

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))	June 24, 2013

**EXELON'S ANSWER OPPOSING NATURAL RESOURCES DEFENSE COUNCIL'S
RESUBMISSION OF CONTENTIONS IN RESPONSE TO STAFF'S SUPPLEMENTAL
DRAFT ENVIRONMENTAL IMPACT STATEMENT**

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(i)(1) and the September 4, 2012 Revised Scheduling Order (“RSO”),¹ Exelon Generation Company, LLC (“Exelon”) submits this timely Answer in opposition to “Natural Resources Defense Council’s [“NRDC”] Resubmission of Contentions in Response to Staff’s Supplemental Draft Environmental Impact Statement,” filed on May 30, 2013 (“Resubmitted Contentions”).² NRDC has simply resubmitted an almost-verbatim version of its previously-proffered environmental contentions—all of which have been either rejected or are currently held in abeyance.³ In this clone filing, NRDC only seeks to substitute all prior references in its original contentions to Exelon’s Environmental Report (“ER”) with new references to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) Staff’s Draft Supplemental Environmental Impact Statement.⁴ It now asks the Atomic Safety and Licensing Board (“Board”) to accept its “resubmitted” contentions.⁵

According to NRDC, the Resubmitted Contentions are merely intended to “preserve” its original contentions for “consideration by a reviewing Court.”⁶ NRDC, however, states that it “accepts” prior Board rulings on the admissibility of those original contentions, as they applied to the ER, as being binding on the Resubmitted Contentions.⁷ NRDC is not requesting that the

¹ Licensing Board Order (Revised Scheduling Order) (Sept. 4, 2012) (unpublished), *available at* ADAMS Accession No. ML12248A195.

² *Available at* ADAMS Accession No. ML13150A420.

³ *See id.* at 1-2.

⁴ NUREG-1437, Supp. 49, Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants, Regarding Limerick Generating Station, Draft Report for Comment (Apr. 2013) (“DSEIS”).

⁵ Resubmitted Contentions at 1-2, 5-6, 8.

⁶ *Id.* at 2.

⁷ *Id.* at 2, 5. NRDC does not, however, state whether or not it “accepts” the Commission’s binding decision in CLI-12-19, partially overturning the Board’s decision to admit, in part, one severe accident mitigation alternatives (“SAMA”) contention. *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 75 NRC ___, slip op. (Oct. 23, 2012) (“CLI-12-19”).

Board revisit those determinations.⁸ In addition, NRDC purports to incorporate by reference all of the bases and “supporting evidence” for its contentions included in its prior pleadings.⁹

Submission of the Resubmitted Contentions is without legal basis and thus responding to their merits is unnecessary and a waste of resources for all concerned: the Board, the NRC Staff, and the applicant. As NRDC admits, its prior contentions have been rejected, and the rulings rejecting those contentions apply equally here.¹⁰ Most of the issues NRDC seeks to raise are in the hands of the Commission.¹¹ The Resubmitted Contentions uniformly fail to satisfy the timeliness and contention admissibility requirements in 10 C.F.R. § 2.309. And finally, through this filing, NRDC essentially seeks to have the Board engage in the academic exercise of determining whether to “accept”—not admit—the Resubmitted Contentions, apparently under the hypothetical assumption that all of the binding decisions recognizing numerous objections to

⁸ Resubmitted Contentions at 2, 5.

⁹ *Id.* at 5-6, 8. Exelon hereby also incorporates by reference all of its prior objections to NRDC’s contentions. See Exelon’s Answer Opposing NRDC’s Petition to Intervene (Dec. 20, 2011) (“Exelon Answer”), available at ADAMS Accession No. ML11354A451; Exelon Notice of Appeal of LBP-12-08 and Supporting Brief at 22-27 (Apr. 16, 2012) (“Exelon Appeal”), available at ADAMS Accession No. ML12107A417; Exelon’s Answer Opposing NRDC’s New Waste Confidence Contention (Aug. 2, 2012) (“Answer to Proposed Waste Confidence Contention”), available at ADAMS Accession No. ML12215A571; Exelon Response Opposing NRDC’s Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) at 24-27 (Dec. 14, 2012) (“Exelon Answer to the Waiver Petition”), available at ADAMS Accession No. ML12349A327; 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 ¶¶ 19-30 (Dec. 14, 2012) (“Exelon’s Counter Affidavit”), available at ADAMS Accession No. ML12349A328; Exelon’s Initial Brief in Response to the Referral of LBP-13-1 to the Commission (Mar. 13, 2013) (“Exelon’s Initial Brief”), available at ADAMS Accession No. ML13072B433; Exelon’s Reply Brief in Response to the Referral of LBP-13-1 to the Commission (Mar. 13, 2013) (“Exelon’s Reply Brief”), available at ADAMS Accession No. ML13079A662.

¹⁰ Resubmitted Contentions at 2, 5.

