

March 20, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S REPLY ON THE BOARD'S REFERRED RULING IN LBP-13-1

INTRODUCTION

Pursuant to the Commission's February 26, 2013 Order,¹ the NRC Staff files its reply brief to the Natural Resources Defense Council's (NRDC) brief² regarding the Atomic Safety and Licensing Board's (Board) referred ruling in LBP-13-1.³ The ruling in LBP-13-1 denied NRDC's Petition for Waiver (Waiver Petition) of 10 C.F.R. § 51.53(c)(3)(ii)(L) (sub-section (L)) in the license renewal proceeding for Limerick Generating Station, Units 1 and 2 (Limerick).⁴

NRDC's Opening Brief illustrates the importance of Commission review because it asserts that the Board's interpretation of sub-section (L) does not comport with the National

¹ Order at 1 (Feb. 26, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13057A822).

² Natural Resources Defense Council's Brief in Support of 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 (Mar. 13, 2013) (ADAMS Accession No. ML13072B038) (NRDC's Opening Brief). The Applicant and Staff also filed briefs on LBP-13-1. NRC Staff's Brief on the Board's Referred Ruling in LBP-13-1 (Mar. 13, 2013) (ADAMS Accession No. ML13072A804) (Staff's Opening Brief); Exelon's Initial Brief in Response to the Referral of LBP-13-1 to the Commission (Mar. 13, 2013) (ADAMS Accession No. ML13072B433). The Staff's reply brief will not respond to the Applicant's opening brief, as it largely echoes arguments in the Staff's Opening Brief.

³ *Exelon Generation Co., LLC* (Limerick Generating Station Units 1 and 2), LBP-13-1, 77 NRC ___, ___ (Feb. 6, 2013) (slip op. at 13).

⁴ *Id.* at 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) (ADAMS Accession No. ML12326A976) (Waiver Petition).

Environmental Policy Act of 1969 (NEPA). However, NRDC incorrectly claims that waiver of the sub-section (L) rule is required to comply with NEPA. Moreover, NRDC's arguments rest on an interpretation of sub-section (L) that is contrary to the rule's plain text and Commission descriptions of the rule. Finally, while recognizing that the four-factor *Millstone* test is the appropriate waiver standard, NRDC's Opening Brief does not provide a *prima facie* showing on any of the four factors. Instead, it largely repeats arguments made in its Waiver Petition, which the Staff previously rebutted, or provides arguments that do not justify waiver. Thus, the Commission should uphold the Board's denial of the Waiver Petition.⁵

BACKGROUND

This proceeding concerns Exelon Generation Company, LLC's (Exelon) June 22, 2011 license renewal application for Limerick.⁶ The Staff's Opening Brief fully discussed the relevant procedural history and legal standards in this proceeding.⁷ As explained in that brief, the Board's referral of LBP-13-1 raises three primary issues. First, whether NRDC's petition to waive sub-section (L), a regulation excusing Exelon from considering severe accident mitigation alternatives (SAMAs) in its NEPA analysis for the Limerick license renewal, meets the Commission's waiver standards. Second whether the Board appropriately found that waiving sub-section (L) is "seemingly impossible."⁸ And last, whether the Board appropriately interpreted the Commission's waiver standard and 10 C.F.R. § 2.335.⁹

⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 NRC 129, 166 (2005) (noting that on review the Commission may "affirm a Board decision on any ground finding support in the record, whether previously relied on or not").

⁶ Application for Renewed Operating Licenses (June 22, 2011) (ADAMS Accession No. ML11179A096); License Renewal Application, Limerick Generating Station, Units 1 and 2 (June 22, 2011) (ADAMS Accession No. ML11179A101).

⁷ Staff's Opening Brief at 2-10.

⁸ *Limerick*, LBP-13-1, 77 NRC at ___ (slip op. at 13).

⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005). NRDC's Opening Brief comports with the Staff's position on this issue. Compare NRDC's Opening Brief at 14 (discussing *Millstone's* four factor test and claiming its contentions

ARGUMENT

I. NRDC's Brief Illustrates the Importance of Commission Review

NRDC observes that the Board's interpretation of sub-section (L) in LBP-13-1 conflicts with NEPA. The Staff's Opening Brief also noted that the Board's interpretation of sub-section (L) does not fully consider the purpose and the stated justification for that regulation.¹⁰ Specifically, NRDC argues that the Board's interpretation of sub-section (L) provides "no opportunity to challenge" Exelon's NEPA consideration of new and significant information regarding sub-section (L) "in the licensing process."¹¹ NRDC analogizes this interpretation of sub-section (L) to the Atomic Energy Commission regulations which the D.C. Circuit found incompatible with NEPA in *Calvert Cliff's Coordinating Committee Inc. v. Atomic Energy Commission*.¹² Those regulations, like the Board's interpretation of sub-section (L), excluded consideration of NEPA issues in certain agency adjudicatory proceedings.¹³ As NRDC notes, the D.C. Circuit overturned those regulations.¹⁴ Thus, the Commission should review LBP-13-1 and resolve any conflicts between the Board's interpretation of sub-section (L) and NEPA.¹⁵

II. NEPA Does Not Mandate Waiver of Sub-Section (L)

However, NRDC's Opening Brief and Waiver Petition do not justify waiver here. Throughout its brief, NRDC argues that "regardless of the purpose for which the Commission

meet all four factors) *with* Staff's Opening Brief at 19-21. Therefore, the Staff's reply will not further discuss this issue.

¹⁰ Staff's Opening Brief at 11-19.

¹¹ NRDC's Opening Brief at 25. See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (1989).

¹² NRDC's Opening Brief at 25 (*citing Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1117 (D.C. Cir. 1971) (describing those regulations)).

¹³ *Id.*

¹⁴ NRDC's Opening Brief at 25.

¹⁵ 10 C.F.R. § 2.323(f)(1); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-00-13, 52 NRC 23, 29 (2000) (encouraging licensing boards "to refer to the Commission rulings that present novel questions that "could benefit from early resolution").

promulgated [sub-section (L)], a waiver must be granted to insure compliance with NEPA.”¹⁶ NRDC claims that “NEPA’s mandate for consideration of new and significant information . . . plainly trumps any contrary regulation.”¹⁷ Thus, NRDC argues that even if the Commission “were to conclude the waiver criteria set forth in 10 C.F.R. § 2.335(a) were not satisfied here, NRDC nonetheless would be entitled to have its Contentions admitted.”¹⁸

This argument ignores the very purpose of a waiver petition for environmental regulations, which is to provide a principled consideration of claims regarding new and significant environmental information in NRC adjudications. As the Commission has explained, its rules “provide a number of opportunities for individuals to alert the Commission to new and significant information . . . for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule.”¹⁹ Consequently, a waiver petition itself provides a petitioner with a way pursue a claim that new and significant information renders a codified generic environmental finding inadequate.

The First Circuit has explained that NEPA does not require any specific approach to considering new and significant information:

¹⁶ NRDC’s Opening Brief at 20, 28-30. NRDC advanced a similar argument in its Waiver Petition, NRDC Waiver Petition at 14, 19-20, 22, to which the Staff fully responded, NRC Staff Answer to Natural Resources Defense Council Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), at 9-11 (Dec. 14, 2012) (ADAMS Accession No. ML12349A384) (Staff Answer to Waiver Petition).

¹⁷ NRDC’s Opening Brief at 18 (*citing Marsh*, 490 U.S. at 365; *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984)).

¹⁸ NRDC’s Opening Brief at 28. NRDC contends that the Commission has previously recognized that sub-section (L) is incompatible with NEPA in denying a petition for rulemaking from the Nuclear Energy Institute (NEI). *Id.* at 19 (*citing Nuclear Energy Institute; Denial of Petition for Rulemaking*, 66 Fed. Reg. 10,834, 10,834 (Feb. 20, 2001)). But, that denial of a rulemaking petition did not consider the exception to the SAMA requirement in sub-section(L). 66 Fed. Reg. at 10,834. Rather, it simply denied NEI’s request to eliminate consideration of SAMAs from license renewal altogether. *Id.* at 10,837-39. The Commission did not address a case, such as this one, where a license renewal applicant sought to rely on the exception in sub-section (L).

¹⁹ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plan, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001).

