

**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))	July 22, 2013
)	

**EXELON’S MOTION FOR CLARIFICATION OR,
IN THE ALTERNATIVE, FOR LEAVE TO REQUEST
PARTIAL RECONSIDERATION OF THE BOARD’S JULY 12 ORDER**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a) and (e), and the September 4, 2012 Revised Scheduling Order (“RSO”),¹ Exelon Generation Company, LLC (“Exelon”) hereby timely moves the Atomic Safety and Licensing Board (“Board”) to clarify or, in the alternative, reconsider part of its July 12 Memorandum and Order (Ruling on Resubmission of Contentions) (“Ruling”).² In the Ruling, the Board denied the Natural Resources Defense Council’s (“NRDC’s”) request that the Board “accept” its resubmitted contentions.³ But the Board also tolled the deadline for NRDC to resubmit “these” contentions until 30 days after the Commission rules on NRDC’s pending waiver petition regarding severe accident mitigation alternatives (“SAMAs”).⁴

Exelon respectfully requests that the Board clarify its Ruling to confirm that the tolling of deadlines applies only to NRDC’s resubmitted SAMA contentions; *i.e.*, contentions 1E, 2E, 3-E,

¹ Licensing Board Order (Revised Scheduling Order) (Sept. 4, 2012) (unpublished), *available at* ADAMS Accession No. ML12248A195.

² Licensing Board Order (Ruling on Resubmission of Contentions) (July 12, 2013) (unpublished), *available at* ADAMS Accession No. ML13193A050.

³ Natural Resources Defense Council’s Resubmission of Contentions in Response to Staff’s Supplemental Draft Environmental Impact Statement (May 30, 2013) (“Resubmitted Contentions”), *available at* ADAMS Accession No. ML13150A420.

⁴ *See* Ruling at 5.

1E-1, 1E-2, and 3E, as filed on May 30, 2013, and not NRDC’s no-action alternative and waste confidence contentions. In the alternative, if the Board declines to grant clarification, then Exelon respectfully requests that the Board reconsider its Ruling and hold that the tolling of the deadline applies only to the previously-resubmitted SAMA contentions.⁵

II. BACKGROUND

On May 30, 2013, NRDC filed its Resubmitted Contentions, asking that the Board “accept” all of its previously-proffered environmental contentions, notwithstanding that they had all been either rejected or held in abeyance.⁶ The only difference was that these resubmitted contentions would substitute all prior references to Exelon’s Environmental Report with new references to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) Staff’s Draft Supplemental Environmental Impact Statement (“DSEIS”).⁷ Although NRDC “accept[ed]” the Board’s prior rulings on the admissibility of its contentions, NRDC expressed a need to “preserve” its original contentions for “consideration by a reviewing Court.”⁸

Exelon objected to the Resubmitted Contentions as completely lacking in legal basis.⁹ Nevertheless, given that NRDC had proffered these contentions and vaguely requested that Board “accept” them, Exelon argued that the Resubmitted Contentions were outside the Board’s jurisdiction, untimely, substantively inadmissible, and impermissibly asked the Board to engage in

⁵ As required by 10 C.F.R. § 2.323(b), on July 16, 2013, counsel for Exelon contacted counsel for the NRC Staff and for NRDC to initiate consultation on this motion. Counsel for Exelon further emailed with counsel for NRDC on July 17. Counsel for the Staff takes no position on this motion. Counsel for NRDC did not take a position prior to Exelon filing this Motion.

⁶ See Exelon’s Answer Opposing Natural Resources Defense Council’s Resubmission of Contentions in Response to Staff’s Supplemental Draft Environmental Impact Statement at 1 (June 24, 2013) (“Exelon’s Answer”), available at ADAMS Accession No. ML13175A250.

⁷ 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), available at ADAMS Accession No. ML13120A078.

⁸ Resubmitted Contentions at 2.