¹¹ Although Exelon believes that NRDC improperly resubmitted its SAMA-related contentions with the Board, Exelon files this Answer with the Board in recognition that every tribunal has the inherent authority to determine, in the first instance, its own jurisdiction. See *Duke Power Co.* (Perkins Nuclear Station Units 1, 2 & 3), ALAB-591, 11 NRC 741, 742 (1980).

these contentions will be reversed later on appeal.¹² For all of these reasons, the Board should reject the Resubmitted Contentions.

II. BACKGROUND

A. NRDC's Original Contentions and the Board's Ruling

On June 22, 2011, Exelon requested renewal of the Limerick operating licenses for an additional twenty years (*i.e.*, until midnight on October 26, 2044, for Unit 1, and midnight on June 22, 2049, for Unit 2).¹³ NRDC filed its "Petition to Intervene and Notice of Intention to Participate" on November 22, 2011.¹⁴ It proposed four contentions under the National Environmental Policy Act ("NEPA"):

- Contention 1-E alleged that the ER has not adequately considered certain allegedly new and significant information relating to SAMAs;¹⁵
- Contention 2-E alleged that in relying on the severe accident mitigation design alternatives ("SAMDA") analysis from 1989 for Limerick, Exelon failed to provide an adequate analysis of SAMAs;¹⁶
- Contention 3-E alleged that Exelon is not legally entitled to claim an exemption under 10 C.F.R. § 51.53(c)(3)(ii)(L) from the requirement to perform another SAMA analysis at

¹² See *U.S. Dep't of Energy* (High Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004) (declining to entertain an appeal where answering the questions left open by the licensing board decision would be a "mere academic exercise").

¹³ See Letter from M. Gallagher, Vice President, Exelon, to NRC, Application for Renewed Operating Licenses (June 22, 2011), *available at* ADAMS Accession No. ML11179A096.

¹⁴ [NRDC] Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011) ("Petition to Intervene"), *available at* ADAMS Accession No. ML11326A320.

¹⁵ *Id.* at 16-19.

¹⁶ *Id.* at 19-20.

the license renewal stage, and that the ER was therefore inadequate for failure to include such an analysis;¹⁷ and

- Contention 4-E alleged that the ER was deficient for failure to provide an adequate analysis of the no-action alternative.¹⁸

In LBP-12-08, the Board denied contentions 2-E, 3-E, and 4-E in their entireties.¹⁹ The Board found that the adequacy of the 1989 SAMDA analysis for Limerick is not at issue in this licensing proceeding and rejected Contention 2-E on that ground.²⁰ The Board entirely denied Contention 3-E on the ground that NRDC erroneously claimed that the Section 51.53(c)(3)(ii)(L) exception did not apply to Limerick.²¹ Finally, the Board denied the energy alternatives contention (Contention 4-E) because it was not supported by an adequate basis.²²

With respect to Contention 1-E, the Board determined that NRDC failed to provide sufficient support for all but two bases.²³ Thus, the Board granted a very limited portion of NRDC's Petition to Intervene. Exelon and the NRC Staff filed timely appeals of LBP-12-08.²⁴

¹⁷ *Id.* at 21-23.

¹⁸ *Id.* at 23-24.

¹⁹ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), LBP-12-08, 75 NRC ___, slip op. at 30, 33-34, 37-38, 40 (Apr. 4, 2012) ("LBP-12-08").

²⁰ *Id.* at 29-30.

²¹ *Id.* at 34.

²² *Id.* at 38-39.

²³ *Id.* at 17-20, 22-23, 26-27. The claims the Board found unsupported were that Exelon should have considered: (1) population through 2049, (2) historical data for core damage frequency, and (3) impacts on the human environment. The Board partially admitted NRDC's claim that Exelon should consider SAMAs evaluated by license renewal applicants for other BWR Mark II containments, but it rejected NRDC's Fukushima-related claims. LBP-12-08, slip op. at 21-22. It also partially admitted NRDC's claim that Exelon should not have relied on Three Mile Island ("TMI") for its economic cost assessment, but it rejected as unsupported NRDC's claim that Exelon should have considered higher cleanup costs for Philadelphia. *Id.* at 25-26.

²⁴ *See* Exelon Appeal at 10-19; NRC Staff's Notice of Appeal of LBP-12-08 (Apr. 16, 2012), *available at* ADAMS Accession No. ML12107A406.

