LBP-13-1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Michael F. Kennedy
Dr. William E. Kastenberg

In the Matter of	Docket Nos. 50-352-LR, 50-353-LR
EXELON GENERATION COMPANY, LLC	ASLBP No. 12-916-04-LR-BD01
(Limerick Generating Station, Units 1 and 2)	February 6, 2013

ORDER
(Denying Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) and
Referring this Decision to the Commission)

Before the Board is a November 21, 2012 petition for waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) filed by the Natural Resources Defense Council (NRDC).[1] For the reasons discussed herein, and in accordance with 10 C.F.R. § 2.335(b), the Board denies NRDC's petition. However, because the legal issue presented by NRDC's petition is novel and worthy of the Commission's immediate attention, we refer this decision to the Commission pursuant to 10 C.F.R. § 2.323(f)(1).

I. BACKGROUND

On August 8, 1985, the Commission issued a full-power operating license for Limerick Generating Station, Unit 1, to the Philadelphia Electric Company (PECO), now a subsidiary of

[1] Natural Resources Defense Council's 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 (Nov. 21, 2012) [hereinafter Waiver Petition].

Exelon Generation Company, LLC (Exelon).[2] A group, Limerick Ecology Action, Inc. (LEA), challenged the granting of this full-power license in part on the ground that the NRC did not consider Severe Accident Mitigation Alternatives (SAMAs) during its review of PECO's operating license application.[3] At the time, NRC regulations did not require applicants to consider SAMAs.[4] In 1989, the United States Court of Appeals for the Third Circuit ruled on LEA's challenge, holding that the National Environmental Policy Act (NEPA) requires the NRC to consider SAMAs.[5] In response to this decision, the NRC Staff considered SAMAs "in the Final Environmental Impact Statement for the Limerick 1 and 2 and Comanche Peak 1 and 2 operating license reviews, and in the Watts Bar Supplemental Final Environmental Statement for an operating license."[6]

In 1996, the NRC amended its regulations regarding environmental reviews for operating license renewals.[7] One of the regulations derived from this amendment process was 10 C.F.R. § 51.53(c)(3)(ii)(L), which reads as follows:

> If the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to

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[2] See Philadelphia Electric Company, Docket No. 50-352, Limerick Generating Station, Unit 1, Facility Operating License, License No. NPF-39 (Aug. 8, 1985) (ADAMS Accession No. ML011520196).

[3] See Limerick Ecology Action v. NRC, 869 F.2d 719, 722-23 (3d Cir. 1989).

[4] Indeed, the Commission issued a policy statement in 1985 declaring that individual licensing proceedings were not the appropriate forum for evaluating SAMAs. Id. at 727.

[5] Id. at 739.

[6] Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,481 (June 5, 1996).

[7] See generally id.

mitigate severe accidents must be provided.[8]

In promulgating that regulation the Commission noted that because SAMAs had already been considered for Limerick, Comanche Peak, and Watts Bar, "[SAMAs] need not be reconsidered for these plants for license renewal."[9]

On June 22, 2011, Exelon submitted an application for renewal of the operating licenses for the Limerick Generating Station, Units 1 and 2 (Limerick) for an additional 20 years.[10] On November 22, 2011, NRDC submitted a petition to intervene, proffering four contentions.[11] One of the central issues presented by NRDC's petition was the interplay between two seemingly contradictory NRC regulations: 10 C.F.R. § 51.53(c)(3)(ii)(L) [sub-section (L)] and 10 C.F.R. § 51.53(c)(3)(iv) [sub-section (iv)]. Whereas the former states that an applicant for license renewal need not consider SAMAs if the NRC Staff has already considered SAMAs for that plant, the latter states, "The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." The question then facing the Board was what effect, if any, the sub-section (L) exemption had on an applicant's duty under sub-section (iv) to consider new and significant information related to SAMAs and, concomitantly, a petitioner's ability to challenge that consideration (or lack thereof).

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[8] 10 C.F.R. § 51.53(c)(3)(ii)(L).

[9] 61 Fed. Reg. at 28,481.

[10] See 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).

[11] Natural Resources Defense Council Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011).