⁹ See Exelon’s Answer at 2.

the academic exercise of evaluating the admissibility of the contentions under the hypothetical reversal of various binding decisions.¹⁰ Moreover, Exelon specifically distinguished certain objections that applied to NRDC’s resubmitted no-action alternative contention (Contention 4-E), which had previously been rejected in its entirety,¹¹ and waste confidence contention, which Exelon argued should also be rejected outright.¹² These objections were separate from, and in addition to, Exelon’s generally-applicable objections and objections that were specific to NRDC’s resubmitted SAMA contentions.

The NRC Staff objected to the Resubmitted Contentions on similar grounds, although the Staff stated that it would not oppose “tolling the deadline for NRDC to file updated SAMA contentions based on the Staff’s DSEIS until the Commission rules on NRDC’s pending Waiver Petition.”¹³ The waiver petition relates solely to NRDC’s SAMA contentions¹⁴ and is pending before the Commission.¹⁵

In Reply, NRDC stated that if the Board did not “accept” the Resubmitted Contentions, then, “[a]t 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.”¹⁶ Notably, NRDC did not distinguish between the SAMA contentions, which are the subject of the waiver petition and the Staff’s suggestion, and the no-action alternative and waste confidence contentions, which bear no

¹⁰ See generally *id.*

¹¹ See *id.* at 16.

¹² See *id.* at 16-17.

¹³ NRC Staff Answer to the Natural Resources Defense Council’s Resubmission of Contentions in Response to Staff’s Supplemental Draft Environmental Impact Statement at 5 (June 24, 2013) (emphasis added), available at ADAMS Accession No. ML13175A214; see also *id.* at 6-7.

¹⁴ See generally *Exelon Generation Co., LLC* (Limerick Generating Stations, Units 1 & 2), LBP-13-1, 76 NRC ___, slip op. (Feb. 6, 2013).

¹⁵ Sec’y Order (Feb. 26, 2013), available at ADAMS Accession No. ML13057A822.

¹⁶ Natural Resources Defense Council’s Reply in Support of Resubmission of Contentions at 7 (July 8, 2013) (emphasis added) (“NRDC Reply”), available at ADAMS Accession No. ML13189A305.

relationship to the pending waiver matters and were not the subject of the Staff's suggestion.¹⁷ NRDC's statement also differed from the Staff's, in that the Staff suggested that the Board could allow a future resubmission of NRDC's SAMA contentions, but NRDC proposed that its already-resubmitted contentions be held in abeyance until the Commission's ruling.¹⁸

In its July 12 Ruling, the Board declined NRDC's request to "accept" the Resubmitted Contentions, but, "*consistent with the approach advanced by the NRC Staff,*" tolled the deadline for NRDC to resubmit "these" contentions until 30 days after the Commission rules on the pending waiver petition.¹⁹ The Board's Ruling, like NRDC's Reply, did not distinguish between SAMA contentions connected to the waiver petition and NRDC's other contentions, which are not.

III. ARGUMENT

A. The Board Should Clarify that Its Ruling Only Tolls the Deadline for SAMA Contentions Challenging the DSEIS

The Board should clarify that its decision to allow NRDC to resubmit its DSEIS contentions after the Commission rules on the pending waiver petition only tolls the deadline for NRDC's SAMA contentions. In so doing, the Board should confirm that its decision not to "accept" the resubmitted waste confidence and no-action alternative contentions is the final word on those contentions.

In NRC adjudications, a party may seek clarification of a ruling.²⁰ In other recent proceedings, Boards have entertained and granted motions for clarification on various topics and

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ Ruling at 6 (emphasis added). The Board also tolled the deadline for contentions challenging the Final Supplemental Environmental Impact Statement ("FSEIS") until after the Commission rules on the waiver petition, in the event the Staff issues its FSEIS before the Commission rules. See *id.* at 5, 6 n.22.

