[ORAL ARGUMENT NOT YET SCHEDULED]

No. 14-1225

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.

Petitioner,

v.

UNITED STATES OF AMERICA AND
NUCLEAR REGULATORY COMMISSION,

Respondents.

PETITION FOR REVIEW OF FINAL ORDERS OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION

OPENING BRIEF FOR PETITIONER NATURAL RESOURCES DEFENSE COUNCIL, INC.

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES, AND RULE 26.1 DISCLOSURE

Pursuant to D.C. Circuit Rules 15(c)(3), 26.1 and 28(a)(1), counsel for Petitioner certifies as follows:

1. Parties, Intervenors, and Amici Curiae

The parties to this Petition for Review are petitioner Natural Resources Defense Council, Inc. ("NRDC") on behalf of its members, and respondents United States Nuclear Regulatory Commission ("NRC") and the United States of America. Exelon Generation Company, LLC has intervened.

RULE 26.1 DISCLOSURE STATEMENT

Petitioner NRDC is a non-profit environmental advocacy organization. It has no parent corporation and issues no stock or shares.

2. Ruling Under Review

Petitioner NRDC seeks review of the following Orders of the Nuclear Regulatory Commission and the Atomic Safety Licensing Board: *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. 377 (Oct. 23, 2012); *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 N.R.C. 199 (Oct. 31, 2013); *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), LBP-14-15 (Atomic Safety Licensing Board Oct. 7, 2014); and the October 24, 2014 Renewed Facility

Operating License Nos. NPF–39 and NPF–85 to Exelon Generation Company, LLC for the continued operation of the Limerick Generating Station, Units 1 and 2, 79 Fed. Reg. 63,650 (Oct. 24, 2014).

3. Related Cases

Petitioners previously filed a Petition for Review addressing *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. 377 (Oct. 23, 2012) and *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 N.R.C. 199 (Oct. 31, 2013). *See NRDC v. NRC*, No. 13-1311 (D.C. Cir.). On November 13, 2014, the Court directed that Petition "be removed from the November 21, 2014 oral argument calendar and be dismissed as moot in light of petitioner's filing of No. 14-1225."

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

GLOSSARY x

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES 1

STATUTES AND REGULATIONS 3

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

A. Statutory And Regulatory Framework 5

1. The Atomic Energy Act and The Hobbs Act 5

2. The National Environmental Policy Act 6

3. Commission Regulations 8

a. The Commission's NEPA Framework For Relicensing Nuclear Power Plants 8

b. The Commission's Hearing Procedures 10

B. Factual And Procedural Background 13

1. The Commission's Consideration of SAMAs In Connection With Limerick's Original Operating License 13

2. The Commission's Refusal To Afford NRDC A Hearing On SAMA Contentions In Relicensing The Limerick Plant 15

a. The Board's Decision Granting NRDC's Hearing Request 15

b. The Commission's Decision That NRDC's Contentions Are Only Admissible Through A Waiver of Commission Regulations, And Denial Of NRDC's Waiver Petition 18

SUMMARY OF ARGUMENT 22

STANDING 23

ARGUMENT 25

I. THE COMMISSION ERRED IN DETERMINING THAT ITS REGULATIONS REQUIRE NRDC TO OBTAIN A REGULATORY "WAIVER" IN ORDER TO PURSUE ITS SAMA CONTENTIONS. . . 27

A. A Hearing Must Be Provided For New And Significant SAMA-Related Issues, Which The Commission Concurs Are Material To The Relicensing Decision. 27

B. The Commission's Regulations Do Not Bar The Hearing NRDC Seeks. 33

II. IF A REGULATORY "WAIVER" IS REQUIRED FOR NRDC TO PURSUE ITS SAMA CONTENTIONS, THE COMMISSION ERRED IN DENYING THE WAIVER REQUEST. 39

A. NRDC Satisfies The Criteria For A Waiver. 41

B. The Commission Erred In Concluding That NRDC's Waiver Request Was Not Sufficiently "Unique" To The Limerick Facility. 43

III. IF THE COMMISSION'S REGULATORY SCHEME PRECLUDES NRDC FROM A HEARING ON SAMA CONTENTIONS, THAT SCHEME VIOLATES NEPA AND THE ATOMIC ENERGY ACT, AND CANNOT LAWFULLY BE APPLIED TO PROHIBIT NRDC FROM OBTAINING A HEARING. 47

IV. APPROPRIATE RELIEF 51

CONCLUSION 52

TABLE OF AUTHORITIES

CASES **PAGE**

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 26

Alaska v. FERC,
980 F.2d 761 (D.C. Cir. 1992).....2, 6

Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm'n,
988 F.2d 146 (D.C. Cir. 1993).....51