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. However, "NEPA does not require agencies to adopt any particular internal decisionmaking structure." Here, the NRC procedures anticipate a situation . . . in which a generic finding adopted by agency rule may have become obsolete.²⁰

Indeed, the First Circuit recently upheld the NRC's application of the *Millstone* factors to a NEPA claim.²¹

As a result, 10 C.F.R. § 2.335 provides an acceptable way for the NRC to consider claims of new and significant information in adjudicatory proceedings because the NRC will waive generic environmental findings upon a site-specific showing that new, or unconsidered, information is significant.²² The waiver process appropriately balances the agency's interest in the finality of its rules with the intervenor's right to raise new and significant information under NEPA.²³ Therefore, NRDC's argument that the NRC must automatically waive the sub-section (L) rule to comply with NEPA is incorrect. The NRC appropriately considers claims of new and significant information under NEPA in agency adjudications through the 10 C.F.R. § 2.335 waiver process in determining contention admissibility.

III. NRDC's View of Sub-Section (L) is Contrary to the Text of the Rule and Commission Statements Regarding the Purpose of the Rule

Understanding the purpose of a rule is important to making a demonstration under the first *Millstone* factor, which requires a petitioner to demonstrate that "the rule's strict application

²⁰ *Massachusetts v. United States*, 522 F.3d 115, 127 (2008) (quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100 (1983)).

²¹ *Massachusetts v. NRC*, Nos. 12-1404, 12-1772, 2013 WL 668468 at *8 & n.17 (1st Cir. Feb. 25, 2013).

²² *Compare Millstone*, CLI-05-24, 62 NRC at 559-60 (requiring a Petitioner to show that application of the rule would not serve the purposes for which the Commission adopted it) *with Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 52 (2001) (finding that a significant environmental issue for purposes of supplementing an environmental impact statement is one that shows a "seriously different picture" of the project's impacts than previously understood).

²³ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13, 21 (2007) (holding that adjudicating previously resolved environmental issues "site-by-site based merely on a claim of 'new and significant information,' would defeat the purpose" of resolving environmental issues generically).

would not serve the purposes for which [it] was adopted.”²⁴ NRDC asks the Commission to adopt its view of the purpose of sub-section (L), which NRDC itself recognizes is contrary to the text of the regulation.²⁵ Specifically, NRDC claims that “despite its language,”²⁶ the purpose of sub-section (L) is to “simply limit facilities that had previously considered SAMAs from being obligated to reconsider the *same* SAMAs during relicensing.”²⁷

The Commission should not adopt NRDC’s interpretation of the purpose of sub-section (L), as it is not supported by the text of the rule and is contrary to the Commission’s statements on the purpose of the rule.²⁸ The text of the rule states that a “*consideration* of alternatives to mitigate severe accidents must be provided” if the “staff *has not previously considered* severe accident mitigation alternatives for the applicant’s plant in an [EIS] or related supplement.”²⁹ Thus, it is a consideration of SAMAs, in the form of a SAMA analysis, that is contemplated by the rule; not, as NRDC claims, an analysis of particular SAMA candidates. The Commission made this purpose clear in CLI-12-19 when stating that “our rules expressly provide that a supplemental SAMA *analysis* need not be performed in this case.”³⁰ Indeed, the Board found

²⁴ *Millstone*, CLI-05-24, 62 NRC at 560 (emphasis added) (internal quotations omitted). To meet this factor, NRDC must, at a minimum, show that there are special circumstances that undercut the rationale for the rule sought to be waived. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988).

²⁵ Waiver Petition at 17.

²⁶ *Id.*

²⁷ NRDC’s Opening Brief at 15 (emphasis in original).

²⁸ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (noting that an agency may not adopt an interpretation of a regulation that conflicts with its “plain language”).

²⁹ 10 C.F.R. § 51.53(c)(3)(ii)(L) (emphasis added). This regulatory text matches the Commission’s description of the purpose of the rule in the SOC, where the Commission stated that “a site-specific *consideration* of severe accident mitigation alternatives is required at license renewal for those plants for which this *consideration* has not been performed.” 61 Fed. Reg. 28,481 (emphasis added).

³⁰ *Exelon Generation Co., LLC* (Limerick Generating Station Units 1 and 2), CLI-12-19, 76 NRC ___, __ (Oct. 23, 2012) (slip op. at 13) (emphasis added).

