53(c)(3)(ii)(L)* that NRDC has been directed to submit a Waiver Petition. Comm. Op. at 13-15.

Accordingly, it is – and must be – entirely irrelevant to NRDC's Waiver Petition that the waiver sought is not consistent with Section 51.53(c)(3)(ii)(L) as written. Indeed the Waiver regulations are designed to allow an interested person to demonstrate that "*application of* a specified Commission rule or regulation" should be waived, 10 C.F.R. § 2.335(b) (emphasis added), which necessarily means that applying the plain language of the regulation at issue would preclude relief. In short, NRDC here seeks a *waiver* of Section 51.53(c)(3)(ii)(L), and thus Staff and Exelon's reliance on the language of the regulation has no traction.

2. The Waiver Would Not Be Inconsistent With The Purposes For Which The Commission Enacted 51.53(c)(3)(ii)(L).

NRC Staff and Exelon argue that it would be inconsistent with the purposes of Section 51.53(c)(3)(ii)(L) to permit NRDC to pursue its Contentions concerning new and significant information related to SAMA for Limerick. NRC Staff Ans. at 15-26; Exelon Resp. at 19-27. These arguments also must fail.

First, with respect to NRDC's argument that the purpose of Section 51.53(c)(3)(ii)(L) was simply to exempt Limerick from reconsidering the SAMAs previously considered, Waiver Pet. at 16-19, Staff asserts that the Commission has already determined that under Section 51.53(c)(3)(ii)(L) "'a supplemental SAMA *analysis* need not be performed in' the Limerick proceeding." Staff Ans. at 17. However, the Staff's citation – and a similar one from Exelon – is to *the Commission decision remanding this matter for NRDC to submit a Waiver Petition. Id.* at 17, n.82; *see also* Exelon Resp. at 20-21 (similarly claiming that the Commission's remand for a waiver petition constitutes a "recent interpretation" by the Commission demonstrating that a waiver may not be granted).

It could hardly make sense to conclude that, in the very decision where it invited NRDC to submit a Waiver Petition, the Commission also concluded that the application of Section 51.53(c)(3)(ii)(L) in this instance serves the rule's purpose – in which case, a waiver *could not be granted*. To the contrary, since the Commission concluded that "NRDC *may challenge* the adequacy of the new information provided in the Limerick Environmental Report," Comm. Op. at 13 (emphasis added), and then explained that the "proper procedural avenue for NRDC to raise its concerns is to seek a waiver," *id.*, the Commission necessarily recognized that

application of Section 51.53(c)(3)(ii)(L) in these circumstances would *not* necessarily serve the regulations' purposes. *Cf. Natural Res. Def. Council, Inc. v. EPA*, 25 F.3d 1063, 1070 (D.C. Cir. 1994) (regulations may not be implemented so as to "conflict with the governing statute").[3]

Second, while Staff and Exelon claim language in the 1996 Statement of Consideration ("SOC") supports their view that the regulation was intended to foreclose further consideration of *any* SAMAs, not just those previously considered, *e.g.* Staff Ans. at 18-19, neither can explain how this could have been the Rule's purpose given the language in the SOC affirming the Commission's commitment to consider new and significant information during relicensing, as mandated by NEPA. *See, e.g.* 61 Fed. Reg. 28,467, 28,468 (1996) ("The NRC will also review and consider any new and significant information presented during the review of individual license renewal applications"). Indeed, neither even attempts to reconcile Section 51.53(c)(3)(ii)(L) and Section 51.53(c)(iv) (requiring consideration of "new and significant information" during relicensing) *at all*. 10 C.F.R. § 51.53(c)(iv). While the Board initially

---

[3] It is thus also irrelevant that the GEIS and Section 51 regulations concluded that the likelihood of severe accidents is "of SMALL significance for all plants," Exelon Resp. at 17, as, once again, if this was a bar to a waiver there would have been no reason for the Commission's remand. Indeed, Staff's overarching premise that granting the waiver would render "the exception in 51.53(c)(3)(ii)(L) meaningless," Staff Ans. at 27, is plainly mistaken. The waiver could not be denied on that basis because that would mean the Commission's remand was a futile exercise. *Cf. In re Butcher*, 125 F.3d 238, 242 (4th Cir. 1997) (reiterating general rule of interpretation whereby a legislature is "presumed not to have enacted futile laws or laws which generate such absurd results"). In NRDC's view, having reached its construction of the regulations, the Commission naturally remanded in recognition that applying the regulation here as written would be contrary to the Commission's commitment, as reflected in the SOC, to comply with NEPA, and that the regulation may have a more narrow purpose – to avoid duplicative SAMA analysis – than reflected by the language itself.

