UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	
		March 20, 2013
(License Renewal Application)		

NATURAL RESOURCES DEFENSE COUNCIL'S RESPONSE 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

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GLOSSARY

APA	Administrative Procedure Act
Comm. Op.	*In re Exelon Generation Co.*, CLI -12-19
ER	Environmental Report
EIS	Environmental Impact Statement
Ex. Br.	Mar. 13, 2013 Initial Brief of Exelon Generation Company, LLC
Exelon	Exelon Generating Co., LLC
First ASLB Op.	*In re Exelon Generation Co.*, LBP-12-8
NEPA	National Environmental Policy Act
NRDC	Natural Resources Defense Council
SAMAs	Severe Accident Mitigation Alternatives
Second ASLB Op.	*In re Exelon Generation Co.* LBP-13-1
Staff	NRC Staff
Staff Br.	Mar. 13, 2013 Brief of NRC Staff

INTRODUCTION[1]

Acknowledging, as they must, that a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) *could* be granted, Exelon Generating Co., LLC ("Exelon") and NRC Staff ("Staff") seek to erect an insurmountable barrier to waiver by conflating the standard for waiver with their own, unsupported assertion that to obtain a waiver a party must meet heightened contention pleading standards. Thus, they assert that Natural Resources Defense Council ("NRDC") can only obtain a waiver by proving, *at the contention admissibility stage*, the existence of "*major* design changes or *major* plant modifications that would be cost-beneficial at Limerick." Ex. Br. at 2 (emphasis added); Staff Br. at 14. *Millstone* contains no such requirement.

Moreover, they fail to explain how this approach can be reconciled with the framework governing their compliance with – and a petitioners' opportunity to *challenge* their compliance with – the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, particularly where, as here, NRDC challenges a *failure* to adequately address an issue required to be addressed in the Environmental Report ("ER"). Under NEPA, governing case law, and the Commissions' regulations, when a prior Environmental Impact Statement ("EIS") has been completed, *additional* environmental analysis is required to address any "significant new circumstances," or new "information relevant to environmental concerns." 40 C.F.R. § 1502.9(c); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 368 (1989); 10 C.F.R. § 51.53(c)(3)(iv). Thus, if NRDC ultimately demonstrates that new information may have significant environmental impacts, further NEPA review is necessary. *E.g. Ramsey v. Kantor*, 96 F.3d 434, 445 (9th Cir. 1996). This is a far cry from Exelon and Staff's attempt to impose a

[1] The parties concur that the Commission should "accept review" of the Board's referral. *See* Mar. 13, 2013 Initial Brief of Exelon Generation Company, LLC's ("Ex. Br.") at 2; Mar. 13, 2013 Brief of NRC Staff ("Staff Br.") at 10.

burden of definitive proof, at the contention pleading stage, that the missing mitigation measures will result in a "major" environmental improvement.

Under the Administrative Procedure Act ("APA"), an interested party is also entitled to *challenge* whether an agency has adequately complied with this fundamental NEPA obligation. 5 U.S.C. § 702. An agency may not remove this right to judicial review. Accordingly, because NRDC has easily satisfied its obligation to come forward with sufficient allegations and evidence that there is new information relevant to environmental concerns at Limerick – in particular, that the ER fails to adequately address new and significant information relevant to Severe Accident Mitigation Alternatives ("SAMAs") – and meets the waiver standards, the Commission should grant the waiver and allow NRDC's contentions to be heard.

ARGUMENT

A. New and Significant Information Concerning SAMAs Must be Considered During Relicensing, and a Petitioner May Challenge the Adequacy of That Consideration.

As Exelon concedes, "Exelon and NRC Staff *have obligations* to address new and significant information related to SAMA's in their NEPA analyses . . . ." Ex. Br. at 16, n.77 (emphasis added); *see also* Staff Br. at 8. Thus, in its ER Exelon included a purported discussion of new and significant information concerning SAMAs. *See* NRDC March 13, 2013 Opening Brief at 1 n.1 (citing ER). The parties' real dispute, then, is not *whether* new and significant information informing SAMAs must be considered during relicensing, but, rather, what burden NRDC must meet in order to *challenge the adequacy* of that analysis in the ER.