In LBP-12-08, we granted NRDC's petition to intervene, admitting portions of one contention.[12] We also noted there that the parties did not dispute that Exelon must consider new and significant information regarding SAMAs pursuant to sub-section (iv).[13] The dispute between the parties thus centered on whether the exemption provided in sub-section (L) converted the issue of SAMAs from a so-called "Category 2" issue to a so-called "Category 1" issue for Limerick.[14]

The effect of this categorization would have significant implications for the environmental review of this (and other) license renewal applications in that Category 1 issues are those issues that the Commission has dealt with generically and that may not be challenged during license renewal absent a waiver.[15] On the other hand, Category 2 issues are plant-specific and may be challenged during license renewal without a waiver.[16] In LBP-12-08 we held that the issue of SAMAs was a Category 2 issue for Limerick, because NRC regulations explicitly list SAMAs as a Category 2 issue,[17] and because we could find no regulatory basis for the notion that a Category 2 issue could be converted into a Category 1 issue without evidence of the Commission's express intent to do so.[18] As such, we held that NRDC was free to challenge Exelon's consideration of new and significant information regarding SAMAs in this license

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[12] LBP-12-08, 75 NRC __, __ (slip op. at 40) (Apr. 4, 2012).

[13] Id. at 10-11.

[14] See Tr. at 43-52, 59-68, 80-85, 108-09, 118-25, 132-34, 172-76, 266.

[15] See 61 Fed. Reg. at 28,474.

[16] See id.

[17] See 10 C.F.R. Part 51, Subpt. A, App. B, Tbl. B-1.

[18] LBP-12-08, 75 NRC at __ (slip op. at 14).

renewal proceeding.[19]

Exelon and the NRC Staff appealed this ruling to the Commission, which reversed our decision, holding that "the exception in [sub-section (L)] operates as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in this, as well as certain other, case-by-case license renewal adjudications."[20] Therefore, the Commission held that "the proper procedural avenue for NRDC to raise its concerns [regarding Exelon's consideration of new and significant information] is to seek a waiver of the relevant provision in [sub-section (L)]."[21] The Commission then remanded this proceeding to us, instructing NRDC to submit a waiver petition for Board consideration by November 27, 2012.[22]

NRDC submitted the instant waiver petition on November 21, 2012,[23] and Exelon and the NRC Staff submitted their responses opposing the waiver petition on December 14, 2012.[24] NRDC submitted a reply brief on December 21, 2012.[25]

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[19] Id. at 16.

[20] CLI-12-19, 76 NRC __, __ (slip op. at 13) (Oct. 23, 2012).

[21] Id.

[22] Id. at 17.

[23] See Waiver Petition.

[24] See Exelon's Response Opposing NRDC's Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) (Dec. 14, 2012) [hereinafter "Exelon Response"]; NRC Staff Answer to [NRDC] Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) (Dec. 14, 2012) [hereinafter "NRC Response"].

[25] See Reply of [NRDC] 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 (Dec. 21, 2012).

II. LEGAL STANDARDS

Generally, NRC regulations may not be challenged in any NRC adjudicatory proceeding.[26] However, a petitioner that believes a regulation should not be applied in a particular proceeding may seek a waiver of that regulation pursuant to 10 C.F.R. § 2.335(b). Section 2.335(b) states:

> The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.[27]

The Commission has elaborated on this standard in its case law, establishing a more arduous four-part test for waiver petitions.[28] The Commission stated in its Millstone decision that for a waiver to be granted, a petitioner must demonstrate the following:

> (i) the rule's strict application would not serve the purposes for which it was adopted; (ii) the movant has alleged special circumstances that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived; (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and (iv) a waiver of the regulation is necessary to reach a significant safety problem.[29]

The Commission made clear that "all four factors must be met" for a waiver to be granted.[30]

The role of the Board when a request for a waiver is filed is limited to determining whether the petitioner has made a prima facie showing that it has satisfied 10 C.F.R. § 2.335(b).

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[26] 10 C.F.R. § 2.335(a).

[27] Id. § 2.335(b).

[28] See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

[29] Id. (quotations and citations omitted). Hereinafter, we will refer to this four-part test as "the Millstone test."

[30] Id. (emphasis in original).