resolved the tension between these regulations by concluding that Section 51.53(c)(3)(ii)(L) did not preclude NRDC's Contentions, the Commission resolved what it characterized as "ambiguity" in the regulations, Comm. Op. at 11, by inviting NRDC to submit this Waiver Petition. Accordingly, the language cited by Staff and Exelon does not demonstrate that the purpose of Section 51.53(c)(3)(ii)(L) was to exempt Exelon from any requirement to consider new and significant information related to individual SAMAs during the Limerick relicensing. Rather, as NRDC has explained, the purpose of the regulation was to insure NEPA compliance while avoiding duplication of effort, by exempting Limerick from reconsidering specific SAMAs during relicensing.

Indeed, it bears emphasizing that both Staff and Exelon agree that "'NEPA *does impose* a requirement that the NRC consider any new and significant information regarding environmental impacts before renewing a nuclear power plant's operating license.'" NRC Ans. at 9 (quoting *Massachusetts v. United States*, 522 F.3d 115, 127 (1st Cir. 2008) (emphasis added)). Thus, as Exelon explained, "[b]oth the applicant and the NRC Staff have obligations to address new and significant information related to SAMAs in their NEPA analyses." Exelon Resp. at 16. NRC Staff and Exelon further assert that the only way an interested party may pursue an argument that these obligations have not been fulfilled is to submit a Waiver Petition. *Id.* at 17; Staff Ans. at 34. *That is precisely what NRDC is doing here*, and thus far from undermining the Waiver Petition these arguments serve to further highlight why it should be granted.

Moreover, if Staff and Exelon were correct that, despite the fact that a waiver is the *only* procedural vehicle for NRDC to challenge the adequacy of the consideration of SAMA's in the Limerick relicensing ER, a waiver cannot be granted because an adequate analysis was

previously conducted – *irrespective of new and significant information bearing on the validity of SAMAs never previously considered* – then the end result would be that a waiver could never be granted and that while the Commission, in carrying out its NEPA responsibilities, *is* required to consider new and significant information, an interested party has no procedural vehicle to challenge the adequacy of that analysis. Exelon Resp. at 17 ("NEPA requires the NRC to fully consider environmental issues, but does not automatically require the NRC to do so in an adjudicatory process."). There is simply nothing in the 1996 regulations suggesting that the Commission's purpose was to foreclose such public participation, in appropriate cases, which, again, would flatly contradict both NEPA's dictates and the good faith presumption that the Commission did not intend this remand to have a preordained result. *See also, e.g. Calvert Cliff's Coord. Comm. v. AEC*, 449 F.2d 1109, 1117 (D.C. Cir. 1971) (rejecting proposal to conduct the NEPA analysis outside the hearing process as a "crabbed interpretation of NEPA).[4]

Third, Staff and Exelon claim that in enacting Section 51.53(c)(3)(ii)(L) the Commission recognized that there would be other, *non-NEPA* methods through which applicants and the NRC would continue to consider SAMAs in the future. NRC Staff Ans. at 13; Exelon Resp. at 40-41.

---

[4] Staff emphasizes that in *Mass. v. U.S.*, 522 F.3d at 127, the First Circuit explained that NRC has broad discretion to structure its NEPA compliance procedures. Staff Ans. at 10. NRDC does not disagree with that proposition, but those procedures *must still comport with NEPA*, including by providing an avenue for an interested party to contest whether adequate consideration has been given to new and significant information. While NRC Staff claims the waiver process provides that avenue, that path is only meaningful *if the Waiver is granted*, as NRDC urges.