Under Exelon and Staff's view, because of 10 C.F.R. § 51.53(c)(3)(ii)(L), it is insufficient for a petitioner like NRDC to simply *identify* new and significant information concerning SAMAs for Limerick. Rather, they claim that in order to pursue its Contentions

NRDC must meet an "extremely high burden" to demonstrate – at the outset – the existence of cost-beneficial "major design changes or major plant modifications." Ex. Br. at 2, 18 (emphasis added); Staff Br. at 14. This argument fails on several levels.

First, it is well-established that a petitioner is not required to *prove* its contentions in order to have them admitted. Rather, a petitioner must simply raise a *material issue of fact* on the matter. *Entergy Nuclear Vermont Yankee, L.L.C.*, 60 N.R.C. 548, 555-556 (2004) ("At the contention admissibility stage all that is required is some alleged fact or facts in support" and "[d]etermining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is . . . not a hearing on the merits")(citations omitted); *Private Fuel Storage, L.L.C.*, 60 N.R.C. 125, 139 (2004) ("we do not expect a petitioner to prove its contention at the pleading stage").[2]

Exelon and Staff's arguments conflate the standards for a waiver with those for contention *admissibility*. The waiver standards do not require proof that specific additional analyses sought will cause a major change, only that the issues sought to be raised are significant. Indeed, the requirement to fully consider mitigation measures, and new and significant information regarding mitigation, are embodied in NRC regulations, and thus have already been deemed to be significant issues. *See* 10 C.F.R. §§ 51.53(c)(3)(iv), 51.103(a)(4). While Staff and Exelon seek to require NRDC *itself* to come forward with the analysis demonstrating whether there are new cost-effective SAMAs for Limerick, *that is Exelon's (and*

[2] Exelon claims "NRDC alleges that the mere assertion" of new information warrants admission. Ex. Br. at 3. NRDC's Contentions included a declaration explaining *in detail* the bases for NRDC's claims, *see* NRDC Opening Br., Ex. A at 36-85 – claims that: (a) the Board found meet contention admissibility standards (First ASLB Op. at 20-21, 23-25) and (b) the Commission concluded may be admitted if NRDC meets waiver standards. Comm. Op. at 13.

NRC's) *job*. The purpose of a NEPA analysis is to, *inter alia*, require the applicant – and ultimately the agency – to analyze appropriate alternatives and their environmental impacts. Accordingly, NRDC need only come forward with sufficient information showing an aspect of the required analysis is *missing*. If the admitted contention succeeds, then the agency/applicant must *conduct* the requisite analysis. *E.g.* 10 C.F.R. 2.309(f)(1)(vi); *N. States Power Co.*, 68 N.R.C. 905, 932 (2008) ("Because Petitioner sets forth a contention of omission . . . Petitioner is not required to provide supporting facts or expert opinion at this stage").

Second, Exelon and Staff's approach would deny Petitioner's their basic APA rights to *challenge* compliance with NEPA. The APA affords NRDC a *statutory right* to review of NRC's compliance with NEPA. 5 U.S.C. § 702 ("a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof"). That right cannot be reconciled with Exelon's assertion that, while it and the Commission must "address new and significant information related to SAMA's" during relicensing, "*there is no inherent right under NEPA to litigate an ER's discussion of new and significant information.*" Ex. Br. at 16, n.77 (emphasis added). In short, if new and significant information concerning SAMAs must be considered during the relicensing process, NRDC is entitled to *challenge* the adequacy of that analysis, without proving up front that such an analysis will require major plant modifications. *E.g. Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"); *Ala. Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (alternatives are "the heart of the environmental impact statement," and

when new reasonable alternatives arise following completion of an EIS they must be independently considered in the NEPA process).

Finally, Exelon and Staff fail to recognize the Commission's own regulatory scheme already *recognizes the obligation* to supplant prior NEPA analyses, requiring the EIS for license renewal to "contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv) (emphasis added). Nowhere does this – or any other – NRC regulation state or imply that this obligation is only triggered if the Petitioner proves that "major design changes or major plant modifications" will result. Accordingly, Exelon's extended discussion of why the issues raised by NRDC do not meet its self-created "major modification" standard – which, Exelon explains, would require a petitioner to demonstrate the need for a "plant change that results in the permanent installation of a new structure, system, or a redundant train of an existing system that changes the footprint of the facility," Ex. Br. at 18-19 – is a non-sequitur, as no such standard exists. Moreover, the fact that Exelon found it necessary to submit a *declaration* challenging NRDC's evidence of the existence and potential importance of additional SAMA's merely serves to highlight the existence of a factual dispute that cannot be resolved at the Contention admissibility stage.