If not, the Board "may not further consider the matter."[31] However, where the petitioner has successfully made such a prima facie showing, the Board "shall, before ruling on the petition, certify the matter directly to the Commission," and the Commission shall determine whether to grant or deny the waiver request.[32]

III. ANALYSIS AND RULING

It is clear to us that the Millstone test establishes an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. § 2.335(b). Indeed, on its face, Section 2.335(b) appears to only require a petitioner to satisfy the first two prongs of the Millstone test. In other words, Section 2.335(b) does not require petitioners to demonstrate that their complaint is "unique" to the facility in question or that their complaint reflects a "significant safety issue." Because, as we will explain, we believe that NRDC has not satisfied the lower threshold of 10 C.F.R. § 2.335(b), we will apply that Section of the Commission's regulations, rather than the more stringent Millstone test.

A. The purpose of 10 C.F.R. § 51.53(c)(3)(ii)(L)

To determine whether NRDC has demonstrated that application of 10 C.F.R. § 51.53(c)(3)(ii)(L) "would not serve the purposes for which [it] was adopted,"[33] we must first determine the purpose of sub-section (L). In its Waiver Petition, NRDC argues that the purpose of sub-section (L) "was simply to limit the analysis during relicensing to exclude 'consideration of such alternatives regarding plant operation' that were previously considered."[34] In other words,

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[31] 10 C.F.R. § 2.335(c).

[32] Id. § 2.335(d). We were unable to find any reported instances in which the Commission has granted a waiver request pursuant to Section 2.335(d) submitted by an intervenor/petitioner.

[33] Id. § 2.335(b).

[34] Waiver Petition at 17 (quoting 61 Fed. Reg. at 28,480) (emphasis in original).

NRDC argues, sub-section (L) was intended to excuse license renewal applicants that have already performed a SAMA analysis "from being forced to reconsider specific alternatives previously considered, from which it necessarily follows that any new alternatives that would mitigate severe accidents should be subject to the standard for 'new and significant information.'"[35]

Exelon and the NRC Staff, however, contend that the purpose of sub-section (L) was to exempt license renewal applicants that have already performed a SAMA analysis from performing another SAMA analysis, even if new mitigation alternatives have emerged since the performance of the original SAMA analysis.[36]

This distinction is subtle, but important in license renewal proceedings. A "mitigation alternative," or a "SAMA candidate," is, as the name suggests, an alternative that may mitigate the impacts of a severe accident. A "SAMA analysis," on the other hand, is an analysis of a class of SAMA candidates using probabilistic risk assessment techniques to determine whether any of the SAMA candidates would be cost-beneficial.[37] So, to contrast the parties' positions, NRDC maintains that the purpose of sub-section (L) is to excuse applicants from considering specific SAMA candidates that they have already considered, while Exelon and the NRC Staff argue that its purpose is to excuse applicants from performing another SAMA analysis altogether, meaning such applicants need not consider any additional SAMA candidates.

We do not find NRDC's argument compelling for several reasons. First, we believe the

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[35] Id. (emphasis in original).

[36] See Exelon Response at 20-21; NRC Staff Response at 13-15.

[37] For a more detailed discussion of how SAMA analyses are conducted, see FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-12-27, 76 NRC __, __ (slip op. at 9-11) (Dec. 28, 2012).

language of sub-section (L) makes its purpose quite clear. It states, "If the staff has not previously considered severe accident mitigation alternatives for the applicant's plant . . ., a consideration of alternatives to mitigate severe accidents must be provided."[38] The clear implication of this language is that, once the staff has considered severe accident mitigation alternatives for the applicant's plant, no further consideration of alternatives to mitigate severe accidents is needed. NRDC's interpretation seems to be that if the staff has previously considered certain severe accident mitigation alternatives, a consideration of those specific alternatives need not be provided, but a consideration of other alternatives must be provided. This is a strained and inappropriate reading of sub-section (L). Rather, the purpose of sub-section (L) seems quite clear: it evidences a Commission determination that, in effect, one SAMA analysis is enough. Once an applicant has performed a SAMA analysis, even if it was performed almost 25 years ago, the applicant does not need to perform another, regardless of whether new SAMA candidates have been discovered in the interim.

This plain-meaning reading of sub-section (L) is bolstered by looking to the Statement of Considerations accompanying the Commission's final rule adopting sub-section (L). The Commission stated, "NRC staff considerations of severe accident mitigation alternatives have already been completed and included in an EIS or supplemental EIS for Limerick, Comanche Peak, and Watts Bar. Therefore, severe accident mitigation alternatives need not be reconsidered for these plants for license renewal."[39] It is noteworthy that the Commission did not say that those severe accident mitigation alternatives considered in the previous analysis need not be reconsidered. Rather, the Commission made a general statement that mitigation

[38] 10 C.F.R. § 51.53(c)(3)(ii)(L).

