

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

| | | |
|--|---|-----------------------|
| In the Matter of: |) | Docket Nos. 50-352-LR |
| |) | 50-353-LR |
| EXELON GENERATION COMPANY, LLC |) | |
| |) | |
| (Limerick Generating Station, Units 1 and 2) |) | March 20, 2013 |

**EXELON'S REPLY BRIEF IN RESPONSE TO THE
REFERRAL OF LBP-13-1 TO THE COMMISSION**

I. INTRODUCTION

Pursuant to the Secretary's Order,¹ Exelon Generation Company, LLC ("Exelon") hereby replies to the initial briefs filed on March 13, 2013, by the U.S. Nuclear Regulatory Commission ("Commission" or "NRC") Staff and the Natural Resources Defense Council ("NRDC"). Those initial briefs responded to the Atomic Safety and Licensing Board's ("Board") referral of LBP-13-1² to the Commission.³ LBP-13-1 denied NRDC's waiver request pursuant to 10 C.F.R. § 2.335(b), concluding that NRDC failed to demonstrate that strict application of 10 C.F.R. § 51.53(c)(3)(ii)(L) ("Subsection L") as it applies to Exelon's license renewal application for the Limerick plant would frustrate the regulation's intended purpose.⁴

However, because the Board perceived a "Catch 22 situation" resulting between the interplay of Section 2.335(b) and Subsection L that it believed would effectively render waiver of the latter impossible, the Board referred its ruling to the Commission to address this novel issue.⁵ Exelon and the NRC Staff demonstrated in their Initial Briefs that there is no conflict between those two regulations.⁶ And both Exelon and Staff urge the Commission to affirm the Board's denial of NRDC's Waiver Petition because NRDC failed to satisfy the high burden of Section 2.335(b).⁷

¹ Sec'y Order (Feb. 26, 2013) ("February 26 Order"), *available at* ADAMS Accession No. ML13057A822.

² *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), LBP-13-1, 76 NRC ____, slip op. (Feb. 6, 2013) ("LBP-13-1").

³ NRC Staff's Brief on the Board's Referred Ruling in LBP-13-1 (Mar. 13, 2013) ("Staff Initial Brief"), *available at* ADAMS Accession No. ML13072A804; 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) ("NRDC Initial Brief"), *available at* ADAMS Accession No. ML13072B038.

⁴ LBP-13-1, slip op. at 12-13.

⁵ *Id.* at 13.

⁶ Exelon's Initial Brief in Response to the Referral of LBP-13-1 to the Commission at 2, 12-15 (Mar. 13, 2013) ("Exelon Initial Brief"), *available at* ADAMS Accession No. ML13072B433; Staff Initial Brief at 11-17.

⁷ Exelon Initial Brief at 16-20; Staff Initial Brief at 21-24. Because LBP-13-1 examined only whether the Waiver Petition demonstrated that application of the Subsection L exception in this proceeding would frustrate the

In its Initial Brief, NRDC argues—as it did before the Board—that portions of two of its proposed environmental contentions satisfy the waiver criteria.⁸ Those contentions (Contention 1-E and 3-E) challenge the discussion of new and significant information (“N&SI”) regarding severe accident mitigation alternatives (“SAMAs”) as set forth in Exelon’s Environmental Report (“ER”). In addition, NRDC argues that if the Commission does not grant a waiver to allow NRDC to litigate Contentions 1-E and 3-E, then the Commission will be violating the National Environmental Policy Act (“NEPA”).⁹

The arguments advanced in NRDC’s Initial Brief were mostly addressed in Exelon’s Initial Brief. Accordingly, this Reply Brief focuses on two key points: (1) NRDC has failed to meet the high burden for waiver; and (2) Exelon’s actions under Subsection L are consistent with NEPA.