Am. Bioscience, Inc. v. Thompson,
269 F.3d 1077 (D.C. Cir. 2001).....51

Am. Bird Conservancy, Inc. v. FCC,
516 F.3d 1027 (D.C. Cir. 2008).....44

Ark Initiative v. Tidwell,
749 F.3d 1071 (D.C. Cir. 2014).....23

AT&T v. FCC,
978 F.2d 727 (D.C. Cir. 1992).....50

Auer v. Robbins,
519 U.S. 452 (1997) 38

Balt. Gas & Elec. Co. v. NRDC,
462 U.S. 87 (1983) 6

Blue Ridge Envtl. Defense League v. NRC,
716 F.3d 183 (D.C. Cir. 2013).....11

---

*Authorities upon which we chiefly rely are marked with asterisks

**Calvert Cliffs' Coordinating Comm. v. AEC*,
449 F.2d 1109 (D.C. Cir. 1971)..... 25, 32, 33, 38

City of Idaho Falls v. FERC,
629 F.3d 222 (D.C. Cir. 2011).....38

Defenders of Wildlife v. Perciasepe,
714 F.3d 1317 (D.C. Cir. 2013).....24

Deukmejian v. NRC,
751 F.2d 1287 (D.C. Cir. 1984)..... 7, 38

Fed. Election Comm'n v. Akins,
524 U.S. 11 (1998) 51

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 24

Indep. Cmty Bankers of Am. v. Bd. Of Governors,
195 F.3d 28 (D.C. Cir. 1999).....50

**Limerick Ecology Action, Inc. v. NRC*,
869 F.2d 719 (3d Cir. 1989) 7, 9, 13, 14, 44, 45

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 23, 24

Massachusetts v. NRC,
708 F.3d 63 (1st Cir. 2013) 48, 49

Metcalf v. Daley,
214 F.3d 1135 (9th Cir. 2000) 51

Murphy Exploration & Prod. Co. v. DOI,
252 F.3d 473 (D.C. Cir. 2001).....26

Nat'l Council of Resistance of Iran v. Dep't of State,
251 F.3d 192 (D.C. Cir. 2001).....51

Natural Res. Def. Council v. EPA,
489 F.3d 1364 (D.C. Cir. 2007).....51

NetCoalition v. SEC,
715 F.3d 342 (D.C. Cir. 2013).....26

New York v. NRC,
681 F.3d 471 (D.C. Cir. 2013).....7

Nuclear Info. Res. Serv. v. NRC,
969 F.2d 1169 (D.C. Cir. 1992).....49

Okla. Dep't of Envtl. Quality v. EPA,
740 F.3d 185 (D.C. Cir. 2014).....38

Sec'y of Labor, Mine Safety & Health Admin. v. W. Fuels-Utah, Inc.,
900 F.2d 318 (D.C. Cir. 1990).....34

Sierra Club v. EPA,
755 F.3d 968 (D.C. Cir. 2014)..... 23, 24

Sierra Club v. NRC,
862 F.2d 222 (9th Cir. 1988).....11

Stinson v. United States,
508 U.S. 36 (1993) 51

**Union of Concerned Scientists v. NRC*,
735 F.2d 1437 (D.C. Cir. 1984)..... 5, 22, 25, 30, 31, 32, 40, 50

Union of Concerned Scientists v. NRC,
920 F.2d 50, 54-56 (D.C. Cir. 1990) 23, 25, 32, 50

Venetian Casino Resort, LLC v. EEOC,
530 F.3d 925 (D.C. Cir. 2008).....37

COMMISSION DECISIONS

In the Matter of Carolina Power and Light Co.,
23 N.R.C. 525 (1986) 11

In the Matter of Dominion Nuclear Connecticut, Inc., CLI-05-24,
62 N.R.C. 551 (2005) 43, 44

In the Matter of Exelon Generation Co., CLI-12-19,
76 N.R.C. 377 (2012) 1, 18, 28, 39, 42

In the Matter of Exelon Generation Co., CLI-13-07,
78 N.R.C. 199 (2013) 1, 19, 20, 21, 28, 29, 35, 40, 41, 42, 43, 44, 45

In the Matter of Phil. Elec. Co.,
23 N.R.C. 125, 129 (1986) 14, 45, 46

STATUTES

5 U.S.C. § 702 1

5 U.S.C. § 706(2) 6

28 U.S.C. § 2239(b) 25

28 U.S.C. § 2241 12

28 U.S.C. § 2341 .....3, 6

28 U.S.C. § 2342(4) 1

28 U.S.C. § 2344 .....1, 6

42 U.S.C. § 2011 3

42 U.S.C. § 2013(d) 5, 25

42 U.S.C. § 2133(c) 5

42 U.S.C. § 2239 3

42 U.S.C. § 2239(a)(1)(A) 5, 25, 50

42 U.S.C. § 2239(b) 1, 5

42 U.S.C. § 2342 6

42 U.S.C. § 2343 6

42 U.S.C. § 4321 ..... 2, 3

42 U.S.C. § 4332(C) 6

CODE OF FEDERAL REGULATIONS

10 C.F.R. § 1.15 12

10 C.F.R. § 2.1202 13

10 C.F.R. § 2.309 ..... 1, 3, 12

10 C.F.R. § 2.309(c) 12

10 C.F.R. § 2.309(f) 11, 12, 15, 17, 21

10 C.F.R § 2.310 11

10 C.F.R. § 2.311 12

10 C.F.R. § 2.335(a) 12

*10 C.F.R. § 2.335(b) 12, 18, 39, 41, 42

10 C.F.R. § 51.45 8

*10 C.F.R. § 51.53(c)(3)(ii)(L) 4, 10, 17, 18, 19, 20, 22, 28, 29, 33, 37, 38, 42, 48