B. NRDC's Proposed Waste Confidence Contention

On July 9, 2012, while the appeal of LBP-12-08 was pending, NRDC filed a motion to admit a new waste confidence contention (“Supplemental Contention 1”),²⁵ based on the D.C. Circuit’s ruling in *New York v. NRC* vacating and amending the NRC’s Waste Confidence Decision (“WCD”) and Temporary Storage Rule (“TSR”) update.²⁶ Exelon objected on the grounds that Supplemental Contention 1 lacks a legal basis and concerns an issue that is or is about to become the subject of rulemaking, contrary to 10 C.F.R. §§ 2.309(f)(1)(ii) and (iii).²⁷

The NRC Staff also opposed admission of Supplemental Contention 1. Specifically, the Staff argued that several portions of NRDC’s proposed contention go beyond the holding in the *New York* decision and are inadmissible because they are outside the scope of this license renewal proceeding.²⁸ NRC Staff also identified several claims by NRDC that lack an adequate factual basis.²⁹

In CLI-12-16, the Commission exercised its inherent authority over adjudications and directed that waste confidence contentions filed in several license renewal proceedings, including this one, be held in abeyance pending further Commission order.³⁰ This abeyance directive also applied to “any related contentions that may be filed in the near term.”³¹ Pursuant to that

²⁵ NRDC’s Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012), *available at* ADAMS Accession No. ML12191A408; NRDC’s Waste Confidence Contention (July 9, 2012), *available at* ADAMS Accession No. ML12191A409.

²⁶ *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

²⁷ *See* Answer to Proposed Waste Confidence Contention.

²⁸ *See* NRC Staff’s Response to NRDC’s Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick and NRDC’s Waste Confidence Contention at 7-9 (Aug. 2, 2012), *available at* ADAMS Accession No. ML12215A457.

²⁹ *See id.* at 9-11.

³⁰ *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), *et al.*, CLI-12-16, 75 NRC ___, slip op. at 6 (Aug. 7, 2012) (“CLI-12-16”).

³¹ *Id.*

directive, the Board held in abeyance NRDC's Supplemental Contention 1 pending further Commission order.³²

C. The Commission's Appellate Decision

In CLI-12-19, the Commission reversed the partial admission of NRDC's Contention 1-E in LBP-12-08. The core issue on appeal was whether an applicant's consideration of new and significant information, related to a matter resolved by rule, is litigable in a license renewal proceeding, absent a waiver.³³ The Commission, *inter alia*, held that the Board should have applied to the current proceeding the Commission's rulings in *Vermont Yankee* and *Pilgrim*.³⁴ Therein, the Commission determined that the new and significant information requirement in Section 51.53(c)(3)(iv) does not override a Category 1 determination because, "[a]djudicating Category 1 issues site 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]."³⁵

In CLI-12-19, the Commission ruled that the exception to performing a SAMA analysis contained in Section 51.53(c)(3)(ii)(L) "operates as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in [the Limerick license renewal proceeding], as well as

³² Licensing Board Order (Suspending Procedural Date Related to NRDC's Proposed Waste Confidence Contention) at 3 (Aug. 8, 2012) (unpublished), available at ADAMS Accession No. ML12221A277.

³³ CLI-12-19, slip op. at 3-4, 12.

³⁴ *Id.* at 12 (citing *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 (2007) ("*Pilgrim/Vt. Yankee*").

³⁵ *Pilgrim/Vt. Yankee*, 65 NRC at 21 (citations omitted). Part 51 divides the environmental impacts from license renewal into Category 1 and Category 2 issues. See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,467 (June 5, 1996). Category 1 issues are those typically resolved for *all* plants by the Generic Environmental Impact Statement and as such, Category 1 issues need not be addressed in plant-specific license renewal ERs. See *id.* at 28,474. In comparison, Category 2 issues require plant-specific review. See *id.*

certain other, case-by-case license renewal adjudications.”³⁶ However, the Commission remanded the proceeding to the Board for the limited purpose of providing NRDC with an opportunity to submit a waiver petition with respect to portions of Contention 1-E, 2-E, and 3-E.³⁷

D. The Board’s Denial of NRDC’s Waiver Petition in LBP-13-1

Following CLI-12-19, NRDC filed a waiver petition on November 21, 2012 as to the portions of Contention 1-E originally admitted by the Board and Contention 3-E.³⁸ In the Waiver Petition, NRDC argued that it would be contrary to the purpose of Section 51.53(c)(3)(ii)(L) to preclude litigation of its proffered contentions.³⁹ Both Exelon and NRC Staff objected because NRDC had not met any of the four prongs of the standard for waiver under 10 C.F.R. §2.335(b) articulated by the Commission in the *Millstone* license renewal proceeding (“*Millstone Factors*”).⁴⁰

In LBP-13-1, the Board denied NRDC’s Waiver Petition.⁴¹ Significantly, the Board observed that the purpose of the Section 51.53(c)(3)(ii)(L) exception “evidences a Commission determination that, in effect, one SAMA analysis is enough.”⁴² Nevertheless, the Board referred its decision to the Commission under 10 C.F.R. § 2.323(f)(1) because it perceived a “Catch 22”

³⁶ CLI-12-19, slip op. at 13.

³⁷ *Id.* at 15. The Commission allowed NRDC to address two contentions originally denied by the Board (2-E and 3-E) in a waiver petition, to the extent the Board dismissed them as challenges to the rule codified in Section 51.53(c)(3)(ii)(L).

³⁸ [NRDC’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 at 2 (Nov. 21, 2012) (“Waiver Petition”), available at ADAMS Accession No. ML12326A976.