10 C.F.R. § 51.53(c)(3)(ii)(L) does not, and cannot, change this result. The Commission may have "anticipated" that any additional SAMAs in the future would be "minor" (and thus presumably would fall below the "significant new information standard"), Staff Br. at 28, and that as a result they could be more appropriately addressed "outside of the SAMA context," Staff Br. at 28-29, but the only purpose for the regulation that would be consistent with NEPA (and the APA) would be that this simply meant that if, after a contention is admitted based on the

failure to consider new and significant information, a Petitioner was unable to demonstrate that that the new information is "significant," new SAMAs need not be considered. It could *not* have been the Commission's purpose to set a *higher* burden, or to otherwise substitute the IPE and IPEE processes for further NEPA review. *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); *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729 (3d Cir. 1989) (AEA procedures cannot substitute for compliance with NEPA).[3]

Accordingly, an adequate consideration of new and significant information related to SAMA must be included in the ER for Limerick relicensing, and NRDC has the right to challenge the adequacy of that analysis.

B. NRDC Meets The Standards For Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L).

1. Barring NRDC's Contentions Based on the Regulation Would Violate NEPA And Run Contrary To The Regulation's Purpose.

Before the Board, it was Staff's position that the "purpose of 10 C.F.R. § 51.53(c)(3)(ii)(L) is . . . that a plant that has previously considered [SAMAs] *need not reassess severe accident mitigation for license renewal*." NRC Staff Answer to Waiver Petition (Dec. 14, 2012) at 12-13 (emphasis added). The Board accepted this argument, concluding that the purpose of the regulation "is to exempt those plants that have already performed SAMA analyses

[3] Staff suggests that the regulation is intended to foreclose further NEPA review on SAMAs unless they will result in major plant modifications because the Commission recognized that the risk of severe accidents was "small." Staff Br. at 14-15. But this seeks to reargue the position that the Third Circuit *rejected* in *Limerick Ecology*, where the Court expressly ruled that, particularly in light of the significant harms that a severe accident would cause, SAMA analysis is required in the NEPA process irrespective of the fact that the risk of an accident may be small. *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d at 741 ("after Three Mile Island, it would be irrational for the NRC to maintain that severe accident risks are too remote to require consideration").

from [considering SAMAs] at license renewal," and thus, that "[e]ven 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 . . . ." Second ASLB Op. at 10. The Board's referral to the Commission was based on that conclusion, because it would mean that a waiver could *never* be granted.

Recognizing this problem, Staff now take a *contrary* position, claiming that a waiver *could* be granted, and that it *would be* within the purpose of the regulation to require further consideration of SAMAs, *if* a petitioner could demonstrate, at the outset, that those SAMAs would "provide a serious reduction in the risk of severe accidents . . . ." Staff Br. at 27. We have explained above why this newly minted standard is inappropriate, *see supra* at 2-6, but in any event this kind of bait-and-switch approach should not be permitted. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position"). Rather, the Commission should simply reject Staff's *original* argument, and conclude that, as compelled by the Commission's regulations and NEPA, further analysis is *required* where, as here, a petitioner sufficiently alleges that an ER inadequately addresses new and significant information concerning SAMAs.[4]

[4] Elsewhere Staff itself suggests this standard, stating that the Board's conclusion – which Staff itself had urged – must be wrong because otherwise "NRDC would have no opportunity to bring claims of new and significant information regarding SAMAs in this adjudication." Staff Br. at 18.

This result is arguably compelled by the Commission's earlier decision remanding this proceeding to the Board, where the Commission explained that "NRDC *may challenge the adequacy of the new information provided in the Limerick*" ER, Comm. Op. at 13 (emphasis added), but stated that the appropriate vehicle to pursue such a claim concerning "new and significant information" is a waiver petition. *Id.* at 10. Accordingly, the Commission should conclude that it would be contrary to the purpose of the regulation to preclude such a waiver based on the impossibility that such a waiver could be granted.