*10 C.F.R. § 51.53(c)(3)(iv) 10, 15, 27, 37

10 C.F.R. § 51.71(a) 9

10 C.F.R. § 51.72(a) 27, 37

10 C.F.R. § 51.90 9

10 C.F.R. § 51.92(a)(2) 27, 37

*10 C.F.R. § 51.95(c) 7, 8, 27, 37, 47, 49

10 C.F.R. § 54.31 5

40 C.F.R. § 1500.1(b) 52

40 C.F.R. § 1502.9(c) 7

50 C.F.R. § 1500.1 38

GLOSSARY

APA	Administrative Procedure Act
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NRDC	Natural Resources Defense Council
SAMAs	Severe Accident Mitigation Alternatives

STATEMENT OF JURISDICTION

Natural Resources Defense Council, Inc. ("NRDC") petitions for review of the Nuclear Regulatory Commission's ("NRC" or "Commission") denial of NRDC's requests for intervention and a hearing in the relicensing proceeding for the Limerick Generating Station nuclear power plant ("Limerick Plant"), and subsequent license renewal. *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. 377 (Oct. 23, 2012) (JA 213); *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 N.R.C. 199 (Oct. 31, 2013) (JA 374); *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), LBP-14-15 (Oct. 7, 2014) (JA 387) (terminating adjudication); 79 Fed. Reg. 63,650 (Oct. 24, 2014) (JA 403) (license renewal notice). The Commission's decisions are reviewable under 42 U.S.C. § 2239(b), 28 U.S.C. § 2342(4), 5 U.S.C. § 702, and Federal Appellate Rule 15. This Petition for Review was filed November 4, 2014, and thus was timely presented under 28 U.S.C. § 2344.

STATEMENT OF ISSUES

To participate in and ultimately challenge a Commission decision related to nuclear power plant relicensing, an applicant must succeed in intervening as a party to the relicensing proceeding in order to pursue admissible "contentions." *See generally* 10 C.F.R. § 2.309 (Addendum at 46). If intervention is denied, the

applicant is not a party, and thus may obtain neither a hearing before the NRC, nor later judicial review. *E.g.*, *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992).

In connection with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*., process for the relicensing of the Limerick Plant, NRDC timely sought to intervene and pursue contentions over the failure to adequately consider Severe Accident Mitigation Alternatives ("SAMAs") – i.e., measures that may seriously diminish the otherwise catastrophic consequences of a severe nuclear accident at the facility, located near Philadelphia, Pennsylvania. The Commission initially found the request to intervene barred by a Commission regulation, ruling that NRDC could only intervene by obtaining a "waiver" of the regulation – and subsequently denied NRDC's waiver request. The issues presented are:

1. Whether the Commission erred in ruling NRDC may only obtain a hearing on its SAMA contentions through a regulatory "waiver."

2. Whether the Commission erred in denying NRDC's waiver petition.

3. Whether NEPA requires the Commission to meaningfully consider SAMAs before relicensing the Limerick Plant, and, if so, whether the Commission may preclude NRDC from administratively challenging, or ultimately obtaining judicial review over, the adequacy of that consideration.

STATUTES AND REGULATIONS

The pertinent provisions of the Atomic Energy Act, 42 U.S.C. 2011, *et seq.*, and implementing regulations, the Hobbs Act, 28 U.S.C. § 2341, *et seq.*, and the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, and pertinent implementing regulations are set forth in the Addendum.

STATEMENT OF THE CASE

In June 2011, Exelon Generation Company, LLC applied for a license renewal for the Limerick Plant, located on the banks of the Schuylkill River, approximately four miles from Pottstown and 35 miles from Philadelphia, Pennsylvania. *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-8, 75 N.R.C. 539 (Apr. 4, 2012) ("First Board Op.") (JA 101-02). The accompanying Environmental Report included a discussion purporting to address new information concerning methods to mitigate against severe accidents – i.e., "SAMAs." *See* Environmental Report – Operating License Renewal Stage, Limerick Generating Station, Units 1 and 2, Section 5.3 (June 2011) (JA 632).

As authorized by 42 U.S.C. § 2239, and required by 10 C.F.R. § 2.309, NRDC filed a hearing request challenging that portion of the Environmental Report,

arguing in its SAMA "contentions" that relevant information concerning SAMAs was not considered as required by NEPA and implementing regulations.

The Atomic Safety and Licensing Board Panel ("Board") granted intervention and admitted the SAMA contentions for a hearing, but, in two separate opinions, the Commission reversed. First, the Commission found the contentions barred by a Commission regulation – 10 C.F.R. § 51.53(c)(3)(ii)(L) – which, in the Commission's view, precluded a hearing concerning SAMAs in the Limerick relicensing proceeding, and invited NRDC to seek a regulatory "waiver" of that regulation. Second, although the Commission decided that the SAMA information NRDC had presented should be considered in the NEPA process for relicensing the Limerick Plant, it determined that NRDC was not entitled to a hearing over the adequacy of that consideration through a regulatory waiver, because the matters NRDC sought to raise *might* also pertain to another nuclear power plant. On that basis, NRDC was denied intervention and a hearing, and on October 24, 2014 the Commission renewed the Limerick license.

