

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

<b>In the Matter of:</b>	)	
	)	
<b>EXELON GENERATION COMPANY, LLC</b>	)	<b>Docket No. 50-352-LR</b>
	)	<b>Docket No. 50-353-LR</b>
<b>(Limerick Generating Station, Units 1 and 2)</b>	)	
	)	<b>July 8, 2013</b>
<b>(License Renewal Application)</b>	)	

**NATURAL RESOURCES DEFENSE COUNCIL’S REPLY IN SUPPORT OF  
RESUBMISSION OF CONTENTIONS**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(i)(2), and the Scheduling Order dated September 4, 2012, Natural Resources Defense Council (“NRDC”) hereby submits its reply in support of its updated Contentions regarding the Draft Supplemental Environmental Impact Statement (“DSEIS”) for the relicensing of the Limerick Generating Station, Units 1 and 2 (“LGS”). As NRDC has explained, the updated Contentions are being submitted simply to direct the existing Contentions – which addressed deficiencies in the applicant’s Environmental Report (“ER”) – to the DSEIS, thereby preempting any argument by the applicant Exelon Generation Company LLC (“Exelon”) or NRC Staff that NRDC waived these Contentions by failing to bring them forward to the DSEIS. NRDC is not requesting that the Board take any action other than accepting NRDC’s updated Contentions.

Predictably, Exelon and Staff oppose NRDC’s request. Exelon Answer Opposing NRDC Resubmission of Contentions (“Exelon Opp.”) (June 24, 2013); NRC Answer To NRDC

Resubmission of Contentions (“Staff Resp.”) (June 24, 2013). However, none of their arguments address NRDC’s request that the Board simply *accept* these updated Contentions, rather than formally admitting them into the proceeding. Rather, Exelon and Staff largely ignore that critical distinction, and argue against a strawman that the updated Contentions should not be admitted.

*Id.*

Nonetheless, Staff has no objection to tolling the deadline for Contentions on the DSEIS until the pending Waiver Petition is resolved. Staff Resp. at 5. As explained below, although NRDC maintains that the most appropriate course at this juncture is to accept the updated Contentions, if the Board is not inclined to do so, at minimum it should adopt the Staff’s suggested approach, by simply deferring consideration of the updated Contentions until the Commission acts on the pending Waiver Petition.

## **II. THE BOARD SHOULD ACCEPT NRDC’S UPDATED CONTENTIONS**

At the outset of their briefs both Exelon and Staff recognize that NRDC is simply seeking to direct its previous Contentions – which were directed at the ER – to the DSEIS. Exelon Opp. at 1; Staff Resp. at 2. However, they nonetheless proceed to argue that NRDC’s request should be rejected because the Board has no jurisdiction to act, NRDC’s filing is too late, or NRDC’s submission does not meet the Contention admissibility requirements. None of these arguments has any merit.

**A. The Board Has Jurisdiction To Simply Accept That NRDC Has Preserved Its Arguments That The DSEIS Contains The Same Deficiencies As The ER.**

Exelon argues at the outset that the Board lacks jurisdiction to act on NRDC's submission because the Waiver Petition is pending before the Commission. Exelon Opp. at 9-10. Exelon is mistaken.

The Waiver Petition pending before the Commission concerns NRDC's Contentions directed *at the ER*, not the DSEIS. Indeed, these are the first Contentions filed concerning the DSEIS, which was just recently issued. Consequently, while the Board may lack jurisdiction at this stage to consider additional Contentions concerning the ER, there is no reason the Board would lack jurisdiction over Contentions that relate to the just-issued DSEIS.<sup>1</sup>

To be sure, NRDC does not dispute that the Commission's ruling as to whether NRDC may pursue its Contentions against the ER may have a bearing on the present Contentions. In particular, if the Commission determines a waiver is appropriate as to the original Contentions, it will plainly be appropriate for the updated Contentions as well. However, NRDC cannot be precluded from carrying its Contentions forward to the DSEIS simply because the waiver issue is

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<sup>1</sup> The cases cited by Exelon are not to the contrary. Exelon Opp. at 1-10. *TMI*, for example, concerned a request to the Licensing Board to reopen the record on an issue that was then pending before the Appeal Board. ALAB-699, 16 N.R.C. 1324, 1325 (1982). The Board ruled that the Licensing Board lacked jurisdiction because the specific underlying issue was already on appeal. *Id.* at 1326. Here, by contrast, Contentions as to the DSEIS are not pending before the Commission, and NRDC is not asking the ASLB to weigh in on the matters pending there by accepting the updated Contentions.

presently before the Commission. Rather, the Board should accept the Updated contentions, and determine how to proceed on them once the Commission rules.<sup>2</sup>

It is surprising that Exelon and Staff would oppose what NRDC has done, which is to update the record such that when, and if, the Commission rules that NRDC may proceed on one or more of its Contentions, there will be no need to delay the hearing to allow NRDC to then update its ER based Contentions so that they are directed at the DSEIS. Moving the hearing process along without unnecessary delay is a well-recognized Commission policy, and NRDC's motion to update its Contentions furthers that goal.

**B. NRDC's Filing Is Timely.**

Exelon's argument that NRDC's updated Contentions are untimely is even further off the mark. Exelon Opp. at 10-12. Exelon claims that because the Contentions were filed long after the Hearing Notice, they may only be accepted if NRDC satisfies 10 C.F.R. 2.309(c)(1). *Id.* This argument is wrong for two reasons. First, the important difference between the deficiencies in the ER and the DSEIS is that the former violated NRC Regulations applicable to applicants, while the latter violates NRC Regulations and the requirements of NEPA which are only applicable to NRC Staff. Second, once again, in making this argument Exelon deliberately ignores the purpose for which NRDC has made its submission – *i.e.*, simply to insure that it may preserve its SAMA Contentions against the DSEIS.