II. DISCUSSION¹⁰

As Exelon noted in its Initial Brief, waivers only should be granted in “unusual and compelling circumstances.”¹¹ Consistent with NRC precedent, a licensing board can only certify a waiver petition to the Commission after finding that the petition “has met ‘extremely high standards’ showing the existence of ‘compelling circumstances in which the rationale of [the

intended purpose of the rule (*see* LBP-13-1, slip. op. at 8-13), Exelon has limited its briefing before the Commission to that waiver standard. Exelon notes that the NRC Staff’s and NRDC’s Initial Briefs address all four prongs of the stringent test for waiver articulated by the Commission in the *Millstone* license renewal proceeding (“*Millstone* Factors”). Exelon’s responses to NRDC’s arguments on the *Millstone* Factors are not repeated here because they are set forth in the Exelon Response Opposing NRDC’s Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) at 18-36 (Dec. 14, 2012) (“Answer”), *available at* ADAMS Accession No. ML12349A327, and Exelon’s Counter Affidavit Supporting Exelon’s Response Opposing NRDC’s Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), at ¶¶ 13-34 (Dec. 14, 2012) (“Exelon’s Counter Affidavit”), *available at* ADAMS Accession No. ML12349A328.

⁸ *See generally* NRDC Initial Brief.

⁹ NRDC Initial Brief at 2, 15, 18-22.

¹⁰ Exelon provided a detailed history of this proceeding in its Initial Brief (pp. 2-9) and is not repeating it here.

¹¹ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988) (internal quotations omitted), *aff’d*, CLI-88-10, 28 NRC 573 (1988), *reconsideration denied*, CLI-89-3, 29 NRC 234 (1989); *see also* Exelon Initial Brief at 11-12.

regulation] is undercut.”¹² In LBP-13-1, the Board correctly determined that the Waiver Petition is fatally defective because NRDC fails to demonstrate that application of Subsection L in this proceeding would frustrate the intended purpose of the exception from the SAMA analysis requirement.¹³ NRDC’s Initial Brief further highlights its failure to meet this extremely high burden for waiver.

NRDC relies on its unsupported argument that Subsection L was intended to “simply limit facilities that had previously considered SAMAs from being obligated to reconsider the *same* SAMAs during relicensing.”¹⁴ Moreover, NRDC renews its claim that the mere assertion of N&SI compels the Commission to waive Subsection L or otherwise permit NRDC to litigate SAMA issues in this proceeding.¹⁵ As explained below, NRDC is simply wrong that *litigation* of Contention 1-E and 3-E in this proceeding is necessary for the Commission to satisfy NEPA.

A. Contrary to NRDC’s Assertion, NRDC Fails to Meet Its High Burden For Waiver

Only two points warrant additional discussion. First, to demonstrate circumstances which would justify waiver of Subsection L, NRDC must identify major design changes or major plant modifications that would be cost-beneficial at Limerick.¹⁶ The Commission’s stated intent to except Exelon from performing another SAMA analysis for Limerick’s license renewal is rooted in its conclusion that any cost-beneficial improvements identified in SAMA analyses at the license renewal stage generally would be procedural and programmatic fixes or minor plant

¹² *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-10-12, 71 NRC 656, 662 (2010) (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 245 (1989)).

¹³ LBP-13-1, slip op. at 12-13.

¹⁴ NRDC Initial Brief at 15 (emphasis in original).

¹⁵ *Id.* at 2-3, 15, 18-20.

¹⁶ *See* Exelon Initial Brief at 12-15; Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,481 (June 5, 1996).

changes.¹⁷ However, although considered unlikely, the Commission left the door open for a petitioner to identify major plant changes in the future.¹⁸ The Commission, therefore, implicitly rejected the need for further consideration of SAMAs at the license renewal stage absent a petitioner identifying a major plant design change or modification. As demonstrated in Exelon’s Answer and Initial Brief, NRDC failed to allege the existence of major design changes or plant improvements that would be cost-beneficial at Limerick.¹⁹

The NRC Staff articulates a slightly different threshold than Exelon for information regarding SAMAs that could justify waiver of Subsection L.²⁰ However, the Staff’s position is consistent with Exelon’s experts’ selection of a 50% reduction in the maximum averted cost risk as the threshold.²¹ Exelon continues to assert that this will require a major design change or improvement, which its experts define as “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.”²² But whether the Commission adopts the NRC Staff’s or Exelon’s threshold, NRDC fails to identify any information that satisfies either.

Second, NRDC objects to the Board’s rejection of its interpretation of the purpose of the Subsection L exception—“to avoid revisiting [only those] SAMAs previously considered.”²³ However, as the Board correctly held, NRDC’s interpretation contradicts the plain language of

¹⁷ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,481; *see also* Exelon Initial Brief at 12-15.

¹⁸ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,481.

¹⁹ Answer at 24-27; Exelon Counter Affidavit at ¶¶ 13-18 & tbl. A; Exelon Initial Brief at 18-19.