STATEMENT OF FACTS

A. Statutory And Regulatory Framework

1. The Atomic Energy Act and The Hobbs Act

The Atomic Energy Act tasks the Commission with licensing the construction and operation of nuclear power plants, providing that an initial license may be issued for up to forty years, and may be thereafter renewed. 42 U.S.C. § 2133(c); *see also* 10 C.F.R. § 54.31. The Act's purpose is to, *inter alia*, "encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. § 2013(d). Accordingly, in creating a process for licensing nuclear power plants, Congress provided that "the Commission *shall grant a hearing* upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." *Id.* § 2239(a)(1)(A) (Addendum at 11) (emphasis added); *see also, e.g., Union of Concerned Scientists v. NRC* ("*UCS I*"), 735 F.2d 1437 (D.C. Cir. 1984) (ruling that a party is entitled to a hearing on any issue material to the licensing decision).

Congress further provided that the Commission's licensing decisions are subject to judicial review. 42 U.S.C. § 2239(b) (Addendum at 12). That review is

governed by the standard of review under the Administrative Procedure Act, 5 U.S.C. § 706(2), and is available under the Hobbs Act, 28 U.S.C. § 2341, *et seq.*, which provides this Court (and other courts of appeal in certain circumstances) with exclusive jurisdiction over Commission Orders. *Id.* §§ 2342, 2343 (Addendum at 149-50). The Hobbs Act provides that "*[a]ny party aggrieved* by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." *Id.* § 2344 (emphasis added). In turn, Circuit precedent dictates that a "party aggrieved" for the purposes of seeking judicial review is limited to a "party" who has met the Commission's strict "contention admissibility" requirements and thus been granted intervenor status in the Commission's *adjudicatory* proceeding. *See, e.g.*, *Alaska*, 980 F.2d at 763.

2. The National Environmental Policy Act

NEPA's "twin aims" are to force every agency "to consider every significant aspect of the environmental impact of a proposed action," and to "inform the public that it has indeed considered environmental concerns in its decision-making process." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (Addendum at 156).

Among other issues, an EIS must analyze the "environmental impact of the proposed action" and reasonable alternatives. *Id.* This includes considering the risks that the proposed action may result in a catastrophic environmental impact, the consequences of such an outcome, and reasonable alternatives for mitigating such consequences. *E.g.*, *New York v. NRC*, 681 F.3d 471, 478 (D.C. Cir. 2013) ("Under NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass."); *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989) (alternatives to mitigate the effects of severe accidents "must be given careful consideration" in the NEPA process).

The *renewal* of a nuclear power plant operating license is a major federal action significantly affecting the quality of the human environment, and thus a new EIS is required. *New York*, 681 F.3d at 476; *see also* 10 C.F.R. § 51.95(c). In addition, an agency must *supplement* an EIS in the event of "significant new circumstances," or new "information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c); *Deukmejian v. NRC*, 751 F.2d 1287, 1298 (D.C. Cir. 1984).

3. Commission Regulations

a. The Commission's NEPA Framework For Relicensing Nuclear Power Plants

The Commission elected to comply with NEPA during power plant relicensing by preparing a "generic" EIS for issues common to *all* plants, followed by individual "supplemental" EISs to address those matters not resolved in the Generic EIS. Issues common to all plants and addressed in the Generic EIS were labeled "Category 1" issues, while those matters requiring supplemental consideration in the plant-specific reviews were labeled "Category 2." The Commission issued the final "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" in 1996 ("Generic EIS") (May 1996) (JA 455); *see also* 10 C.F.R. §§ 51.53(c) and 51.95(c) (codifying this approach).[1]

Under the Commission's NEPA regulations, before the agency issues a draft Supplemental EIS for license renewal the license applicant itself prepares what amounts to an initial draft, called the Environmental Report. 10 C.F.R. §§ 51.45 and 51.53(c). The matters addressed in that Report are subsequently covered by the

1 A Generic EIS "Revision" was issued in 2013, but it did not mention SAMAs and is irrelevant here. *See* Generic EIS Revision 1 (June 2013) (available at http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/r1/) (last visited Mar. 19, 2015); *see also* 78 Fed. Reg. 37,283 (June 20, 2013) (amending other relicensing regulations).

draft and final Supplemental EIS. *See id.* §§ 51.71(a) and 51.90 (carrying the Report requirements over to the Supplemental EIS).

Among the vital matters requiring NEPA analysis for nuclear power plant licensing (and relicensing) are prospective measures to ameliorate the consequences of a severe accident, or "SAMAs" – i.e., measures "intended not to prevent an accident, but to lessen the severity of the impact of an accident should one occur." *Limerick Ecology*, 869 F.2d at 731.[2]

Consistent with the Second Circuit's ruling in *Limerick Ecology*, which determined that SAMA's may not be resolved generically for all plants, *see infra* at 13-14, the Commission identified SAMAs as a "category 2" issue for license renewal, meaning that they must be subject to site-specific review in connection with renewal proceedings for each plant. *See* Generic EIS, Section 5 (JA 581) ("it would be premature to generically conclude that a consideration of severe accident mitigation is not required for license renewal"). However, the applicable regulation

2 As the Board in this proceeding explained, a SAMA analysis can include, *e.g.*, "consideration of (i) hardware modifications, procedure changes, and training program improvements; (ii) SAMAs that could prevent core damage as well as SAMAs that could mitigate severe accident consequences; and (iii) the full scope of potential accidents (meaning both internal and external events)." First Board Op. at 3 n.11 (JA 103).

– central to the issues presented here – also appears to limit the required site-specific analysis by providing that:

> *[i]f the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment*, a consideration of alternatives to mitigate severe accidents must be provided.