But this merely serves to highlight once again that the Commission's purpose in enacting Section 51.53(c)(3)(ii)(L) was not to foreclose consideration of additional SAMAs during relicensing, in the event that new and significant information exists. In short, since these alternative avenues for considering SAMAs certainly are not the functional equivalent of NEPA review – with, *inter alia*, appropriate public participation and consideration of alternatives – they are no substitute for considering SAMAs in the NEPA review during relicensing. *See, e.g. United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 38 (1st Cir. 2011) (rejecting argument that alternative process can substitute for NEPA).[5]

Indeed, Staff and Exelon's rejoinder regarding the 1999 Nuclear Energy Institute ("NEI") Rulemaking Petition further demonstrates this point. Staff Ans. at 20-21; Exelon Resp. at 41-42. As NRDC explained in the Waiver Petition, when NEI sought to make SAMA analysis a Category 1 issue on the grounds that the issue was being considered through other methods (*e.g.*, through Individual Plant Examinations of External Events ("IPEEE")), the Commission *rejected the Petition,* explaining that "it should continue to consider SAMAs for individual license renewal applications to continue to meet its responsibilities under NEPA," 66 Fed. Reg. 10,834, 10,836 (2001). NRDC Pet. at 18, n.10. While Staff claims that in resolving this Petition the Commission rejected an argument that SAMAs need not be considered during license renewal "because severe accidents are remote and speculative," Staff Ans. at 20, in fact the Commission expressly concluded that "insufficient information is available to conclude generically that a

[5] Exelon also conclusorily states that updated SAMAs were considered in a more recent update of the GEIS. Exelon Resp. at 23, n.95. This overstates the status of the GEIS update, which has not been completed. *See* Staff Ans. at 18, n.88 (citing *proposed rule*).

SAMA analysis is not warranted for individual plant license renewal reviews." 66 Fed. Reg. at 10,838. Since the Commission has affirmatively decided, contrary to Staff and Exelon's claim, that its other analyses of SAMAs are insufficient to support a generic SAMA finding, there is no basis in the Commission's prior actions for concluding that this alternative could substitute for adequate NEPA review.[6]

Staff and Exelon's responses regarding NRDC's specific Contentions are also unavailing.[7] *First*, with respect to the additional specific SAMAs that Exelon has thus far

---

[6] Thus, although Staff *claims* that the Commission "explicitly determined that . . . if a consideration of SAMA was completed, another need not be completed at license renewal, despite the fact that future SAMA analyses may uncover additional, cost-beneficial SAMAs," Staff Ans. at 24, they provide no citation for this unvarnished assertion, which is not only antithetical to NEPA – as it would mean that even though the Commission recognizes that a relicensing is a *new* decision involving "the consideration of environmental impacts caused by 20 additional years of operation," 66 Fed. Reg. at 10,836, a new SAMA with extremely high benefits for very low costs neither need be considered nor implemented – but, also, to the Commission's own regulation governing consideration of "new and significant information" during relicensing. 10 C.F.R. § 51.53(c)(iv).

[7] Exelon's extended attack on NRDC's supporting Declarations, Exelon Resp. at 24, 43-45, is spurious. The Waiver Petition was supported both by the Declaration of Dr. Weaver (and Mr. Fettus), *as well as* by NRDC's original Request for Hearing and Contentions, which was supported by a more extensive Declaration of Dr. Weaver and two of his colleagues – *all of which was submitted in support of the Waiver Petition*. *See* ADAMS Doc. ID 11648 (Nov. 21, 2012). NRDC pared down the Hearing Request Declaration to focus on the issues most relevant to the Waiver Petition, and most importantly, to remove discussion related to Contentions that are no longer at issue, such as population numbers. The Board and Commission should thus not be distracted by Exelon's effort to waste the parties, Board, and Commission's time arguing that submitting the Dr. Weaver declaration with the Waiver Petition somehow calls into question the earlier Declaration, or otherwise precludes the Board and Commission from considering the earlier Declaration should that prove necessary. Such diversionary tactics have no place in this or any other proceeding. *E.g. AT&T. v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir.

refused to consider, as noted, Staff asserts that, in promulgating Section 51.53(c)(3)(ii)(L), the Commission recognized that "future SAMA analyses may uncover additional, cost-beneficial SAMAs," but determined that if a prior SAMA had been completed during licensing a further consideration of SAMAs during relicensing was not required. NRC Staff Ans. at 24.

However, NRC Staff can point to no specific language in the SOC that makes this point. To the contrary, the SOC repeatedly emphasizes that "new and significant information" *will be considered* during relicensing. 61 Fed. Reg. at 28,468. Again, since such consideration is both consistent with NEPA, and with NRC's own concession in its (and Exelon's brief) that "new and significant information" must be considered during the relicensing process, application of the regulation to preclude NRDC from pursuing this issue would be contrary to the purpose of the regulation.[8]

1992) (parties should not be subjected to an "administrative law shell game").