³⁹ *See generally id.*

⁴⁰ *See generally* Exelon Answer to the Waiver Petition; Exelon’s Counter Affidavit; NRC Staff Answer to [NRDC] Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) (Dec. 14, 2012) (“NRC Staff Answer to Waiver Petition”), available at ADAMS Accession No. ML12349A384.

⁴¹ *Exelon Generation Co., LLC* (Limerick Generating Stations, Units 1 & 2), LBP-13-1, 76 NRC ___, slip op. at 12-13 (Feb. 6, 2013) (“LBP-13-1”).

⁴² *Id.* at 9.

situation which, in its view, rendered a waiver of Section 51.53(c)(3)(ii)(L) “impossible.”⁴³ Pursuant to Exelon’s unopposed request, the Commission solicited briefing from the parties.⁴⁴ On March 13 and March 20, 2013, the parties submitted initial⁴⁵ and reply briefs⁴⁶ on the Board’s referred decision in LBP-13-1. The issue remains pending before the Commission.

E. NRDC’s Resubmitted Environmental Contentions

As part of the NRC Staff’s environmental review of the Limerick LRA under 10 C.F.R. Part 51, the NRC Staff issued the DSEIS on April 30, 2013. NRDC characterizes its Resubmitted Contentions as a request to “update” the Original Contentions in response to the DSEIS.⁴⁷

As previously noted, NRDC’s filing seeks the Board’s “acceptance” of newly proffered Contentions 1-E, 2-E, 3-E, 4-E, 1E-1, 1E-2, 3E and Supplemental Contention 1 (collectively, “Resubmitted Contentions”), even though NRDC recognizes and “accepts” the binding prior rulings rejecting all but Supplemental Contention 1, which is held in abeyance. According to NRDC, the Board’s “acceptance” of the Resubmitted Contentions is necessary to “preserve” them for “consideration by a reviewing court.”⁴⁸ In essence, the Resubmitted Contentions are

⁴³ *Id.* at 13.

⁴⁴ Sec’y Order (Feb. 26, 2013), *available at* ADAMS Accession No. ML13057A822.

⁴⁵ Exelon’s Initial Brief; NRC Staff’s Brief on the Referred Ruling in LBP-13-1 (Mar. 13, 2013), *available at* ADAMS Accession No. ML13072A084; [NRDC’s] Brief in Support of Waiver of 10 C.F.R. 51.53(c)(3)(ii)(L) as Applied to Application for Renewal of License for Limerick Units 1 & 2 (Mar. 13, 2013), *available at* ADAMS Accession No. ML13072B038.

⁴⁶ Exelon’s Reply Brief; NRC Staff’s Reply on the Referred Ruling in LBP-13-1 (Mar. 13, 2013), *available at* ADAMS Accession No. ML13079A501; [NRDC’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 License for Limerick Units 1 & 2 (Mar. 13, 2013), *available at* ADAMS Accession No. ML13079A551.

⁴⁷ Resubmitted Contentions at 1-3, 9 (stating that the intent of the filing is to direct previously proffered contentions and bases to the DSEIS).

⁴⁸ *Id.* at 2, 5 (citing no authority).

intended to function as a placeholder for a potential judicial appeal to be filed after the Commission's ruling on LBP-13-1.

III. THE BOARD SHOULD REJECT NRDC'S RESUBMITTED CONTENTIONS

A. The Board Has No Jurisdiction Over Issues That Are Before the Commission

NRDC's request that the Board "accept" its new SAMA-related contentions is contrary to Commission precedent divesting licensing boards of jurisdiction over matters pending Commission appellate review.⁴⁹ The Board only has jurisdiction over those matters that the Commission commits to it in the hearing notice and referral order for the hearing.⁵⁰ Once it issues a decision which disposes of a particular issue and an appeal or petition for review is filed, as it has here, the Board loses jurisdiction to act further on that issue.⁵¹ This principle covers referred rulings, as well as appeals, because 10 C.F.R. § 2.341(f)(1) specifies that referrals under 10 C.F.R. § 2.323(f)(1) are a form of Commission appellate review.⁵²

For example, in special proceedings regarding the restart of TMI Unit 1, the Atomic Safety and Licensing Appeal Board ("ALAB") held that jurisdiction over a motion to reopen the

⁴⁹ *E.g.*, *Georgia Power Co.* (Vogtle Generating Plant, Units 1 & 2), ALAB-859, 25 NRC 23, 27 (1987); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326 (1982).

⁵⁰ *Fla. Power & Light Co.* (Turkey Point, Units 2 & 4), LBP-01-06, 53 NRC 138, 151 (2001) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985)).

⁵¹ *See, e.g.*, *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) ("Generally, once there has been an appeal or petition to review a Board order . . . jurisdiction passes to the Commission."); *Vogtle*, ALAB-859, 25 NRC at 27 (holding that once the Board issues a decision which disposes of a particular issue on the merits and a notice of appeal is filed, the Board loses jurisdiction to act further on that issue); *TMI*, ALAB-699, 16 NRC at 1326-27 (holding that a licensing board loses jurisdiction over concerns/contentions that have been addressed in a decision to which exceptions were filed).