10 C.F.R. § 51.53(c)(3)(ii)(L) (emphasis added) (Addendum at 111); *see also id.* App. B, Table B-1 (Addendum at 145) (providing that, for the Supplemental Draft and Final EIS, as to "[s]evere accidents," "alternatives to mitigate severe accidents must be considered for all plants *that have not considered such alternatives*") (emphasis added); *accord* Generic EIS, Section 5.4.1.5 (JA 582).

The license renewal NEPA regulations also provide that each individual plant Supplemental EIS – beginning, again, with the Environmental Report – must address "any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv) (Addendum at 112).

b. The Commission's Hearing Procedures

In order to obtain party status and thereby a hearing challenging the adequacy of a relicensing application – and, hence, to be able to seek judicial review of an adverse decision under the Hobbs Act – an applicant must file a petition to intervene and request for a hearing, and set forth "contentions" identifying, *inter alia*, the

specific issues to be raised and the reasons those issues are material to the agency's decision-making. 10 C.F.R. § 2.309(f) (Addendum at 49).[3] An applicant need not *prove* the contentions at the admissibility stage, but rather must only identify material facts in dispute. *E.g.*, *Sierra Club v. NRC*, 862 F.2d 222, 226 (9th Cir. 1988) (citing *Carolina Power & Light Co.*, 23 N.R.C. 525, 541 (1986)). Once a contention is admitted, an Intervenor – now a party to the proceeding – is afforded an opportunity to litigate the merits of the contention at an evidentiary hearing. *See generally* 10 C.F.R. § 2.310 and Subpart L; *see also, e.g.*, *Blue Ridge Envtl. Defense League v. NRC*, 716 F.3d 183, 187 (D.C. Cir. 2013) (explaining that contentions must simply provide "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.")

For compliance with NEPA, contentions must be timely presented in connection with the license applicant's Environmental Report. 10 C.F.R.

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3 Specifically, the regulations require an applicant to: "(i) Provide a specific statement of the issue of law or fact to be raised or controverted"; "(ii) Provide a brief explanation of the basis for the contention"; "(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding"; "(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding"; and "(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue." *Id.*

§ 2.309(f)(2). Thus, a NEPA contention first presented after issuance of the Draft license renewal Supplemental EIS, for example, will generally be excluded, unless it is timely presented based on "materially different information" not previously available. *Id.* § 2.309(c).[4]

Under the Commission's regulations a prospective Intervenor may not generally obtain a hearing over an issue resolved in a regulation. 10 C.F.R. § 2.335(a) (Addendum at 64). The only avenue for such a hearing is to seek a "waiver" of the regulation, based on "special circumstances with respect to the subject matter of the particular proceeding." *Id.* § 2.335(b).

A request for a hearing is initially heard by an Atomic Safety and Licensing Board. 10 C.F.R. § 1.15; *see also* 28 U.S.C. § 2241. Board decisions granting (or denying in *toto*) a hearing are immediately appealable to the Commission. 10 C.F.R. § 2.311. In proceedings before the Board or Commission, the Commission's

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4 Accordingly, while it may seem counterintuitive to raise NEPA concerns even before a Draft (S)EIS is issued (let alone a Final), the NRC's process *requires* that if a party should be aware of a NEPA concern once the ER is issued, it must be raised at that time or be forever forfeited. 10 C.F.R. § 2.309. Under that process, the contentions "migrate" from the Environmental Report to the Draft EIS, and then from the Draft to the Final EIS, unless the issues are resolved in the subsequent documentation. *E.g.*, *Progress Energy Fla., Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-01, 73 N.R.C. 19, 26 (2011); *accord S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-02, 67 N.R.C. 54, 63–64 (2008). In short, rather than waiting until the NEPA process is complete to determine agency compliance, an interested party must raise all issues of which it should be aware *from the beginning of the process*. 10 C.F.R. § 2.309(c).

interests are represented by an office within the Commission unconnected to the adjudicatory branch, referred to as "NRC Staff." *See* 10 CFR § 2.1202.

B. Factual And Procedural Background

1. The Commission's Consideration of SAMAs In Connection With Limerick's Original Operating License

In 1980, in the wake of the partial nuclear meltdown at Three Mile Island, the Commission issued a policy requiring the consideration of "severe accidents in future NEPA reviews." *Limerick Ecology*, 869 F.2d at 726. Five years later, the agency reversed course and announced that it would "exclude[ ] consideration of severe accident mitigation design alternatives from individual licensing proceedings." *Id.* at 727.

In 1987 an environmental group, Limerick Ecology, petitioned for review over the original Limerick licensing decision, challenging, *inter alia*, whether the NRC had adequately considered SAMAs there. *Id.* at 731. As the Third Circuit explained, the Commission had "neither considered nor specifically rejected SAMDAs[5]" on the grounds that there were "no special or unique circumstances about the Limerick site" that warranted their consideration. *Id.* at 731-32. During the hearing process, Limerick Ecology's arguments had been rejected on the

5 The terms "severe accident mitigation design alternatives" (called "SAMDAS") and "severe accident mitigation alternatives ("SAMAs") mean the same thing.

grounds that, while "SAMDAs were being excluded from consideration in the Limerick licensing proceedings, they were not being ignored," because the issue was being addressed generically for all plants. *Id.* at 732.[6]

The Third Circuit reversed, rejecting the premise that SAMAs could be addressed generically. 869 F.2d at 737-39. As the court explained, "because risk equals the likelihood of an occurrence times the severity of the consequences," the accident risks will "vary tremendously," even for plants "of exactly equal design and construction," because "potential consequences will largely be the product of the location of the plant . . . ." *Id.* at 738. "This is particularly true for plants such as Limerick," the court continued, "which were built near densely populated areas." *Id.*; *see also id.* (noting population estimate in 2000 of seven million within 50 miles of the plant).