[8] Seeking to put NRDC to an untenable and inappropriate burden, Staff also asserts the waiver should be denied because NRDC has not demonstrated that the SAMAs it has identified are different from those the Commission recognized "could be identified" in promulgating Section 51.53(c)(3)(ii)(L), or have not "already been considered at Limerick." Staff Ans. at 24-25. Of course, if the Commission or Exelon had already considered these specific SAMAs, Staff would point to that consideration, rather than suggesting the NRDC's has an obligation to prove a negative. In any event, the salient point is that these SAMAs have not yet been considered *in the NEPA process*, and since the SOC makes plain that the Commission was not disavowing its fundamental NEPA obligation to consider new and significant information during the relicensing *NEPA* process, application of Section 51.53(c)(3)(ii)(L) to preclude NRDC's contentions would be contrary to its purposes.

Second, as regards economic analysis and modeling techniques, Staff claims that these issues concern how a SAMA analysis is conducted, and that since "the rule does not provide particular requirements for a SAMA analysis," there is no basis for these Contentions. Staff at 25-26. Similarly, Exelon argues that the Commission anticipated that any SAMA improvements would be "minor in nature and few in number." Exelon Resp. at 22; *see also id.* at 24 (asserting that waiver can only be granted if NRDC identifies "*major* design changes or *major* plant modifications that would be cost effective"); *id.* at 26 (arguing NRDC has failed to demonstrate "major, cost-beneficial plant improvements"); *id.* at 31 ("NRDC fails to demonstrate" that its Contentions "would lead to cost-effective, major design or hardware changes for Limerick").[9]

These arguments are premature. As NRC Staff explains, Exelon's ER "*omit[ted] a discussion of severe accident mitigation alternatives*, which are typically analyzed in license renewal ERs." Staff Ans. at 2 (emphasis added). Once Exelon evaluates the impact of new and significant information in its analysis of the required reasonable range of severe accident mitigation alternatives for Limerick, NRDC will be able to assess whether the economic analysis and modeling approaches employed are adequate. *See, e.g., Lands Council v. Vaught*, 198 F. Supp. 2d 1211, 1238 (E.D.Wash. 2002) (reiterating the principal that "[a]n environmental impact statement must contain high quality information and accurate scientific analysis"); *see*

---

[9] Exelon's "expert" conclusorily asserts that a "50% reduction in the maximum averted cost-risk" is necessary for a SAMA to be significant. Decl. ¶ 21. However, the Commission has no such threshold, and, in any event, as noted, NRDC need not demonstrate the significance of these matters in order to obtain a Waiver; rather those are matters for another day, once the Waiver has been granted.

also 40 C.F.R. § 1502.22(a) (Council on Environmental Quality NEPA regulations providing that where information "is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement"). However, at this stage the issue is whether the purpose of Section 51.53(c)(3)(ii)(L) is served by precluding NRDC from challenging the fact that Exelon inappropriately relied on data from Three Mile Island ("TMI") in considering the significance of information concerning economic cost risks, and has not used the most updated probabilistic safety assessment severe accident consequences code system. NRDC Cont. at 18 (¶ 15), 22 (¶¶ 1,3). Again, given the Commission's assurances that new and significant information *would be considered during relicensing*, it would be wholly inconsistent with the purpose of this regulation to foreclose consideration of these matters unless NRDC can demonstrate – *before such NEPA analysis is performed* – that such consideration will lead to major changes at Limerick.

Indeed, it once again bears emphasizing in this regard that the Board *already determined that two of NRDC's Contention bases should be admitted*, simply not through the waiver process. ASLB Op. at 20-21 ("NRDC has shown there are numerous new SAMA candidates which should be evaluated for their significance"); *id.* at 23-25 (admitting "whether Exelon's use of data from TMI in its analysis provides an adequate consideration of new and significant information regarding economic cost risk"). And the Commission invited NRDC to add the

third. Comm. Op. at 15. Therefore, the admissibility of NRDC's Contentions is simply not at issue in this Waiver Petition.[10]

B. Neither Exelon Nor NRC Staff Demonstrate That The Petition Raises No Special Circumstances Unique To Limerick.

Staff's and Exelon's threshold argument as to special circumstances repackages the argument that, in promulgating 51.53(c)(3)(ii)(L), the Commission anticipated that SAMAs would be considered in the future *outside* the NEPA process. Staff Ans. at 28-29; Exelon Resp. at 28-30. However, as NRDC has explained, *see supra* at 10-11, this is not consistent with the Commission's commitment in the SOC to consider new and significant information through NEPA.