Alternatively, the Commission should conclude that the narrow purpose of 10 C.F.R. § 51.53(c)(3)(ii)(L) is to exempt Exelon from reconsidering the SAMA candidates that were previously considered. *See* NRDC Mar. 13, 2013 Opening Brief at 15-18. This more narrow purpose would reconcile the regulations with NEPA and with 10 C.F.R. § 51.53(c)(3)(iv) by allowing NRDC to challenge whether Exelon has adequately considered new and significant information that may serve to identify *new* SAMA candidates, and has used more current analyses and cost considerations in doing so.

2. Special Circumstances Unique to Limerick and Concerning a Significant Environmental Concern Warrant A Waiver Here.[5]

Exelon does not contest that NRDC meets the remainder of the waiver test, and should not be permitted to so argue in its response brief. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010); *Louisiana Energy Services, L.P.*, 60 N.R.C. 223, 225 (2004) ("new arguments

[5] The Board concluded that the *Millstone* test contains "an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. § 2.335(b)," because the regulation does not require the waiver request to be 'unique' to the facility or concern a 'significant safety issue.'" Second ASLB Op. at 7. While NRDC agrees with the Board that it should not be required to satisfy these factors here, they are nonetheless amply met.

may not be raised for the first time in a reply brief"). While Staff contests whether NRDC meets the remaining factors, the arguments have no merit.

First, Staff claims that NRDC's request is not unique because the regulation could apply to other license renewals or "reactors applying for subsequent license renewal . . . ." Staff Br. at 26. Of course, if there were any such plants Staff would have named them, and NRDC is aware of none. As for subsequent renewals, the notion that the regulation will exempt further SAMA analysis when plants are again renewed in the mid-twenty-first century flatly contradicts the GEIS, which was prepared only to address environmental impacts of "renewing the licenses of and operating individual nuclear power plants for an additional twenty years," not second – and third, and fourth – generation renewals. *See* GEIS Executive Summary; *id.* at § 1.1. Thus, in fact, the request *only* covers Limerick, since, of the three plants covered by the exception to 10 C.F.R. § 51.53(c)(3)(ii)(L) – Limerick, Companche Creek, and Watts Barr – only Limerick is a Boiling Water Reactor. *See* 61 Fed. Reg. at 28,481.

Second, Staff claims there are no "special circumstances" or "significant environment concerns" because, in promulgating 10 C.F.R. § 51.53(c)(3)(ii)(L), the Commission anticipated that additional cost-effective SAMAs would be developed in the future. Staff Br. at 25; *id.* at 28 (arguing that in promulgating the regulation the Commission "explicitly recognized that future SAMA analyses done at other plants may identify other cost-beneficial SAMAs"). Of course, if that were the governing standard then, again, a waiver could *never* be granted. But, having already determined that "NRDC *may challenge* the adequacy of the new information" Exelon provided concerning SAMAs, Comm. Op. at 13 (emphasis added), and that the appropriate

mechanism through which to do so is the waiver process, the Commission has already, in effect, concluded that such a challenge meets these remaining criteria.[6]

Moreover, Staff's view of how these factors can be satisfied here is at odds with the Statement of Consideration, where, in responding to concerns that new information may undermine the bases for generic licensing determinations, the Commission itself recognized that if subsequent information demonstrates that "the analysis of an impact codified in the rule is incorrect with respect to [a] particular plant," *a waiver of the rule will be appropriate*. 61 Fed. Reg. at 28,470. NRDC has produced more than sufficient information to challenge the adequacy of Exelon's analysis of new and significant information concerning SAMAs in its ER. Thus, a waiver must be granted.

Respectfully Submitted,

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[6] Staff's reliance on a decision rejecting an effort to *reopen* the record in another proceeding based on contentions concerning a SAMA analysis is misplaced. Staff Br. at 29 n.158. The reopening standards are not at issue here, and, the fact that "claims related to" SAMAs "are not *necessarily* significant," Staff Br. at 29 (emphasis added), has nothing to do with whether NRDC has raised significant issues *here*.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRDC RESPONSE IN SUPPORT OF REQUEST 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 and supporting documents in the captioned proceeding were served via the Electronic Information Exchange (EIE) on the 20th day of March 2013, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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