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<sup>2</sup> Alternatively, the Board could follow Staff's suggestion that it simply hold the present motion in abeyance pending the outcome of the Waiver petition pending before the Commission.

Contrary to Exelon's argument, Exelon Opp. at 12, n.62, the Board decision in *Detroit Edison Co.* is not relevant here, for in that case the intervenor sought to resubmit Contentions that could have been raised earlier, and that were identical to contentions that had previously been dismissed.<sup>3</sup> Here, by contrast, this was the first opportunity to submit Contentions as to the DSEIS, and the Contentions as to the ER are still under consideration. In particular, NRDC has three Contentions presently under consideration by the Commission in the Waiver Petition, and the Waste Confidence Contention is being held in abeyance. Accordingly, timeliness is not an issue here.<sup>4</sup>

Exelon's further argument that, rather than filing updated Contentions, NRDC was required to seek an extension of the deadline to file Contentions against the DSEIS until the waiver petition is resolved, Exelon Opp. at 11, n.60, is also far off the mark. Indeed, the net result of that approach would effectively be the same, since NRDC is simply asking the Board to accept the updated Contentions so that they can be resolved once the Waiver Petition is resolved.

**C. NRDC's Submission Meets All Requirements For Contention Admissibility**

The Updated Contentions also meet all the requirements for Contention admissibility. Indeed, each of Exelon and Staff's arguments ignore that NRDC is not asking the Board to admit Contentions previously rejected, but simply to accept that NRDC has directed them to the DSEIS

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<sup>3</sup> Licensing Board Mem. and Order (Denying Intvrs' Motion for Resubmission of Contentions) (unpublished) (Apr. 30, 2013).

<sup>4</sup> The Board did not admit all of NRDC's original Contentions, but, as explained, NRDC has only brought those Contentions forward to the DSEIS to preserve them for future judicial review. *See* NRDC Motion to Resubmit Contentions (May 30, 2013) at 5.

so they are preserved for further review. Accordingly, their arguments about law of the case, the relationship between the updated Contentions, and the adequacy of analysis in the DSEIS (Exelon Opp. at 13-16; Staff Resp. at 2-5) are all irrelevant, because NRDC is not asking the Board to reconsider any prior decision, and simply seeks to preserve its Contentions as to the DSEIS.<sup>5</sup>

Similarly, with regard to the Waste Confidence Contention, Exelon ignores that the Contention simply directs the previously submitted contention to the DSEIS, which was just issued. Exelon Opp. at 16-17. NRDC anticipates that the Contention will be held in abeyance, like the Waste Confidence Contention directed at the ER; however that fact has no bearing on whether the Board accepts the Contentions directed at the DSEIS.

Finally, there is nothing “academic” about NRDC’s request, Exelon Opp. at 17-18, and the cases cited by Exelon do not suggest otherwise. Had NRDC not submitted updated Contentions on the DSEIS, there can be little doubt that Exelon and Staff would later argue that NRDC’s Contentions had been forfeited. It is precisely to protect against such arguments that NRDC filed the updated Contentions.<sup>6</sup>

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<sup>5</sup> Exelon’s argument regarding the adequacy of the DSEIS itself simply restates the matters at issue in the Waiver Petition, which NRDC is not asking the Board to resolve here. Exelon Opp. at 15.

<sup>6</sup> Exelon suggests that there is no support for the notion that NRDC needed to preserve its Contentions. Exelon Opp. at 17-18. However, numerous cases state that “participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions *and preserve their admissibility.*” *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-42, 50 N.R.C. 306, 313 (1999) (emphasis added). That guidance certainly indicates that it was

Thus, the appropriate result here is to accept the updated Contentions. Nonetheless, if the Board is not so inclined, at bare minimum it should adopt Staff's suggested approach whereby the updated Contentions are held in abeyance pending the outcome of the pending Waiver Petition. Staff Resp. at 5. Anything less would risk precluding NRDC from carrying its Contentions forward to the DSEIS, thereby denying NRDC its fundamental rights under the National Environmental Policy Act, the Administrative Procedure Act, and NRC's regulations to pursue its Contentions here.

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prudent for NRDC to file its updated Contentions.

Exelon's reliance on *Millstone* and *Calvert Cliffs* are also misplaced. Exelon Opp. at 18, nn.94 & 96. In *Millstone* the intervenors filed a "placeholder" motion seeking the right to file contentions at a later time. CLI-09-5, 69 N.R.C. 115, 120 (2009). Here, by contrast NRDC has submitted its updated Contentions. In *Calvert Cliffs*, the Commission declined a request by a project *applicant* to resolve an issue where the applicant intended to amend their application. CLI-13-04, 2013 WL 1496949, at \*2 (N.R.C. Mar. 11, 2013). Here, the relicensing is moving forward – as evidenced by issuance of the DSEIS – and there would be nothing academic about accepting NRDC's updated Contentions directed at the DSEIS. Indeed, in *Shaw Areva*, on which Exelon also relies, the Board made it absolutely clear that the Intervenor would have an opportunity to have their Contentions heard, which is all NRDC is asking for here. 67 N.R.C. 460, 489-90 (2008).

### III. CONCLUSION

For the foregoing reasons, NRDC respectfully requests that the Board accept the updated Contentions directing NRDC's Contention to the newly released DSEIS.

Respectfully Submitted,

s/ (electronically signed)

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the NATURAL RESOURCES DEFENSE COUNCIL'S REPLY IN SUPPORT OF RESUBMISSION OF CONTENTIONS IN RESPONSE TO STAFF'S SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT in the captioned proceeding were served on the 8th day of July, 2013 via the Electronic Information Exchange (EIE) on the following , 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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