

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chair
Dr. Michael F. Kennedy
Dr. William E. Kastenberg

In the Matter of

EXELON GENERATION COMPANY, LLC

(Limerick Generating Station, Units 1 & 2)

Docket Nos. 50-352-LR, 50-353-LR

ASLBP No. 12-916-04-LR-BD01

October 7, 2014

MEMORANDUM AND ORDER

(Denying Motion to File New Contention and Terminating Adjudicatory Proceeding)

The Natural Resources Defense Council (NRDC) has challenged Exelon Generation Company, LLC's (Exelon's) application to renew for twenty years its operating licenses for both nuclear power reactors at the Limerick Generating Station near Limerick, Pennsylvania.¹ After two published decisions by this Board and two appeals to the Commission, the only remaining contention in this proceeding concerns the storage and disposal of the facility's spent fuel.²

I. BACKGROUND

Exelon received operating licenses for Limerick Generating Station Unit 1 in 1985 and for Unit 2 in 1989.³ As the result of a court challenge during the initial application process, the

¹ NRDC's Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011).

² NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012).

³ See Philadelphia Electric Company, Limerick Generating Station, Unit 1, Docket No. 50-352, Facility Operating License, License No. NPF-39 (Aug. 8, 1985) (ADAMS Accession No. ML011520196); Limerick Generating Station, Unit 2, Docket No. 50-353, Facility Operating License, License No. NPF-85 (Aug. 25, 1989) (ADAMS Accession No. ML052780037).

NRC was ordered to analyze features or actions, currently called “Severe Accident Mitigation Alternatives” (SAMAs), that could prevent a serious accident or mitigate its consequences.⁴ The NRC Staff conducted the SAMA analysis and supplemented the Final Environmental Statement for the Limerick facility in August 1989.⁵

Exelon filed a license renewal application for Limerick Units 1 and 2, which included an environmental report (ER), on June 22, 2011.⁶ NRDC petitioned to intervene and, among several other issues, proffered the contention that Exelon’s 2011 ER had overlooked “new and significant” information required by 10 C.F.R. § 51.53(c)(3)(iv) because the report did not discuss new SAMAs addressed in more recent reports for other nuclear power plants of the same or similar Boiling Water Reactor (BWR) Mark II design.⁷ The NRC Staff argued, based on 10 C.F.R. § 51.53(c)(3)(ii)(L), that the regulations do not require Exelon to perform a new SAMA analysis.⁸ Noting the tension between these regulatory sections—one exempts Exelon from conducting a new SAMA analysis, but the other requires Exelon to review all new and significant information—the Board ruled that NRDC had proffered an admissible contention with respect to the significance of these new SAMAs.⁹ The Board admitted NRDC’s contention:

⁴ See Limerick Ecology Action v. NRC, 869 F.2d 719, 722–23 (3d Cir. 1989).

⁵ This review was called a “Severe Accident Mitigation Design Alternatives” analysis. See Office of Nuclear Reactor Regulation, Final Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2, NUREG-0974 Supp. (Aug. 1989) (ADAMS Accession No. ML11221A204).

⁶ 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 (Aug. 24, 2011).

⁷ NRDC’s Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011) at 17.

⁸ NRC Staff’s Answer to NRDC’s Petition to Intervene and Notice of Intention to Participate (Dec. 21, 2011) at 8.

⁹ LBP-12-08, 75 NRC 539, 561 (2012).

Applicant's Environmental Report (§ 5.3) erroneously concludes that new information related to its severe accident mitigation design alternatives ("SAMDA") analysis is not significant, in violation of 10 C.F.R. § 51.53(c)(3)(iv), and thus the ER fails to present a legally sufficient analysis in that:

1. Exelon has omitted from its ER a required analysis of new and significant information regarding potential new severe accident mitigation alternatives previously considered for other BWR Mark II Containment reactors.
2. Exelon's reliance on data from [Three Mile Island] in its analysis of the significance of new information regarding economic cost risk constitutes an inadequate analysis of new and significant information.¹⁰

Both Exelon and NRC Staff appealed the Board's decision to the Commission.¹¹

The Commission determined on appeal that NRDC's contention regarding mitigation alternatives was effectively a collateral attack on § 51.53(c)(3)(ii)(L), the section that exempts applicants from having to re-analyze SAMAs during the renewal process.¹² Therefore, the Commission concluded, NRDC had not offered an admissible contention because intervenors in adjudicatory proceedings are prohibited from challenging regulations unless they first obtain a waiver by showing "special circumstances" under 10 C.F.R. § 2.335(b).¹³ The Commission remanded the proceeding to the Board to consider whether NRDC had satisfied this waiver requirement.¹⁴ Under the test established by the Commission, a waiver may be granted only when all four factors are met: (1) strict application of the rule would not serve the rule's intended purpose, (2) special circumstances exist that were not considered during rulemaking, (3) those

¹⁰ Id. at 561–62.

¹¹ Exelon's Notice of Appeal of LBP-12-08 (Apr. 16, 2012); Exelon's Brief in Support of the Appeal of LBP-12-08 (Apr. 16, 2012); NRC Staff's Notice of Appeal of LBP-12-08 (Apr. 16, 2012); NRC Staff's Appeal of LBP-12-08 (Apr. 16, 2012).