[39] 61 Fed. Reg. at 28,481.

alternatives, as a class of items, need not be reconsidered at license renewal. As such, we find that the purpose of sub-section (L) is to exempt those plants that have already performed SAMA analyses from considering severe accident mitigation alternatives at license renewal.

As noted above, in order to obtain a waiver of a regulation, a petitioner must demonstrate that application of the regulation "would not serve the purposes for which [it] was adopted."[40] Considering this requirement, it becomes abundantly clear why NRDC provided such a strained reading of the purpose of sub-section (L). After all, if the purpose of sub-section (L) is simply to grant to a set of plants an exemption from the otherwise applicable requirement to consider severe accident mitigation alternatives at license renewal, then that purpose will always be met if no further analysis is required or submitted by the applicant. Accordingly, it is unclear how any petitioner could ever demonstrate that the purpose of sub-section (L) is frustrated by the application of sub-section (L). Even if a petitioner could demonstrate that there exists a group of cost-effective SAMA candidates that would greatly reduce the impacts of severe accidents and that have not been considered in the previous analysis, that petitioner could not successfully seek a waiver of sub-section (L), because the purpose of sub-section (L) – to grant the plant an exemption from considering any SAMA candidates at license renewal – is not frustrated. Given its clear purpose, sub-section (L) becomes, in effect, unwaivable.

B. The application of 10 C.F.R. § 51.53(c)(3)(ii)(L)

The Commission stated in CLI-12-19 that sub-section (L) "operates as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in this, as well as certain other, case-by-case license renewal adjudications."[41] This is certainly true as to the preclusive

[40] 10 C.F.R. § 2.335(b).

[41] CLI-12-19, 76 NRC at __ (slip op. at 13).

effect of sub-section (L), but is not necessarily the case relative to the "waivability" of sub-section (L). Indeed, in this regard sub-section (L) seemingly functions very differently than Table B-1 of 10 C.F.R. Part 51, Subpart A, Appendix B, which lists certain issues and then categorizes them as Category 1 or Category 2.

To illustrate the difference, let us consider, as an example, bird collisions with cooling towers. Table B-1 lists this issue as Category 1, stating that "[t]hese collisions have not been found to be a problem at operating nuclear power plants and are not expected to be a problem during the license renewal term."[42] The finding that an issue like this is a Category 1 issue seems to be based on then-current factual information, as subjected to appropriate scientific analysis. But there is nothing in this designation that precludes a later finding associated with a waiver petition that bird collisions with cooling towers would have to be considered at license renewal for a certain plant should matters change. And indeed, one can readily imagine a set of circumstances where a petitioner could successfully seek a waiver of this Category 1 finding. For instance, if changes in the migratory habits of a certain bird during the initial operating term led to a large number of collisions with the cooling towers at a specific plant, a petitioner might well be able to satisfy 10 C.F.R. § 2.335(b) and the Millstone test and, therefore, challenge the applicant's lack of consideration of bird collisions with cooling towers in an adjudicatory license renewal proceeding. This possibility is based on the understanding that factual circumstances and scientific analysis can change over time. That is, while bird collisions may not have posed a problem for plants generally at the time the generic determination was made, they may pose a problem now, at a specific facility seeking license renewal. The waiver process provides, then, a mechanism through which such new information and analysis may be brought to the

[42] 10 C.F.R. Pt. 51, Subpt. A, App. B, Tbl. B-1.

Commission's attention.

However, the same argument simply does not apply to sub-section (L). When it enacted sub-section (L) the Commission understood that technology would change, and that new SAMA candidates could emerge over time.[43] The emergence of new SAMA candidates is, it seems, the equivalent of the new data regarding bird collisions in our example above. However, in the case of bird collisions, the possibility that new data could become available also provides the basis for a potential successful waiver petition. Here, the possibility that new SAMA candidates may become available cannot be the basis for a successful waiver petition, because the Commission knew that SAMA technology would change, but was confident that processes, other than the SAMA analysis process, would adequately address any such developments.[44] To put it another way, for most Category 1 issues, there is an implicit understanding that information and analysis may change, and such new information may be presented in a waiver petition. However for sub-section (L), for this "functional equivalent" of a Category 1 issue, there can be no such understanding. Indeed, the Commission certainly enacted sub-section (L) knowing that new SAMA candidates likely could and would emerge during the time between the initial SAMA analysis and license renewal.