⁵² *See also Private Fuel Storage L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-03-5, 57 NRC 233, 237 n. 6 (2002) (noting that jurisdiction over 9/11-related contention transferred to the Commission by virtue of acceptance of referral by the licensing board). There is no distinction in NRC precedent between petitions for review (*i.e.*, appeals) and referred rulings with respect to the transfer of jurisdiction from the Board to the Commission. *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-03-4, 57 NRC 69, 143 (2003) (recognizing that "appellate proceedings ordinarily deprive a lower tribunal of jurisdiction over the substance of the matter that was before it").

record on an issue that was pending before the ALAB rested with the ALAB, not the Board.⁵³ The ALAB's reasoning in the *TMI* decision applies equally to this case.⁵⁴ The Board's jurisdiction over SAMA-related contentions ended when it rendered LBP-13-1 and referred its ruling thereby initiating Commission review of NRDC's request for waiver of Section 51.53(c)(3)(ii)(L) to litigate SAMA-related contentions in this proceeding. In sum, the Board is not authorized to "accept" contentions while the question of whether there will be a hearing on an admittedly identical set of contentions is pending before the Commission. Therefore, the Board must reject NRDC's Resubmitted Contentions 1-E, 2-E, 3-E, 1E-1, 1E-2 and 3E as outside the Board's jurisdiction.

B. NRDC Failed to Satisfy the Timeliness Requirements of 10 C.F.R. § 2.309(c)(1)

The Resubmitted Contentions must be denied as untimely. Because NRDC filed its Resubmitted Contentions after the deadline in the Hearing Notice,⁵⁵ it must demonstrate per Section 2.309(c)(1) that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.⁵⁶

⁵³ *TMI*, ALAB-699, 16 NRC at 1325, 1327.

⁵⁴ See *Private Fuel Storage*, LBP-03-5, 57 NRC at 237 n. 6 (noting that jurisdiction over intervenor's 9/11-related contention rested with the Commission by virtue of acceptance of a referral from the licensing board).

⁵⁵ 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).

⁵⁶ This formulation of Section 2.309(c)(1) is an amendment to and simplification of previous timeliness standards articulated in the 2012 version of 10 C.F.R. §§ 2.309(f)(2) and (c)(1). See Amendment to the Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed. Reg. 46,562, 45,591 (Aug. 3, 2012). The revised regulations eliminate the eight-part balancing test for nontimely filings that formerly appeared in 10 C.F.R. § 2.309(c)(1).

NRDC ignores those standards, which is reason enough to reject the Resubmitted Contentions.⁵⁷

In the context of a DSEIS, a new or amended contention is not timely under Section 2.309(c)(1)(ii) unless it rests on data or conclusions that “differ significantly” from those in the applicant’s ER.⁵⁸ Thus, new contentions will be admitted only if the information “is truly new and materially different and provided that the Petitioner acts promptly.”⁵⁹ The RSO states that “[f]or purposes of this proceeding, as the parties have proposed, any contention filed within 30 days of the availability of the information upon which it is based shall be deemed ‘timely’ under 10 C.F.R. § 2.309(c)(1)(iii).”⁶⁰

Contrary to these requirements, NRDC does not allege that the DSEIS contains data or conclusions that differ significantly from those in the Limerick ER, or that any other “new and materially different information” exists, contrary to 10 C.F.R. § 2.309(c)(i) and (ii). In fact, NRDC argues the reverse is true. It relies entirely on its previous bases and “supporting evidence,” while it concedes that the DSEIS “contains the same fundamental analytical flaws as the Exelon ER.”⁶¹ This tactic of relying on previous bases and arguments to support a new

⁵⁷ See, e.g., *Millstone*, CLI-09-5, 69 NRC at 126 (“The Board correctly found that failure to address [timeliness] requirements was reason enough to reject the proposed new contentions.”).

⁵⁸ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385 (2002); see also *Private Fuel Storage L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (denying new and amended contentions where the only claim was that certain concerns that were not dealt with in the ER have additionally not been dealt with in the DSEIS and intervenors made no showing of “new or different data or conclusions” in the DSEIS).

⁵⁹ *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573, 579 (2006) (rejecting new contentions because petitioners failed to identify precisely what information was “new” and “different”).

⁶⁰ RSO at 8. If the purpose of NRDC’s Resubmitted Contentions is to ensure that those updated contentions are deemed timely under 10 C.F.R. § 2.309(c)(1)(iii) in the future if the Commission reverses LBP-13-1 and grants its Waiver Petition, it was incumbent on NRDC to file a motion to extend the RSO’s 30-day deadline for filing new and amended contentions based on the DSEIS after its issuance on April 30, 2013. NRDC did not do so. Accordingly, NRDC does not get yet another bite at the apple to challenge the DSEIS, or brief the Board on its Resubmitted Contentions, if the Commission grants the waiver petition.