²⁰ See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 374-384, 388 (2002) (addressing the applicant's request that the Commission clarify its intent, as set forth in a prior Commission order (CLI-02-17), regarding the scope of an admitted contention).

reasons; for example, to avoid confusion and correct errors.²¹ Consistent with this precedent, Exelon respectfully requests that the Board clarify its July 12 Ruling.

The Board's Ruling does not explain why the deadline for non-SAMA contentions should be tolled—indeed, it does not distinguish between NRDC's resubmitted SAMA contentions and its other contentions at all.²² Absent clarification, the Board's ruling could be interpreted as granting NRDC, *sua sponte*, yet another opportunity to proffer its waste confidence and no-action alternative contentions.²³ This opportunity goes beyond anything NRDC requested in its resubmitted contentions, and beyond anything the Staff suggested in its Answer. The Board, therefore, should clarify its Ruling to clearly explain that the tolling of deadlines until after the Commission rules on NRDC's waiver petition applies only to NRDC's resubmitted SAMA contentions (*i.e.*, contentions 1E, 2E, 3-E, 1E-1, 1E-2, and 3E) which are the only contentions whose admissibility could be impacted in any way by the Commission's waiver petition ruling. The Board should clarify that its Ruling does not apply to NRDC's resubmitted no-action alternative contention (4-E) or waste confidence contention, which are not "accepted" for all of the reasons set forth in the Board's Ruling.²⁴

²¹ See, e.g., *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Licensing Board Order (Granting In Part and Denying in Part Motion for Clarification) at 2 (Sept. 8, 2010) (unpublished) (clarification granted to avoid confusion and correct errors), available at ADAMS Accession No. ML102510353; *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Licensing Board Order (Granting Entergy's Motion for Clarification) (July 9, 2013) (unpublished) (granting clarification to establish deadlines based on movant's arguments), available at ADAMS Accession No. ML13190A068 ("Indian Point July 9, 2013 Order"); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Licensing Board Order (Granting Entergy's Request for Clarification) at 3 (August 10, 2011) (unpublished) (granting clarification to avoid a misunderstanding), available at ADAMS Accession No. ML11222A033.

²² For example, the Background section of the Board's ruling discusses only SAMA-related waiver issues, stating that "NRDC has submitted a waiver petition pursuant to 10 C.F.R. § 2.335(b) in order to litigate its original contentions." Ruling at 2.

²³ This aspect of the Board's decision is *sua sponte* because none of the parties has ever suggested that the deadline for another resubmission of NRDC's no-action alternative and waste confidence contentions should be tolled.

²⁴ Exelon's Answer provides additional reasons why the Board should not accept these contentions.

B. In the Alternative, the Board Should Reconsider Its Ruling and Hold that the Deadline Is Only Tolloed for Resubmitted Contentions Related to the Waiver Petition

In the alternative, if it was the Board’s intent to toll the deadline and provide NRDC with yet another opportunity to resubmit its waste confidence and no-action alternative contentions after the Commission rules on the unrelated waiver petition, then Exelon respectfully requests that the Board reconsider its Ruling.

To avoid manifest injustice, motions for reconsideration may be filed with leave of the presiding officer “upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”²⁵ Although the standard is a high one, reconsideration is appropriate where a party “brings decisive new information” to the decisionmaker’s attention or “demonstrates a fundamental [] misunderstanding of a key point.”²⁶

Compelling circumstances are present here. The Board’s apparent decision to toll the deadline for contentions unrelated to the waiver petition until after the Commission’s ruling on that petition is a clear and material error, based on a fundamental misunderstanding of a key point, which Exelon could not have reasonably anticipated.²⁷

In Exelon’s Answer, it explained that NRDC did not request any extension of the deadline for filing contentions challenging the DSEIS, so no such extension was warranted.²⁸ Nevertheless, based on the Staff’s limited, specific suggestion (and NRDC’s vague agreement with it), the Board determined that the deadline should be tolled. The Board’s failure to distinguish between

²⁵ See 10 C.F.R. § 2.323(e); see also Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004); *Consumers Energy Co., Nuclear Mgmt. Co., LLC, Entergy Nuclear Palisades, LLC, & Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527 (2007).