Staff next argues that the waiver cannot be predicated on an issue "the Commission *did not consider*" in promulgating the regulation. Staff Ans. at 31 (emphasis added) (arguing that waiver concerning economic analysis "cannot be proper merely when the Commission did not consider how a licensee might later address . . . an issue in the first place").[11] Once again, Staff offers a heads they win, tails we lose approach: waiver cannot be inappropriate *both* because the Commission considered these issues and because it did *not* consider them. To the contrary, the

---

[10] Moreover, neither Staff nor Exelon have met the strict standards for reconsideration of the Board's determination to admit NRDC's contentions, and thus at least with respect to the previously admitted Contentions, their admissibility once the Waiver is granted should not be reconsidered here. *E.g.*, 10 C.F.R. § 2.323(e) (reconsideration standards).

[11] For its part, Exelon claims that "[t]he Commission was aware of the specific concern" regarding economic analysis when the regulations was issued. Exelon Resp. at 31.

salient question is whether it would be consistent with the purposes of the regulation – which expressly made SAMA analysis a Category 2 issue, and included a narrow exception for Limerick – to conclude that an interested party has no recourse concerning whether new and significant information regarding SAMAs is properly included in the Limerick relicensing NEPA process. Since the answer to that question is no, it is irrelevant whether the Commission did or did not generally anticipate NRDC's Contentions in promulgating 51.53(c)(3)(ii)(L), particularly given that the Commission has already recognized the tension between this regulation and 51.53(c)(iv) requiring consideration of new and significant information during relicensing.[12]

As regards NRDC's third Contention basis, Exelon claims that even if "every other BWR nuclear power plant" relicensing has utilized the improved methodologies NRDC has identified, in promulgating the Rule the Commission intended to exempt Limerick from doing so. Exelon Resp. at 31-32. Since NRDC does not argue that these improved analytical techniques should be used to reexamine the SAMAs already evaluated by Exelon, the point is irrelevant. In addition, once again, Exelon's argument is flatly inconsistent with the Commission's commitment to

---

[12] In further circular reasoning, Staff argues that Exelon's obligation to consider new and significant information, and NRDC's opportunity to challenge that consideration, are tied to 51.53(c)(3)(ii)(L) and whether the exemption it provides Limerick should be waived. Staff Ans. at 33-34 ("Exelon is required under § 51.53(c)(3)(iv) to determine whether any new and significant information might impact the Commission's § 53.53(c)(3)(ii)(L) finding" and "NRDC's right to challenge Exelon's analysis is via waiver petition"). If so, then the new and significant information NRDC has presented warrants a Waiver.

consider new and significant information during relicensing, and its commitment in the rulemaking to comply with NEPA.[13]

Staff and Exelon's efforts to demonstrate the Waiver Petition is not unique to Limerick is also unavailing. Staff Ans. at 34-36; Exelon Resp. at 32-35. Staff suggests the rule "could" apply to other license renewals, Staff Ans. at 35, but, once again, if there were such other plants Staff would have identified them, and NRDC is aware of none. As for "second license renewals," *see* Staff Ans. at 35, Exelon Resp. at 33, the notion that Section 51.53(c)(3)(ii)(L) will exempt further SAMA analysis when plants are renewed again in the mid-twenty-first century is flatly contradictory to the Generic Environmental Impact Statement ("GEIS") on which the regulations are predicated, which was prepared only to address "the potential environmental consequences *of renewing the licenses of and operating individual nuclear power plants for an additional 20 years,*" not of second – and third, and fourth – generation renewals. *See* GEIS Executive Summary; *see also id.* at § 1.1 ("This Generic Environmental Impact Statement (GEIS) for license renewal of nuclear plants was undertaken to assess what is known about the

---

[13] Exelon also claims that NRDC is expressly forbidden from suggesting the use of modern SAMA analysis methodologies, such as Level 3 PRAs and MACCS2, as part of any updated NEPA analysis. Exelon Resp. at 43. What Exelon ignores is that the Commission did not want to specify the particular way in which an applicant would supplement the results of the Level 1 and Level 2 PRAs. Contention 3E does not seek to require Exelon to use MACCS2 or any other PRA Level 3 analysis. Rather, NRDC seeks no more, at this time, than that any further analysis of SAMAs follow the guidance provided by NEI and NRC Staff in ascertaining severe accident impacts and mitigation measure benefits.