²⁰ *See* Staff Initial Brief at 16 (proposing a “sufficient reduction in severe accident risk” test for SAMAs and citing pressurized water reactor coolant pump seals as an example that could hypothetically support a successful waiver petition).

²¹ Exelon Counter Affidavit at ¶¶ 20-26.

²² *Id.* at ¶ 17.

²³ NRDC Initial Brief at 15.

the regulation.²⁴ Moreover, contrary to NRDC’s argument, the regulatory history of Subsection L does not support its interpretation.²⁵ As noted by the Board, the Commission determined that one site-specific SAMA analysis is sufficient to satisfy NEPA in the 1996 rulemaking leading to Subsection L.²⁶ Therefore, there is no support for NRDC’s interpretation for waiver to litigate its contentions involving newly-identified SAMA candidates, updated economic cost risk data, and modern SAMA methodologies.

In sum, NRDC provides no basis to support its argument that the purpose of Subsection L would not be served in this proceeding. For that reason alone, the Commission should affirm the Board’s decision denying the Waiver Petition.

B. Applying Section 51.53(c)(3)(ii)(L) to this Proceeding is Consistent With NEPA

Notwithstanding its obligation to meet the stringent standards for waiver under Section 2.335(b), NRDC contends that the Commission must grant waiver to reconcile the Subsection L exception with NEPA.²⁷ According to NRDC, NEPA requires the NRC to consider the new information regarding SAMAs that NRDC identified in Contentions 1-E and 3-E *in an adjudicatory proceeding*.²⁸ NRDC’s argument is flawed for several reasons.

First, NRDC misunderstands the N&SI requirement in 10 C.F.R. § 51.53(c)(iv).

Throughout this proceeding, Exelon has made clear—as has the NRC Staff—that Exelon and the

²⁴ LBP-13-1, slip op. at 9.

²⁵ See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,481 (“Therefore the Commission has reclassified severe accidents as a Category 2 issue, requiring only that alternatives to mitigate severe accidents be considered for those plants that have not included such a consideration in a previous [environmental impact statement (“EIS”)] or supplemental EIS [“(SEIS)”].”); see also Exelon Initial Brief at 15-17 & Answer at 19-23.

²⁶ LBP-13-1, slip op. at 9.

²⁷ NRDC Initial Brief at 15; see also *id.* at 3 (asserting that any result other than granting waiver “would be contrary to NEPA’s dictates”), 18-20 (arguing that acceptance of the Board’s conclusion that both the language and purpose of Subsection L is to preclude any obligation to consider N&SI relevant to the 1989 SAMDA analysis would be “flatly contrary” to NEPA).

²⁸ NRDC Initial Brief at 2-3, 15, 18-20.

NRC Staff have obligations to address N&SI related to SAMAs in their NEPA analyses.²⁹

Pursuant to that responsibility, Exelon evaluated in Section 5 of the ER the significance of new, SAMA-related information post-dating the 1989 SAMDA analysis performed for Limerick.

NRDC states that because Exelon included a discussion of N&SI relating to SAMAs in the ER, NRDC must be allowed to litigate the adequacy of that discussion.³⁰ In other words, it claims that the existence of that discussion in Section 5 of the ER, in itself, requires the Commission to grant a waiver to permit litigation of Contentions 1-E and 3-E. The only authority NRDC cites for this proposition is the Commission's statement, in CLI-12-19, that "NRDC may challenge the adequacy of the new information provided in the Limerick Environmental Report."³¹ As the Commission held, however—in the very next sentence of its decision—any such challenge is subject to the waiver standards of 10 C.F.R. § 2.335.³² Nothing in CLI-12-19 suggests that the Commission intends to relax those standards here or that NRDC had somehow met them in its original petition to intervene.

To the contrary, NRDC's contention that the N&SI requirement overrides and, therefore, allows litigation regarding Subsection L absent a waiver is contrary to Commission precedent establishing that the sufficiency of the applicant's evaluation of purported N&SI relating to Category 1 issues may not be litigated absent a waiver.³³ As the Commission held in the *Vermont Yankee/Pilgrim* license renewal proceedings, "[a]djudicating category one issues site-

²⁹ Answer at 6-7, 16-17; 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), available at ADAMS Accession No. ML12349A384.