¹² CLI-12-19, 76 NRC 377, 385–86 (2012).

¹³ Id. at 387.

¹⁴ Id. at 388–89.

circumstances are unique to the facility, and (4) the waiver is necessary to address a significant safety problem.¹⁵

The Board rejected NRDC's request for a waiver on February 6, 2013.¹⁶ The Board concluded, based on the first factor, that NRDC was not entitled to a waiver because the apparent purpose of § 51.53(c)(3)(ii)(L) was to exempt applicants from having to analyze SAMAs again for the same facility and therefore the rule served its purpose.¹⁷ The Commission affirmed our decision on a different ground,¹⁸ explaining that the purpose of the exemption was "to reflect our view that one SAMA analysis, as a general matter, satisfies our . . . obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents."¹⁹ The Commission thus concluded that unique circumstances might require a new analysis, but determined that NRDC had not met its burden of showing those circumstances here.²⁰ NRDC has appealed the Commission's decision in CLI-13-7 to the United States Court of Appeals for the District of Columbia Circuit.²¹

Meanwhile, in June 2012, while the SAMA analysis contention was pending before the Commission, the United States Court of Appeals for the District of Columbia Circuit vacated 10 C.F.R. § 51.23, a regulation governing the storage and disposal of spent nuclear fuel.²² Based on that decision, in July 2012 NRDC moved to file a new contention concerning the temporary

¹⁵ See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559–60 (2005).

¹⁶ LBP-13-1, 77 NRC 57, 60 (2013).

¹⁷ Id. at 65–66.

¹⁸ CLI-13-7, 78 NRC 199, 202 (2013).

¹⁹ Id. at 210.

²⁰ Id. at 216.

²¹ See Initial Opening Brief for Petitioner, NRDC v. NRC, No. 13-1311 (D.C. Cir. July 21, 2014).

²² New York v. NRC, 681 F.3d 471, 483 (D.C. Cir. 2012).

storage and ultimate disposal of Limerick Generating Station's spent fuel.²³ On August 7, 2012, the Commission directed that all such contentions be held in abeyance.²⁴ The Board issued an order holding NRDC's contention in abeyance on August 8, 2012.²⁵

II. ANALYSIS

On August 26, 2014, after undergoing a two-year rulemaking process during which public comments were received and considered, the Commission adopted (1) a generic environmental impact statement (GEIS) to identify and analyze the environmental impacts of continued storage of spent nuclear fuel; and (2) associated revisions to the Temporary Storage Rule in 10 C.F.R. § 51.23 (now called the "Continued Storage of Spent Nuclear Fuel" Rule).²⁶ The Commission "concluded that the impacts of continued storage will not vary significantly across sites," noting that "[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings."²⁷ The Commission directed the Licensing Boards, including this one, to reject the pending waste confidence contentions that had been held in abeyance.²⁸

Following the Commission's direction in CLI-14-08, we deny the NRDC's motion seeking to admit a new contention concerning the environmental impacts of the storage and disposal of Limerick Generating Station's spent nuclear fuel. Even if NRDC disputes that the Commission's

²³ NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012).

²⁴ CLI-12-16, 76 NRC 63, 68–69 (2012).

²⁵ Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) at 3 (unpublished).

²⁶ Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014); Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014).

²⁷ CLI-14-08, 80 NRC __, __ (slip op. at 9) (Aug. 26, 2014).

²⁸ Id. at __ (slip op. at 10).

newly adopted Continued Storage of Spent Nuclear Fuel Rule satisfies the requirements of the National Environmental Policy Act or the court's decision in New York v. NRC,²⁹ it cannot challenge the adoption or validity of the rule itself before this Board.³⁰

III. CONCLUSION

Because our denial of NRDC's motion results in it no longer having any contentions before the Board, this adjudicatory proceeding is terminated.³¹ This order shall constitute the final decision of the Commission, unless, within twenty-five (25) days of its service, a petition for review is filed in accordance with 10 C.F.R. § 2.341(b).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. William E. Kastenber
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 7, 2014

²⁹ See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (2012); New York v. NRC, 681 F.3d at 483.

³⁰ See 10 C.F.R. § 2.335(a). As the Commission noted, “[c]ontentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings.” CLI-14-08, 80 NRC at __ n.27 (slip op. at 9 n.27).

³¹ We suspended this proceeding before NRDC could reply to NRC Staff's and Exelon's Answers to its motion. See Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) at 3 n.15 (unpublished). In light of the Commission's decision in CLI-14-08, any reply would now be moot.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Exelon Generation Company, LLC) Docket Nos. 50-352-LR and 50-353-LR
(Limerick Generating Station, Units 1 and 2))
) ASLBP No. 12-916-04-LR-BD01
(License Renewal))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to File New Contention and Terminating Adjudicatory Proceeding) (LBP-14-15)** have been served upon the following persons by Electronic Information Exchange.

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Limerick Generating Station, Units 1 and 2, Docket Nos. 50-362-LR and 50-363-LR
MEMORANDUM AND ORDER (Denying Motion to File New Contention and Terminating Adjudicatory Proceeding) (LBP-14-15)

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[Original signed by Herald M. Speiser ____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 7th day of October, 2014