²⁶ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004) (“LES”); see also Indian Point July 9, 2013 Order at 3.

²⁷ See *LES*, CLI-04-35, 60 NRC at 622.

²⁸ See Exelon’s Answer at 11 n.60.

contentions related to the waiver petition (which was the subject of the Staff’s proposal) and other, unrelated contentions appears to be a clear and material error. Neither the Ruling, nor NRDC’s pleadings provide any reason why the deadline should be tolled for those unrelated contentions—nor is there any valid reason to do so. The Commission ruling on the waiver petition will not impact the admissibility of NRDC’s waste confidence and no-action alternative contentions, and any conclusion to the contrary would be a fundamental misunderstanding and would render this aspect of the Ruling invalid.²⁹

Exelon certainly could not have reasonably anticipated this aspect of the Ruling at the time it filed its Answer. NRDC had not even suggested any tolling of deadlines in its Resubmitted Contentions. The Staff’s proposal, filed on the same day as Exelon’s Answer, was clearly limited to the SAMA contentions.³⁰ Only vaguely in NRDC’s Reply—and in the Board’s Ruling issued four days later³¹—was this distinction dropped. There was no reasonable opportunity for Exelon to anticipate this issue and brief the Board on it. Exelon could not reasonably have anticipated that the Board would grant NRDC, *sua sponte*, yet another opportunity to proffer its waste confidence and no-action alternative contentions.

Reconsideration would avoid manifest injustice in that Exelon is entitled to the regulatory certainty that can only come from a prompt resolution of disputes concerning its license renewal application.³² Providing NRDC with repeated, unrequested, and unwarranted opportunities to

²⁹ See *LES*, CLI-04-35, 60 NRC at 622 (reconsideration is warranted when (“the party seeking reconsideration brings decisive new information to our attention or demonstrate a fundamental . . . misunderstanding of a key point”).

³⁰ See Staff Answer at 5.

³¹ Thus, while the Staff’s suggestion was clear, Exelon had no opportunity to file any motion to address the ambiguity in NRDC’s Reply. This ambiguity was carried forward into the Board’s Ruling.

³² See Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998); see also *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 & 2), CLI-10-26, 72 NRC 474, 475 (2010) (“In the interest of efficient case management and prompt resolution of adjudications, we generally have enforced the ten-day deadline for appeals strictly . . .”) (citations omitted).

reargue the same claims would deprive Exelon of this regulatory certainty, and also would unnecessarily waste the resources of the Board, the NRC Staff, and Exelon.

In sum, the Board should reconsider its Ruling and determine that the deadline is only tolled for NRDC to resubmit its SAMA contentions—as previously-resubmitted on May 30, 2013—until after the Commission rules on NRDC’s related waiver petition. The Board’s decision to decline to “accept” the resubmitted waste confidence and no-action alternative contentions should therefore be the Board’s final ruling on those contentions.³³

IV. CONCLUSION

For the above reasons, the Board should clarify that its July 12 Ruling tolls the deadline for NRDC to resubmit its SAMA contentions until after the Commission rules on NRDC’s related pending waiver petition. In the alternative, if the Board does not clarify its Ruling in this manner, it should reconsider its ruling and reach the same determination. The Board’s decision not to accept

³³ Those contentions are subject to dismissal for all of the additional reasons set forth in Exelon’s Answer.

NRDC's resubmitted waste confidence and no-action alternative contentions should be the Board's final ruling on those contentions.

Respectfully submitted,

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

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Dated in Washington, D.C.
this 22nd day of July 2013

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that on July 22, 2013, Exelon served a copy of “Exelon’s Motion for Clarification or, in the Alternative, for Leave to Request Partial Reconsideration of the Board’s July 12 Order” in this proceeding through the NRC’s E-Filing system.

Signed (electronically) by Brooke E. McGlinn
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