³⁰ See, e.g., NRDC Initial Brief at 11-12 (citing *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 75 NRC ___, slip op. at 13 (Oct. 23, 2012) ("CLI-12-19").

³¹ CLI-12-19, slip op. at 13.

³² See *id.*

³³ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) and *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13, 19-21 (2007) ("*Vermont Yankee/Pilgrim*"); CLI-12-19, slip op. at 12-14.

by-site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a [Generic Environmental Impact Statement].”³⁴ The Commission ruled in CLI-12-19 that SAMA analyses are the functional equivalent of a Category 1 issue for Limerick’s license renewal.³⁵ The Commission then applied the *Vermont Yankee/Pilgrim* decision and concluded that Subsection L removes SAMAs from litigation “in this as well as certain other, case-by-case license renewal adjudications,” absent a waiver.³⁶

Second, NRDC misinterprets its legal support. In its Initial Brief (pp. 19-20), NRDC claims that the *Statements of Consideration* accompanying Subsection L (“1996 SOC”) establish that NEPA confers on parties an absolute right to a hearing on N&SI addressed in a NEPA document. NRDC quotes the 1996 SOC: If a commenter provides “new, site-specific information which demonstrates that the analysis of an impact codified in the rule is incorrect with respect to a particular plant, the NRC staff will seek Commission approval to waive the application of the rule with respect to that analysis in the specific renewal proceeding.”³⁷ But this statement only confirms that the Commission satisfies NEPA through the public comment process (*i.e.*, “if a commenter provides . . .”), and that the Staff would need to request a waiver from the Commission to evaluate the impact otherwise codified in a rule. It does not support an argument that the commenter must be allowed to litigate its comment in an adjudicatory hearing.

Likewise, the Commission’s denial of the Nuclear Energy Institute’s petition for rulemaking requesting amendment of NRC regulations to delete the requirement to consider

³⁴ *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 21.

³⁵ CLI-12-19, slip op. at 13.

³⁶ *Id.* The Commission’s holding in *Vermont Yankee/Pilgrim* applies regardless of whether the challenged ERs omit any discussion of N&SI (as was the case in *Vermont Yankee/Pilgrim*) or whether the challenged ERs include a discussion of N&SI (as is the case at bar). To rule otherwise would penalize an applicant for evaluating the significance of new information in an ER and result in ERs which only included discussion of new information which the applicant concluded was indeed significant.

³⁷ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,470.

SAMAs as part of the license renewal environmental review does not support NRDC's argument. The Commission denied that petition because it believed that, without further Staff review and expenditure of considerable resources, there was an inadequate basis to support a rulemaking to reclassify SAMAs as a Category 1 issue.³⁸ However, the Commission explicitly stated that applicants "should continue to refer to the guidance set out for SAMA analyses in the [1996 SOC],"³⁹ which clearly excepts Exelon for Limerick from performing another SAMA analysis at the license renewal stage and does not delineate N&SI as special circumstances justifying waiver or otherwise require litigation of N&SI.

Indeed, the Courts of Appeals for the First, Second, Third, Ninth, and District of Columbia Circuit have all confirmed that NEPA does not confer a right to the public to *litigate* issues in an ER or an agency's EIS.⁴⁰ In particular, the D.C. Circuit rejected a petitioner's argument that the NRC's contention admissibility rules violated NEPA by not automatically allowing a hearing on NEPA documents, holding that "[w]hile NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues."⁴¹

³⁸ See Nuclear Energy Institute, Denial of Petition for Rulemaking, 66 Fed. Reg. 10,834, 10,836 (Feb. 20, 2001).

³⁹ *Id.* at 10,838.

⁴⁰ See, e.g., *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55-56 (D.C. Cir. 1990) (rejecting petitioner's argument that the NRC's contention admissibility standards violated NEPA because there is no statutory right to a hearing on NEPA documents); *Brodsky v. NRC*, 704 F.3d 113, 120 (2d Cir. 2013) (internal citations omitted) (analyzing public participation in the NEPA process and noting that there is no statutory requirement for public hearings); *Beyond Nuclear v. NRC*, 704 F.3d 12, 15 (1st Cir. 2013) (observing that NEPA does not provide for hearings on environmental matters in explaining the NRC's standards for contention admissibility); *Del. Dept. of Natural Res. and Env'tl. Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 270 (3d Cir. 2012) ("Understandably, neither NEPA nor [Council on Environmental Quality] regulations prescribes particular proceedings agencies should use in carrying out [NEPA's required] 'hard look.'"); *San Luis Obispo Mothers for Peace v. NRC*, 635 F.3d 1109, 1115 (9th Cir. 2011) (upholding the NRC's denial of petitioners request for a closed hearing on an electric utility's application for a proposed interim spent fuel storage installation and reasoning, in part, that "NEPA contains no hearing requirement").