⁶¹ Resubmitted Contentions at 2-4; see also *id.* at 5, n.1 (“[T]he Bases for these Contentions are the Bases provided in NRDC’s Petition to Intervene, with the references to the ER substituted to refer to the DSEIS.”); *id.*

contention was recently rejected by the licensing board in the *Fermi* combined operating license proceeding.⁶² Accordingly, based on NRDC's acknowledgment that there is no new and materially different information with respect to its contentions in the DSEIS, the Resubmitted Contentions must be rejected as untimely.

C. NRDC's Resubmitted Contentions Do Not Satisfy the NRC's Contention Admissibility Standards of 10 C.F.R. § 2.309(f)(1)

Beyond the lack of Board jurisdiction over NRDC's request and the procedurally-fatal failure to address timeliness, the Board must reject the Resubmitted Contentions because they fail to meet the Commission's strict substantive contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).⁶³ These requirements are discussed in detail in Exelon's December 20, 2011 Answer opposing NRDC's initial Petition to Intervene and that discussion is incorporated by reference into this Answer.⁶⁴

NRDC acknowledges that the prior rulings on contention admissibility set forth in LBP-12-08 and CLI-12-19 are binding with respect to the Resubmitted Contentions that are directed to the DSEIS.⁶⁵ NRDC's Resubmitted Contentions are inadmissible for the same reasons as the previous contentions were, as set forth in Exelon's Answer, Appeal, Answer to the Waiver

at 6 ("All other references to the ER in NRDC's Contention Bases are similarly updated to refer to the DSEIS.").

⁶² See *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), Licensing Board Memorandum and Order (Denying Intervenors' Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (unpublished) (Apr. 30, 2013) (rejecting as untimely portions of a resubmitted contention in response to issuance of the final environmental impact statement ("EIS") that asserted claims previously raised in earlier versions).

⁶³ That section specifies that each contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.

⁶⁴ See Exelon Answer at 5-10; see also LBP-12-08, slip op. at 7-8.

⁶⁵ Resubmitted Contentions at 2, 5.

Petition, and briefings before the Commission, and in the orders of the Board and the Commission finding those arguments meritorious.⁶⁶ Exelon's objections are briefly summarized in the following sections.

1. Exelon's Prior Objections and the Binding Law of the Case Demand Rejection of NRDC's SAMA-Related Contentions

This is the third attempt by NRDC to litigate SAMA issues in this proceeding.⁶⁷ Resubmitted Contentions 1-E, 2-E, 3-E, 1E-1, 1E-2 and 3E, once again, challenge Section 51.53(c)(3)(ii)(L), which exempts certain applicants from performing another SAMA analysis at the license renewal stage, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).⁶⁸ The sufficiency of the applicant's evaluation of purported new and significant information relating to Category 1 issues may not be litigated absent a waiver.⁶⁹ That includes new and significant information regarding Section 51.53(c)(3)(ii)(L) because SAMA analyses are the functional equivalent of a Category 1 issue for Limerick's license renewal.⁷⁰ Therefore, NRDC cannot challenge Exelon's consideration of new and significant information related to SAMA analyses, through acceptance of its new SAMA-related contentions, absent a waiver from the Commission under Section 2.335(b).⁷¹

⁶⁶ As previously stated, Exelon's objections to NRDC's current and prior contentions are incorporated by reference into this Answer. *Cf.* Resubmitted Contentions at 6.

⁶⁷ The original versions of NRDC's SAMA-related contentions were set forth in its Petition to Intervene. In CLI-12-19, the Commission held that the proper procedural avenue for NRDC to raise its concerns regarding "new and significant" information relating to SAMAs was to seek a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L). Thereafter, NRDC made its second attempt to admit portions of its original SAMA-related contentions via its Waiver Petition.

⁶⁸ See Exelon Answer at 18-20, 26-33; Exelon Appeal at 11-22.

⁶⁹ *Pilgrim/Vt. Yankee*, CLI-07-03, 65 NRC at 13, 20-21.

⁷⁰ CLI-12-19, slip op. at 13.

⁷¹ The Board has already found that NRDC has not met the standards for waiver under 10 C.F.R. § 2.335(b). In the Resubmitted Contentions, NRDC suggests that its "evidence" in support of waiver is incorporated by reference. See Resubmitted Contentions at 6. The waiver request, however, is pending before the Commission, so the Board lacks jurisdiction. In any event, Exelon's responses to NRDC's arguments on the *Millstone* factors are not repeated here, but are set forth in Exelon's Answer to the Waiver Petition.