C. Conclusions regarding 10 C.F.R. § 51.53(c)(3)(ii)(L)

So, this leaves us in a difficult and ambiguous situation. Has NRDC demonstrated that

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[43] In the Statement of Considerations accompanying the final rule adopting sub-section (L), the Commission stressed that it had three other ongoing processes whereby the NRC Staff would be evaluating alternatives to mitigate severe accidents: the Containment Performance Improvement (CPI) program, the Individual Plant Examination (IPE) program, and the Individual Plant Examination for External Events (IPEEE) program. 61 Fed. Reg. at 28,481. The Commission noted that the IPE and IPEEE programs "have resulted in a number of plant procedural or programmatic improvements and some plant modifications that will further reduce the risk of severe accidents." Id.

[44] See id.

the purpose of sub-section (L) will be frustrated by applying sub-section (L) to Limerick? No, but through no fault of their representatives, who seem to have done the most they could in a confusing situation. Ultimately, given the purpose of sub-section (L), NRDC was faced with the seemingly impossible task of demonstrating that the purpose of sub-section (L) (i.e., to grant Limerick an exemption from the SAMA requirement) would be frustrated by granting Limerick an exemption from the SAMA requirement. In CLI-12-19, the Commission remanded to the Board review of a waiver petition to be filed by NRDC. This implies to the Board that, on some level, the Commission believed that a petitioner or party could be granted a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) under Section 2.335(b). Our review of the regulations leads us to conclude that this is an impossibility.

For the foregoing reasons, we are compelled to find that NRDC has not presented a prima facie case that it has satisfied 10 C.F.R. § 2.335(b), and therefore we must deny its waiver petition. However, NRDC's petition has presented us with such a "catch-22" situation[45] that we also feel compelled to refer this decision to the Commission, not under 10 C.F.R. § 2.335(d), but under 10 C.F.R. § 2.323(f)(1). We trust the Commission, in its review of our decision, will shed light on the interplay of 10 C.F.R. § 51.53(c)(3)(ii)(L) and 10 C.F.R. § 2.335(b).

IV. CONCLUSION

For the foregoing reasons, NRDC's petition for a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L)

[45] A catch-22 is a paradoxical situation in which an individual cannot or is incapable of avoiding a problem because of contradictory constraints or rules. Random House Dictionary (2012).

is DENIED, and this decision of the Board is hereby REFERRED to the Commission pursuant to 10 C.F.R. § 2.323(f)(1).[46]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

_____
William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE
/RA/

_____
Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE
/RA/

_____
Dr. William E. Kastenberg
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 6, 2013

[46] We note that our denial of NRDC's waiver petition does not terminate this proceeding. On July 9, 2012, NRDC filed with the Board a motion to admit a new environmental contention that challenges the failure of Exelon's Environmental Report to address the environmental impacts of spent fuel pool leakage and fires, as well as the environmental impacts that may occur if a spent fuel repository does not become available. See NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012) [hereinafter New Contention Motion]. The New Contention Motion is based on the United States Court of Appeals for the District of Columbia Circuit's decision in State of New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012) which invalidated the NRC's Waste Confidence Decision Update (75 Fed. Reg. 81,037 (Dec. 23, 2010)) and the NRC's final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81,032 (Dec. 23, 2010)).

On August 7, 2012, the Commission issued CLI-12-16, wherein it found, "[I]n view of the special circumstances of this case, as an exercise of our inherent supervisory authority over adjudications, we direct that these [Waste Confidence] contentions—and any related contentions that may be filed in the near term—be held in abeyance pending our further order." CLI-12-16, 76 NRC __, __ (slip op. at 6) (Aug. 7, 2012). The Commission noted that "should we determine at a future time that case-specific challenges are appropriate for consideration, our normal procedural rules will apply." Id. at 6 n.11. In an August 8, 2012 Order we held any participant or Board activity concerning this new contention in abeyance pending further Commission directive. See Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) (unpublished).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Exelon Generation Company, LLC	)	Docket Nos. 50-352-LR and 50-353-LR
(Limerick Generating Station, Units 1 and 2)	)	
	)	ASLBP No. 12-916-04-LR-BD01
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) and Referring this Decision to the Commission)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of February, 2013