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6 The "Appeals Board" (an intermediate appellate tribunal no longer part of the hearing process) had rendered the decision, and the Commission declined review. *Id.* at 733. However, one Commissioner dissented, explaining that, given Limerick's location "in [a] densely population area[ ]," SAMAs warranted further consideration. *Id.*; *see also Phila. Elec. Co.*, (Limerick Generating Station, Units 1 and 2), 23 N.R.C. 125, 128-29 (1986) (separate views of Commissioner Asselstine) ("[T]here is about a 50–50 chance of a severe core melt accident, an accident at least as severe as the [Three Mile Island] accident, within the next 20 years [and] I do not believe that a 50–50 chance within the next 20 years is an acceptable level of risk. Further, I believe that particularly at high-population sites, such as Limerick and Indian Point, consideration should be given to additional accident prevention and mitigation measures because of the uncertainties associated with estimating risk and because of the high cost to society should a serious accident occur at such a site.").

Subsequent to the court's decision, the Commission completed a "Supplement" to the Final EIS for Limerick to address SAMA issues. Supplement to the Final Environmental Statement related to the operation of Limerick Generating Station, Units 1 and 2 (Aug. 1989) (NUREG-0974) (JA 405).

2. The Commission's Refusal To Afford NRDC A Hearing On SAMA Contentions In Relicensing The Limerick Plant

a. The Board's Decision Granting NRDC's Hearing Request

In response to the Notice of Opportunity for Hearing on Exelon's Limerick relicensing application, *see* 76 Fed. Reg. 52,992 (2011), NRDC timely submitted a petition to intervene and a hearing request, along with expert supporting declarations. NRDC Petition to Int. and Hearing Req. and Expert Declarations (JA 22); *see also* 10 C.F.R. § 2.309(f)(2) (requiring that NEPA contentions be filed when Environmental Report is issued). In an extensive Memorandum the Board admitted several of NRDC's SAMA contentions, finding they satisfied each of the contention admissibility criteria, and reframing the contentions as follows:

> 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 [Boiling Water Reactor] Mark II Containment reactors.[7]

2. Exelon's reliance on data from TMI [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.[8]

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7 As NRDC's experts had explained, other Boiling Water Reactors have identified numerous cost-beneficial or potentially cost-beneficial SAMAs such as, for example, portable generators for emergency power supply; providing alternative sources of water to address emergencies; and improvements to the connections between electric power systems to allow more flexible supply of critical power needs during an emergency. NRDC Contentions Expert Decl. ¶¶ 12-14 (JA 75-77); *see also* First Board Op. at 20 (JA 120) (finding contention admissible, explaining that while NRDC's expert "points out that the 1989 SAMDA considered a cost-benefit analysis for only seven mitigation alternatives," in comparison, "'the cohort of 27 U.S. BWR units at 18 sites that are undergoing license renewal reviews, or that have recently been granted license renewal, have on average considered 175 Phase I SAMA candidates and 35 Phase II SAMA candidates.'") (quoting Expert Decl. ¶ 12); *id.* at 21 ("NRDC has demonstrated that among recent BWR applications for license renewal, applicants have found between two and eleven SAMA candidates to be cost-beneficial or potentially cost-beneficial [and] has meticulously listed which SAMA candidates these plants found to be cost-beneficial. This suggests to us that this contention is material, as consideration of new information regarding SAMA candidates could very well lead to a conclusion that this information is significant. Further, we find that NRDC's analysis of recently-performed SAMAs at other plants provides support for its argument that the information that Exelon has failed to consider is not only new, but also significant").

8 *See also* First Board Op. at 24-25 (explaining bases for admission of this Contention); *accord* NRDC Expert Decl. 17-24 (JA 86-93) (detailing deficiency in reliance on Three Mile Island, a Pressurized Water Reactor located in a markedly less economically developed and populated site than Limerick).

First Board Op. at 40 (JA 140).

In admitting the contentions, and thereby affording NRDC a hearing to pursue them, the Board first concluded NRDC had demonstrated standing (which was not contested), First Board Op. at 5-7, and then rejected NRC Staff's and Exelon's arguments against a hearing. *Id.* at 10-40. Staff and Exelon principally argued the contentions were barred by 10 C.F.R. § 51.53(c)(3)(ii)(L), because SAMAs had previously been considered for Limerick when the plant was first licensed. *Id.*

The Board found, however, that the regulation could not be read to bar a hearing because to do so would conflict with the separate NEPA obligation to consider any new and significant information during the relicensing process. *Id.* at 15. Thus, concluding that "[r]egulations cannot trump statutory mandates," *id.*, the Board admitted NRDC's contentions aimed at whether Exelon had considered new and significant information related to SAMAs in the ER. *Id.* at 21 ("NRDC has shown there are numerous new SAMA candidates which should be evaluated for their significance.").[9]

9 The Board found other aspects of NRDC's SAMA contentions, and a separate contention concerning the "no action alternative," did not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f), First Board Op. at 40, and those matters are no longer at issue.