⁴¹ *Union of Concerned Scientists*, 920 F.2d at 56 (internal citations omitted).

Third, the Commission has established appropriate procedural avenues for ensuring that N&SI is considered as required by NEPA. In affirming the decision and reasoning of the *Vermont Yankee/Pilgrim* licensing boards and the Commission, the Court of Appeals for the First Circuit reasoned that prohibiting petitioners from challenging N&SI pertaining to issues decided by rule, as is the case here, was permissible under NEPA because the NRC has established “other means” to challenge those findings.⁴² Specifically, individuals may petition for rulemaking, comment on the NRC Staff’s draft SEIS, or seek a Commission waiver.⁴³

To litigate SAMA issues in this proceeding, NRDC must show that the alleged information in Contentions 1-E and 3-E meets the NRC’s stringent standards for waiver. As discussed in Section II.A above, the Board correctly concluded that NRDC failed to do so. Two other non-adjudicatory processes are available to NRDC to present its concerns in addition to satisfying the stringent standards for waiver. As the Commission recognized in CLI-12-19, NRDC may seek a rulemaking to rescind Subsection L.⁴⁴ Further, NRDC can submit comments on the draft SEIS.⁴⁵ Through these processes, the Commission can fully comply with NEPA.⁴⁶

⁴² *Mass. v.NRC*, 522 F.3d 115, 120-121 (1st Cir. 2008).

⁴³ *See id.*; *see also Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001).

⁴⁴ *Id.*; *see also Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 562 (2005) (emphasizing that the Commission’s denial of a waiver petition “does not mean that [the petitioner] is bereft of appropriate means by which to bring its emergency-planning concerns to this Agency’s attention” and noted that a petition for rulemaking is an appropriate means for considering generic issues).

⁴⁵ CLI-12-19, slip op. at 14 (citing Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,470).

⁴⁶ Given the multitude of NEPA processes available to NRDC to air its concerns raised in Contentions 1-E and 3-E, NRDC’s argument that the individual plant (“IPE”) and IPE for externally initiated events (“IPEEE”) processes *alone* are not a substitute for NEPA is without merit. Environmental Review for Renewal of Nuclear Power Plant Operating License 61 Fed. Reg. 66,537, 66,540 (Dec. 18, 1996). Moreover, NRDC ignores the fact that Section 5 of Exelon’s ER explicitly discusses the Limerick IPE and IPEEE, as well as other analyses and improvements. As Exelon’s experts explained, though not conducted to satisfy NEPA, these probabilistic risk assessments inform the analysis in the ER – which is a NEPA document required under Part 51 – and can be used to inform the environmental analysis performed by the NRC Staff. Exelon Counter Affidavit at ¶¶ 33-34.

Accordingly, application of Subsection L to this license renewal proceeding without allowing NRDC to litigate its contentions via grant of a waiver is consistent with NEPA.

III. CONCLUSION

For the foregoing reasons and for the reasons set forth in its Initial Brief, Exelon respectfully requests that the Commission: (a) accept review of the referred ruling in LBP-13-1 as certified by the Board; (b) clarify that there is no conflict between the Commission's waiver rules and 10 C.F.R. §51.53(c)(3)(ii)(L); and (c) affirm the Board's holding in LBP-13-1 that NRDC has not presented a *prima facie* case for waiver under 10 C.F.R. § 2.335(b).

Respectfully submitted,

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

Signed (electronically) by Alex S. Polonsky

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Dated in Washington, D.C.
this 20th day of March 2013

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| |) | 50-353-LR |
| (Limerick Generating Station, Units 1 and 2) |) | March 20, 2013 |
| |) | |

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that on March 20, 2013, Exelon served a copy of “**EXELON’S REPLY BRIEF IN RESPONSE TO THE REFERRAL OF LBP-13-1 TO THE COMMISSION**” in this proceeding through the NRC’s E-Filing system.

Signed (electronically) by Brooke E. McGlinn
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