NRDC's interpretation of the purpose of sub-section (L) "strained and inappropriate."³¹

Despite the rule's plain language, NRDC claims that its view finds support in portions of the SOC supporting sub-section (L),³² a Third Circuit decision,³³ and an NEI rulemaking proposal.³⁴ But as discussed in the Staff's initial answer to NRDC's Waiver Petition, NRDC reads these documents out of context to support its view of the purpose of sub-section (L).³⁵

For example, NRDC reads the ruling in *N.J. Dep't. of Env'tl. Prot. v. NRC* as supporting its position because that case states that the "purpose of the Category 2 regulations...is to require 'evaluations of site-specific Category 2 issues – including a consideration of [SAMAs] for those issues that have not previously been considered.'"³⁶ But when read in proper context, the Third Circuit's decision simply contrasts Category 2 issues to Category 1 issues to establish the familiar principle that site-specific evaluations must consider issues not addressed in generic evaluations.³⁷ Thus, this decision only describes the Commission's process for environmental reviews of license renewal applications.

IV. NRDC Does Not Make a *Prima Facie* Showing on the *Millstone* Factors

Last, NRDC's Opening Brief repeats arguments from the Waiver Petition regarding additional SAMA candidates, advanced computer modeling, and economic inputs to support

³¹ *Limerick*, LBP-13-1, 77 NRC __ (slip op. at 9).

³² See NRDC's Opening Brief at 15-16.

³³ *Id.* at 17 (citing *N.J. Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132, 135 (3d Cir. 2009)).

³⁴ *Id.* at 19; see *supra* n. 18 (discussing why the NEI rulemaking proposal does not further NRDC's claims).

³⁵ Staff Answer Waiver Petition, at 12-21. NRDC's citation to the SOC accompanying sub-section (L), when read in context, only confirms the language in the text of the regulation that a "consideration" of SAMAs is not needed at license renewal if the Staff previously considered the issue. *Id.* at 19.

³⁶ NRDC's Opening Brief at 17 (quoting *New Jersey*, 561 F.3d at 135) (emphasis added by NRDC). See also 10 C.F.R. Part 51, Subpt. A, Appx. B, Table B-1 (noting that the NRC has already reached generic conclusions for Category 1 issues in a Generic Environmental Impact Statement for License Renewal but must consider Category 2 issues on a site-specific basis for license renewal).

³⁷ *New Jersey*, 561 F.3d at 134-35.

waiver of sub-section (L), but none of these arguments meet the *Millstone* factors.³⁸ First, NRDC argues that its list of potentially cost-beneficial SAMAs identified at other plants demonstrates that sub-section (L) should not apply here.³⁹ But, when it promulgated sub-section (L), the Commission recognized that future SAMA analyses at other plants could identify certain additional SAMA candidates.⁴⁰ With this knowledge, the Commission stated that the previous analysis of severe accident mitigation at Limerick was a SAMA analysis and another need not be done for license renewal.⁴¹ The Commission based this determination, in part, on its expectation that future SAMA analysis would likely only uncover procedural and programmatic fixes or minor hardware changes.⁴²

Despite these clear statements, NRDC argues that its list of potentially cost-beneficial SAMAs identified at other plants demonstrates that sub-section (L) should not apply here.⁴³ But NRDC has not discussed how these SAMAs are different from the procedural, programmatic, and minor hardware modification changes the Commission explicitly recognized could be identified in future SAMA analyses at other plants.⁴⁴ Moreover, as discussed in the Staff's Opening Brief, when it promulgated sub-section (L), the Commission foresaw that future SAMA

³⁸ NRDC's Opening Brief at 20-22; Waiver Petition at 20-21.

³⁹ NRDC's Opening Brief at 20-21; Waiver Petition at 20.

⁴⁰ 61 Fed. Reg. at 28,481.

⁴¹ *Id.* NRDC suggests that the Commission inappropriately relied on safety studies to support this finding. NRDC's Opening Brief at 17-18. But, the agency considered these studies in a generic environmental impact statement, meant to comply with NEPA. NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report, at 5-106 to 5-114 (May 1996). Additionally, the exception in sub-section(L) rests on the assumption that the staff will have considered severe accidents under NEPA at least once, as the Staff did for Limerick. Final Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2, NUREG-0974 Supplement (Aug. 1989) (ADAMS Accession No. ML11221A204). In any event, agencies may rely on analyses or research completed in other contexts to support a NEPA analysis. *E.g., Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1182-85 (9th Cir. 2000).

⁴² 61 Fed. Reg. at 28,481

⁴³ NRDC's Opening Brief at 20-21; Waiver Petition at 20.

⁴⁴ 61 Fed. Reg. at 28,481.

analyses may take differing approaches to severe accident modeling and it understood that the agency had considered economic data in a variety of ways in the past.⁴⁵ NRDC has not provided any additional information to support its claim that economic data and advances in modeling could undermine the Commission's stated rationale for sub-section (L).⁴⁶ Thus, NRDC has not shown that the Commission's determination in sub-section (L) should be waived in this proceeding.