b. The Commission's Decision That NRDC's Contentions Are Only Admissible Through A Waiver of Commission Regulations, And Denial Of NRDC's Waiver Petition

The Commission reversed the Board's decision to permit a hearing. Waiver Decision, CLI-12-19 (JA 213). While recognizing the mandate for "the license renewal application [to] contain any significant new information relevant to environmental impacts," which "may be challenged in individual adjudications," the Commission concluded that 10 C.F.R. § 51.53(c)(3)(ii)(L) *exempted* Exelon from challenges concerning its site-specific supplemental SAMA analysis in the ER – a result the Commission characterized as an "ambiguity in our regulations." *Id.* at 11. To address the ambiguity, the Commission concluded that "the proper procedural avenue for NRDC to raise its concerns is to seek a *waiver of the relevant provision*" of the regulations, pursuant to 10 C.F.R. § 2.335(b). *Id*. at 13 (emphasis added). On that basis the Commission remanded the matter to the Board, inviting NRDC to submit a waiver request. *Id.* at 17.

NRDC subsequently filed a Petition, by way of motion, for waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), as applied to the Limerick Renewal proceeding. Waiver Petition (Nov. 21, 2012) (JA 230). The Petition explained that if a waiver is necessary, it must be granted to ensure compliance with the Atomic Energy Act

and NEPA, and the waiver criteria are satisfied. *Id.* at 13-27; *see also* Reply in Support of Waiver Petition (Dec. 21, 2012) (JA 277).[10]

The Board denied the Petition. *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-13-1 (Feb. 6, 2013) (JA 300). According to the Board, a waiver was "seemingly impossible" – and NRDC had been put in a "catch-22" precluding a waiver – because the waiver regulation requires a finding that applying the regulation would not serve the purpose for which it was enacted, and the entire *purpose* of 10 C.F.R. § 51.53(c)(3)(ii)(L) was to preclude the very hearing NRDC had requested. *Id.* at 13.

The Commission affirmed, but on different grounds. Waiver Denial, CLI-13-07 (Oct. 31, 2013) (JA 374). The Commission acknowledged that, under NEPA and its own regulations, the NEPA process for license renewal must consider "new and significant information," including information concerning SAMAs. *Id.*

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10 While the Waiver Petition was pending, on April 30, 2013, the NRC published its Draft Supplemental EIS for the Limerick relicensing. In order to preserve the timeliness of its arguments *vis-á-vis* the Draft Supplemental EIS, NRDC filed a motion to *resubmit* its SAMA contentions directed at that new document. On July 12, 2013, the Board ruled that any such contentions – against either the Draft Supplemental EIS or the Final Supplemental EIS – may only be filed once the Commission rules that SAMA contentions may be pursued. *Exelon Generation Co, LLC*, Memorandum and Order of July 12, 2013 (JA 366); *see also Exelon Generation Co, LLC*, Memorandum and Order of Aug. 6, 2013 (JA 372) (clarifying scope of tolling order).

at 13-14. Thus, the Commission specifically directed "the Staff to review the significance of any new SAMA-related information in its environmental review of Exelon's license renewal application, *including the information presented in NRDC's waiver petition*, and to discuss its review in the final supplemental EIS." *Id.* at 23 (emphasis added).

However, the Commission drew a sharp distinction between, on the one hand, Exelon and the NRC Staff's obligations under NEPA to consider new information and, on the other, *NRDC's right to obtain and participate in a hearing (and ultimately obtain judicial review) on those same issues*. Thus, while the Commission recognized that "[o]ur rules provide a mechanism for supplementing an original NEPA analysis," the agency continued: "*But our rules do not guarantee a hearing*." *Id.* at 14 (emphasis added). Thus, in light of 10 C.F.R. § 51.53(c)(3)(ii)(L), the Commission found NRDC is not entitled to a hearing on concededly relevant SAMA contentions that must be addressed in the NEPA process.

With regard to the waiver request, which would have been an alternate procedure through which NRDC could have obtained party status, the Commission focused on the requirement that a waiver movant demonstrate that "the issues it raises are unique" to the specific plant at issue. *Id.* at 18. Because, in the

Commission's view, NRDC's contentions "could apply to any license renewal applicant for whom SAMAs already were considered," the Commission found that NRDC had failed to demonstrate that they are unique. *Id.* [11]

Based on this analysis the waiver petition was denied, and NRDC's request for a hearing on the SAMA contentions was finally rejected. *Id.* at 23.[12]

SUMMARY OF ARGUMENT

The Commission erred in concluding that NRDC must satisfy the "waiver" criteria to obtain a hearing challenging the consideration of SAMAs in the Limerick

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11 In the course of considering the waiver request the Commission purported to reject aspects of NRDC's SAMA contentions. Waiver Denial at 18. However, to date the Commission has not considered whether the contentions even meet the threshold contention eligibility criteria of 10 C.F.R. § 2.309(f). Rather, the Commission has only considered NRDC's substantive arguments in connection with whether they are, in the Commission's view, "unique" to Limerick. Waiver Denial at 20-21.