In addition to lodging an impermissible challenge to NRC regulations, each of the items of “new and significant” information alleged as bases for Resubmitted Contentions 1-E, 1E-1 and 1E-2 fail to raise a genuine dispute over a material issue, contrary to 10 C.F.R. § 2.309(f)(1)(vi).⁷² Indeed, the Board agreed that the following claims were unsupported and failed to raise a material issue: (1) population data through 2049, (2) information relating to the Fukushima accident; (3) the use of historical data for plant-specific CDF and (4) higher clean up costs in Philadelphia.⁷³ Moreover, NRDC’s argument in Resubmitted Contention 1-E regarding impacts to the human environment is vague and unsupported.⁷⁴ The Board agreed.⁷⁵ Exelon continues to assert that the remaining claims are equally unsupported.⁷⁶

Resubmitted Contention 2-E challenges the adequacy of the 1989 SAMDA analysis and thus raises issues outside the scope of this proceeding.⁷⁷ The Board rejected Contention 2-E in its entirety on this ground.⁷⁸ With respect to Resubmitted Contention 3-E, NRDC’s suggestion that NEI-05-01 applies to the Limerick license renewal application fails to raise a genuine dispute on a material issue.⁷⁹

In sum, the binding law of the case holds that NRDC’s resubmitted SAMA-related contentions are outside the scope of this proceeding and must be rejected for that reason, as well as Exelon’s other objections summarized above.

⁷² See Exelon Answer at 34-49; Exelon Appeal at 22-27.

⁷³ LBP-12-08, slip op. at 16-27.

⁷⁴ Exelon Answer at 50.

⁷⁵ LBP-12-08, slip op. at 26-27.

⁷⁶ Exelon Answer at 41-42, 47-49; Exelon Appeal at 22-27.

⁷⁷ Exelon Answer at 52-55.

⁷⁸ LBP-12-08, slip op. at 29-30.

⁷⁹ Exelon Answer at 21-22.

2. The Resubmitted SAMA Related Contentions Are Subject to Dismissal on Additional Grounds

In addition to these longstanding objections, two other aspects of the resubmitted SAMA contentions warrant objections. First, Resubmitted Contentions 1E-1, 1E-2 and 3E are repackaged versions of and duplicative of Resubmitted Contentions 1-E and 3-E.⁸⁰ It is unclear whether NRDC is seeking to update the statement of its original SAMA contentions or litigate two different sets of contentions on the same topic. Therefore, NRDC fails to provide a specific statement of the issue of law or fact to be raised or controverted, contrary to 10 C.F.R. § 2.309(f)(1)(i).

Second, NRDC mischaracterizes the DSEIS, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi). NRDC alleges that Section 5 of the DSEIS inappropriately relied on the NRC's study of SAMAs through the containment performance improvement, individual plant examination, individual plant examination for external events and accident management processes in lieu of evaluating new and significant information related to SAMAs in its NEPA analysis.⁸¹ This is incorrect. As NRC Staff explained in its Answer to the Waiver Petition in response to similar prior arguments from NRDC, those studies provide further support for the Commission's conclusion that one SAMA analysis is sufficient; a decision that was codified in Section 51.53(c)(3)(ii)(L).⁸² NRDC also incorrectly claims that NEPA requires the NRC to consider the new information regarding SAMAs that NRDC identified in its Resubmitted Contentions *in an adjudicatory proceeding*.⁸³ As discussed in detail in Exelon's Answer to the Waiver Petition and

⁸⁰ Compare Resubmitted Contentions at 5 with *id.* at 6.

⁸¹ Resubmitted Contentions at 3-4.

⁸² See Staff Answer to the Waiver Petition at 13-14.

⁸³ See Resubmitted Contentions at 3-4.

Reply Brief, the Commission has established appropriate procedural avenues for ensuring that new and significant information is considered as required by NEPA.⁸⁴

3. Like Its Predecessor, Resubmitted Contention 4-E Is Inadmissible

NRDC does not even acknowledge that the Board rejected Contention 4-E, nor does it discuss Contention 4-E in its Resubmitted Contentions at all, except to include it in the list of contentions to be “accepted” by the Board. Resubmitted Contention 4-E is inadmissible for all of the reasons that the original Contention 4-E was.⁸⁵

4. The Waste Confidence Contention Should Be Dismissed Outright

As noted in Section II.B above, the Commission has directed that all waste confidence contentions—and “any related contentions that may be filed *in the near term*”—in response to the *New York* decision be held in abeyance pending further order.⁸⁶ More than nine months has passed since the issuance of CLI-12-16 in August 2012. Because the Resubmitted Contentions were not filed in the “near term” after CLI-12-16, the Board may evaluate the admissibility of Resubmitted Supplemental Contention 1 now, without further order of the Commission, and dismiss it. In the alternative, if the Board determines that Supplemental Contention 1 is within the scope of the Commission’s abeyance order, then it must hold the contention in abeyance pending further order of the Commission.⁸⁷

Resubmitted Supplemental Contention 1 should be rejected because, as explained in Exelon’s Answer Opposing NRDC’s New Waste Confidence Contention, longstanding Commission precedent holds that 10 C.F.R. § 2.309(f)(1)(iii) precludes the admission of a

⁸⁴ Exelon Answer to the Waiver Petition at 46-48; Exelon Reply Brief at 5-9.

⁸⁵ Exelon Answer at 57-70; LBP-12-08, slip op. at 35-38.