environmental impacts that could be associated with license renewal *and an additional 20 years of operation of individual plants*. That assessment is summarized in this GEIS") (emphasis added). In short, Staff and Exelon may not use the prospect of second-generation renewals to demonstrate that allowing NRDC to obtain a waiver of the regulation as it applies to Limerick would open the door for waiver of the regulation as applied to hypothetical license re-renewal proceedings in the future since it is clear the GEIS does not apply to re-relicensing applications. Rather, the waiver sought here is limited to only a *single* BWR, Limerick, for which Exelon has asserted, with allegedly supporting evidence and reasoning, in its ER that it need not do an economic analysis of severe accidents and mitigation alternatives and that it need not consider mitigation alternatives not previously considered.

NRDC also need not demonstrate that the SAMAs and measures it has identified are only relevant to Limerick in order to obtain a waiver. Exelon Resp. at 34. As NRDC has explained, because Limerick is the only BWR to which the exemption in Section 51.53(c)(3)(ii)(L) applies, this issue here is necessarily unique to that "facility rather than 'common to a large class of facilities.'" *In the Matter of Dominion Nuclear Connecticut (Millstone),* 62 N.R.C. 551, 560 (Oct. 26, 2005). Put another way since the other BWRs are not subject to the Section 51.53(c)(3)(ii)(L) exemption, the fact that other BWRs have considered these SAMAs serves to highlight, rather than undermines, the uniqueness of the circumstances here.

C. Neither Exelon Nor NRC Staff Demonstrate That The Petition Raises No Significant Environmental Concerns.

Staff and Exelon assert that the Petition does not raise any significant environmental concerns warranting waiver. Staff Ans. at 37-42; Exelon Resp. at 36-42. They are mistaken.[14]

At the outset, it is critical to note that, as the Staff acknowledges, the fact that the risk of a severe accident may be small does not mean that measures to mitigate against that risk cannot be significant. Staff Ans. at 39, n.189. Rather, as NRDC has explained, particularly because of the severe consequences associated with such an accident, even a small reduction in that risk may be significant. NRDC Pet. at 26. Moreover, given that alternatives analysis is "the heart" of the NEPA process, App. A to 10 C.F.R. 51 at Section 5, the consideration of alternatives to mitigate severe accidents is central to fulfilling the Commission's NEPA obligations.

NRC Staff's assertion that significance must be evaluated in terms of the environmental impacts *alone* rather than in relation to reasonable alternatives that may reduce that impact is also mistaken. Staff Ans. at 38. NEPA – and NRC's regulations – rightly also focus on reasonable *alternatives*, and thus when viewing NRDC's Contentions bases through the lens of alternatives analysis, reasonable alternatives must be appropriately considered even if they have similar impacts. *See, e.g.¸ Ala. Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 730 (9th Cir. 1995) (stating that alternatives are "the heart of the environmental impact statement," and when new reasonable alternatives arise they must be independently considered in

---

[14] Both Staff and Exelon acknowledge that this factor encompasses environmental as well as safety concerns. Staff Ans. at 6, n.26 and 37-38; Exelon Resp. at 36, n.144.

the NEPA process); *see also* 10 C.F.R. § 51.103(a)(4) (explaining that an NRC Record of Decision must "[s]tate whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted. Summarize any license conditions and monitoring programs adopted in connection with mitigation measures"). Moreover, since the entire purpose of SAMAs and the other related bases for NRDC's contentions is to lessen the environmental impacts that would be associated with severe accidents, significant environmental impact issues have been raised as well. *E.g.*, *LEA*, 869 F.2d at 738-39 (rejecting NRC's argument that SAMA alternatives need not be considered in individual licensing proceedings).

As for whether NRDC has met this factor, NRC Staff argues that it is not met because NRDC has not shown that the analysis it seeks "*will* result in a serious reduction in the risk of severe accidents posed by the Limerick facility." Staff Ans. at 39 (emphasis added); *id.* at 40 (arguing factor not met due to failure to show waiver will "necessarily lead to a substantial reduction in risk of severe accidents"). However, as the Staff elsewhere recognized, NRDC need not "*prove the merits of its underlying contention at this stage . . . .*" Staff Ans. at 38, n.182 (emphasis added).