NRDC's Opening Brief also does not make a *prima facie* showing on *Millstone* factors 2, 3, or 4, which require a showing that there are unforeseen special circumstances, that are unique to the facility in question, and that waiver is necessary to reach a significant issue, respectively.⁴⁷ Instead of showing special circumstances, NRDC points to information and circumstances explicitly considered by the Commission when it promulgated sub-section (L).⁴⁸ Thus, NRDC does not make a *prima facie* showing of special circumstances.

Instead of making a *prima facie* showing of uniqueness, NRDC's Opening Brief simply repeats arguments made in its Waiver Petition that the Staff has already rebutted. For example, NRDC's Opening Brief argues that there are unique circumstances at Limerick because the Third Circuit's *Limerick* decision held that severe accident issues " 'vary tremendously across all plants.' "⁴⁹ But, NRDC misreads the decision. The Third Circuit did not hold that Limerick was a unique facility; it only decided that the Commission had not provided an adequate basis in a challenged-policy statement for resolving severe accident mitigation generically and noted that

⁴⁵ Staff's Opening Brief at 23-24 (*citing* 61 Fed. Reg. 28,481-82; NUREG-1530, "Reassessment of NRC's Dollar Per Person-Rem Conversion Factor Policy," at 3, 6-7 (Dec. 1995) (ADAMS Accession No. ML063470485)).

⁴⁶ NRDC's Opening Brief at 20-22.

⁴⁷ *Millstone*, CLI-05-24, 62 NRC at 559-60.

⁴⁸ NRDC's Opening Brief at 22-26; See Staff's Opening Brief at 24-26, Staff Answer to Waiver Petition at 27-34 (addressing these claims).

⁴⁹ NRDC's Opening Brief at 22-23 (*quoting* *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 738 (1989) (emphasis added by NRDC); Waiver Petition at 22-23; see Staff Answer to Waiver Petition at 36.

reactors will pose different severe-accident risks based on design and location.⁵⁰

Similarly, NRDC's Opening Brief repeats arguments that its claims on economic data, computer modeling, and other SAMA candidates are significant simply because they relate to severe accident mitigation.⁵¹ But NRDC has not made a showing of significance. For example, while NRDC lists additional SAMA candidates from other plants, it does not indicate how these SAMAs "reveal a 'seriously different picture of the environmental impact of the proposed project'"⁵² or lead to a substantial reduction in risk of severe accidents at Limerick.⁵³ Therefore, NRDC has not met any of the *Millstone* factors, and its Waiver Petition must be denied.

CONCLUSION

NRDC's Opening Brief recognizes that the Board's interpretation of sub-section (L) in LPB-13-1 does not comport with NEPA or Commission precedent on waiver. However, NRDC's Opening Brief incorrectly claims that NEPA mandates waiver of sub-section (L), incorrectly interprets the purpose of sub-section (L), and does not provide a *prima facie* case on any of the *Millstone* factors. Therefore, the Commission should (1) take review of the Board's referral of LBP-13-1, (2) overrule the portions of LBP-13-1 that are contrary to NEPA and prior Commission holdings on waiver, and (3) affirm the Board's denial of NRDC's Waiver Petition.

/Signed (electronically) by/
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Executed in Accord with 10 CFR 2.304(d)
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⁵⁰ *Limerick*, 869 F.2d at 738-39. In light of differences across plants, the court doubted whether "severe accident mitigation can be treated as a generic issue." *Id.* at 739. But, the Commission partially based its generic resolution of SAMAs in sub-section (L) on site-specific studies. 61 Fed. Reg. 28,481.

⁵¹ NRDC's Opening Brief at 27 (arguing that "by definition" its claims are significant because they relate to severe accident mitigation); Waiver Petition at 26-27.

⁵² *Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 52 (2001) (quoting *Hydro Resources, Inc.*, CLI-99-22, 50 NRC 3, 14 (1999)).

⁵³ Staff Answer to Waiver Petition at 39-40.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S REPLY ON THE BOARD'S REFERRED RULING IN LBP-13-1" in the above captioned proceeding have been served over the Electronic Information Exchange, the NRC's E-Filing System, this 20th day of March, 2013.

/Signed (electronically) by/

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