⁸⁶ CLI-12-16, slip op. at 6 (emphasis added).

⁸⁷ *See id.*

contention that concerns an issue that is, or is about to become, the subject of a rulemaking.⁸⁸ Indeed, in response to the *New York* decision, the Commission has initiated a rulemaking and directed the NRC Staff to prepare an EIS associated with updating the WCD and TSR, 10 C.F.R. § 51.23.⁸⁹ NRDC's resubmitted waste confidence contention is therefore outside the scope of this proceeding and inadmissible.

In addition, like its predecessor, Resubmitted Supplemental Contention 1 demands an environmental evaluation that is inconsistent with the *New York* holding.⁹⁰ Contrary to NRDC's allegation, the D.C. Circuit did not direct the Commission to take any specific action in or to suspend any ongoing licensing proceeding, including the Limerick license renewal proceeding. Therefore, Resubmitted Supplemental Contention 1 lacks a legal basis, contrary to 10 C.F.R. § 2.309(f)(1)(ii).

5. The Board's Acceptance of the Resubmitted Contentions Would Amount to A Mere Academic Exercise

NRDC requests that the Board "accept" the Resubmitted Contentions to preserve its litigation options in challenging the prior rejection of those contentions.⁹¹ NRDC's placeholder request is based on its apparent concern that, absent acceptance of the Resubmitted Contentions, its right to judicial review of Commission rulings on contention admissibility would somehow be jeopardized.⁹² However, NRDC provides no legal citations to support its assertion that

⁸⁸ Answer to Proposed Waste Confidence Contention at 10-12 (citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 99 (2010) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

⁸⁹ Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 77 Fed. Reg. 65,137 (Oct. 25, 2012). Moreover, the NRC Staff recently indicated that it remains on target to officially issue the proposed rule and draft GEIS in September 2013. Waste Confidence Directors Monthly Status Update Teleconference Transcript at 7-8, 22 (May 29, 2013), available at ADAMS Accession No. ML13154A436.

⁹⁰ Answer to Proposed Waste Confidence Contention at 13-14.

⁹¹ Resubmitted Contentions at 2, 5, 9.

⁹² *See id.*

acceptance of the Resubmitted Contentions is necessary to preserve its right to judicial review.⁹³ Also, NRDC does not provide a legal basis for the Board to accept placeholder contentions to preserve NRDC's litigation options.⁹⁴ There is no such legal basis.

Furthermore, there is no reason for the Board to evaluate the theoretical admissibility of NRDC's "updated" contentions under the hypothetical assumption that all of the valid objections to its predecessors, as recognized by the Board and Commission, will somehow be eradicated from the record. This is particularly true here, where NRDC admits that its contentions are not admissible under binding law of the case and simply incorporates-by-reference all of its prior arguments and bases.⁹⁵ The Board must decline NRDC's baseless invitation to engage in a mere academic exercise.⁹⁶

IV. CONCLUSION

For the foregoing reasons, Exelon respectfully requests that the Board enter an Order that rejects the Resubmitted Contentions in their entirety. In the alternative, if the Board determines that the Resubmitted Supplemental Contention 1 is subject to the Commission's abeyance order in CLI-12-16, then the Board should hold that contention in abeyance pending the Commission's direction.

⁹³ Any legal support that NRDC introduces for the first time in a Reply would be the appropriate subject of a motion to strike.

⁹⁴ *Cf. Millstone*, CLI-09-5, 69 NRC at 120 (affirming licensing board's denial of intervenors' motion for leave to file new contentions intended as a "placeholder" for a further motion to reopen the record to be filed in the future); *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 490 (2008) (denying admission of contention intended to function as a placeholder for future litigation of the NRC Staff's completion finding where construction of the facility had just begun).

⁹⁵ *See* Resubmitted Contentions at 2, 5, 9.

⁹⁶ *See, e.g., Calvert Cliffs 3 Nuclear Project LLC & Unistar Nuclear Operating Services LLC* (Calvert Cliffs Nuclear Plant, Unit 3), CLI-13-04, 76 NRC ___, slip op. at 5 (Mar. 11, 2013) (declining to embark on an advisory opinion on the licensing board's decision to deny applicant's combined operating license application that would amount to "a mere academic exercise" given applicant's stated intention to amend its application after securing a U.S. partner); *Dep't of Energy*, CLI-04-32, 60 NRC at 473 (declining to resolve issues that would be a "mere academic exercise").

Respectfully submitted,

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

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Dated in Washington, D.C.
this 24th day of June 2013

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

_____)	
In the Matter of)	
)	Docket Nos. 50-352-LR
EXELON GENERATION COMPANY, LLC)	50-353-LR
)	
(Limerick Generating Station, Units 1 and 2))	June 24, 2013
_____)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that on June 24, 2013, Exelon served a copy of “Exelon’s Answer Opposing Natural Resources Defense Council’s Resubmission of Contentions in Response to Staff’s Supplemental Draft Environmental Impact Statement” in this proceeding through the NRC’s E-Filing system.

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