As discussed above, the Board already determined that NRDC had met its threshold burden to assert "not only new, but significant" information warranting consideration of certain of NRDC's Contentions. ASLB Op. at 21. As Exelon recognizes, "new and significant information" is an appropriate basis on which to find that NRDC has "satisf[ied] the fourth prong" of the *Millstone* test. Exelon Resp. at 36, n.146. Accordingly, this issue has already been resolved. *See supra* at 5.

Exelon further argues that because the 1996 SOC contemplated that that Exelon would continue to consider SAMAs outside the NEPA context, the issues NRDC raises are not significant for NEPA purposes. Exelon Resp. at 41. However, once again, this circular logic merely reinforces the basis for NRDC's Contentions. Exelon claims that "*though not conducted to satisfy NEPA*, these PRAs inform the analysis in the ER – which is a document required under Part 51 – and can be used to inform the environmental analysis performed by the NRC staff." *Id.* (emphasis added). Once again, since Exelon acknowledges its obligation to consider new and significant information concerning its SAMA analysis, it plainly must do so in a way that satisfies NEPA, and thus the Waiver Petition – by insuring review of the adequacy of Exelon's SAMA analysis – raises significant environmental concerns satisfying this factor.[15]

Finally, Exelon's reliance on *Mass. v. NRC*, 522 F.3d at 120-121, and the underlying Commission proceeding there, to argue that the significance of new and significant information is insufficient to allow NRDC's Contentions to be admitted, Exelon Resp. at 46-47, is misplaced. In *Mass.*, Petitioners claimed that they were entitled to pursue their contentions *without* seeking a waiver. 522 F.3d at 121-24. Here, by contrast, NRDC contends that if, as the Commission has determined, a waiver is required, then NRDC satisfies the criteria, including this final factor, in light of the new and significant information it has presented concerning the consideration of SAMAs at Limerick. Nothing in *Mass.* suggests that the waiver may not be granted. To the

---

[15] Indeed, if Exelon has conducted the requisite analysis in its ER, it should be able to defend the analysis rather than expending its efforts trying to foreclose any challenge to its adequacy. Moreover, if the analysis has been conducted elsewhere, there is simply no logical reason not to include it in the NEPA review, where it squarely belongs.

contrary, the First Circuit's admonition that "NEPA *does* impose a requirement that NRC consider new and significant information regarding environmental impacts before renewing a nuclear power plant's operating license," 522 F3d at 127 (emphasis added), merely serves to further highlight that, in this case, a waiver is appropriate to consider NRDC's Contentions regarding whether Staff and Exelon have adequately fulfilled this fundamental NEPA responsibility.

III. CONCLUSION

For the foregoing reasons the Waiver Petition should be granted.

Respectfully Submitted,

s/ (electronically signed)
Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

s/ (electronically signed)
Anthony Z. Roisman
National Legal Scholars Law Firm, P.C.
241 Poverty Lane, Unit 1
Lebanon, NH 03766
603-443-4162
aroisman@nationallegalscholars.com

s/(electronically signed)
Geoffrey H. Fettus
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, D.C. 20005
202-289-2371
gfettus@nrdc.org

Filed this date of December 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRDC REPLY IN SUPPORT OF PETITIONFOR WAIVER OF 10 C.F.R. § 51.53(c)(3)(ii)(L) AS APPLIED TO APPLICATION FOR RENEWAL OF LICENSES FOR LIMERICK UNITS 1 AND 2 in the captioned proceeding were served via the Electronic Information Exchange (EIE) on the 21 day of December 2012, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Chief Judge Roy Hawkens
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Roy.Hawkens@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
ocaamail@nrc.gov

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Alex S. Polonsky, Esq.
apolonsky@morganlewis.com
Kathryn M. Sutton, Esq.
ksutton@morganlewis.com
Brooke E. Leach
bleach@morganlewis.com

Exelon Generation Company, LLC
4300 Warrenville Road
Warrenville, IL 60555
J. Bradley Fewell, Deputy General Counsel
Bradley.Fewell@exeloncorp.com

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
ogcmailcenter@nrc.gov
Catherine Kanatas
catherine.kanatas@nrc.gov
Brian Newell
brian.newell@nrc.gov
Maxwell Smith
maxwell.smith@nrc.gov
Mary Spencer
mary.spencer@nrc.gov
Ed Williamson
edward.williamson@nrc.gov

/Signed (electronically) by/

Howard M. Crystal