12 Because the Commission's ruling had definitively resolved whether NRDC could obtain a hearing on its SAMA contentions, NRDC filed a Petition for Review at that time to ensure that they were preserving their right to appeal to this Court. *NRDC v. NRC*, No. 13-1311 (D.C. Cir. Dec. 24, 2013). However, while that Petition was pending, in August, 2014 the NRC issued the Final Limerick Supplemental EIS, and on October 24, 2014 the renewed the Limerick license (JA 667 and 403). In addition, on October 7, 2014 the Board formally terminated the adjudicatory proceeding, which had remained "open" in light of an unrelated contention that had been temporarily stayed, but which the Commission directed be dismissed. *See* Board Order of Oct. 7, 2014 (JA 397). In response to NRDC's protective Petition for Review incorporating these new decisions, the Court dismissed the original Petition for Review. *See NRDC v. NRC*, No. 13-1311 (D.C. Cir. Order of Nov. 13, 2014).

relicensing NEPA process, and compounded that error in finding the waiver criteria unsatisfied.

1. The Commission does not dispute that a relicensing Environmental Report, and Supplemental EIS, must consider new and significant information related to SAMAs, even where a SAMA analysis was previously conducted. Especially given that common ground, the Commission erred in applying 10 C.F.R. § 51.53(c)(3)(ii)(L) to preclude NRDC from obtaining a hearing and judicial review on the adequacy of the Commission's consideration of the new and significant information . *See, e.g.*, *UCS I*, 735 F.2d 1437.

2. Alternatively, if, as the Commission contends, a "waiver" of 10 C.F.R. § 51.53(c)(3)(ii)(L) is necessary for NRDC to obtain a hearing regarding SAMAs during relicensing, then the Commission erred in denying NRDC's waiver request. NRDC satisfied the waiver criteria, and the Commission's contrary conclusion on the grounds that SAMA issues *could* arise at other plants turns the waiver exception into a regulatory dead-end.

3. If the Court were to conclude that 10 C.F.R. § 51.53(c)(3)(ii)(L) bars a hearing, and NRDC is not entitled to a waiver, then the Commission's regulatory scheme violates NEPA, the APA, and NRDC's rights under the Atomic Energy Act to a hearing before the Commission and review in this Court. *E.g.*, *UCS I*, 735 F.2d

1437; *Union of Concerned Scientists v. NRC* ("*UCS II*"), 920 F.2d 50, 54-56 (D.C. Cir. 1990). The Commission may not, by regulation, bar an interested party with unchallenged standing from a hearing on a matter material to relicensing.

STANDING

NRDC has Article III standing based upon its members' proximity to Limerick, and their concrete concerns regarding the adequacy of the facility's capacities to mitigate the adverse effects of a severe nuclear accident. *E.g.*, *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)); *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014).

NRDC is a national non-profit environmental organization with a nationwide membership of over 350,000 (plus hundreds of thousands of online activists) and almost 16,000 members in Pennsylvania – almost 3,000 of whom live within 50 miles of Limerick, and more than 50 of whom live within 10 miles. *See* Declaration of Linda Lopez ¶ 4, Nov. 17, 2011 (JA 64). Among its missions, NRDC seeks to improve environmental, health, and safety conditions at nuclear power plants, including Limerick, *id.* ¶ 6, and thus the issues raised here are germane to the

organization's interests. *E.g. Center for Sustainable Economy v. Jewell*, _ F.3d _, 2015 WL 967955, *4 (D.C. Cir. Mar. 6, 2015).[13]

NRDC members Mr. Charles W. Elliott, Ms. Suzanne Day, and Mr. William White have demonstrated concrete health and safety interests adversely affected by the Commission's decision to grant a renewed operating license for Limerick without adequately considering, in the NEPA process, measures to mitigate the otherwise catastrophic consequences of a severe nuclear accident (*see* Declarations of Charles W. Elliott, Suzanne Day, and William White (JA 55-63, 66-69) – concerns detailed in NRDC's expert declaration. *See* Declaration of Dr. Thomas Cochran, Dr. Matthew McKinzie, and Dr. Jordan Weaver, and Declaration of Christopher E. Paine (JA 70). Accordingly, NRDC has Article III standing here, and no parties to this proceeding have raised challenges to NRDC's standing. *Sierra Club*, 755 F.3d at 973 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)); *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013); *see also*, *e.g.*, *Lujan v. Defenders of Wildlife* , 504 U.S. 555, 572 n.7 (1992).

13 The declarations were all originally submitted to the Commission in support of NRDC's motion to intervene.

ARGUMENT

As noted, in order to fulfill the mandate to achieve "widespread participation" in nuclear power plant licensing proceedings, 42 U.S.C. § 2013(d) (Addendum at 2), the Atomic Energy Act mandates the Commission "*shall* grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." *Id.* § 2239(a)(1)(A) (Addendum at 11) (emphasis added). This Court has repeatedly held that to comply with this mandate the Commission must provide a hearing to an applicant raising a NEPA-related issue material to the agency's decision-making. *UCS II*, 920 F.2d 50; *UCS I*, 735 F.2d 1437; *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

In this case, the Commission does not dispute that new and significant information concerning SAMAs is material to the relicensing of the Limerick nuclear power plant. Waiver Denial at 22-23. Nonetheless, the Commission takes the position that Petitioner is not entitled to a *hearing* on the issue. *Id.* at 14 ("[O]ur rules do not guarantee a hearing.").

The Commission's decision is subject to review under the arbitrary and capricious standard. 28 U.S.C. § 2239(b). However, because the parties' dispute is over whether the regulations can be read to limit NRDC's right to a hearing – and

thus, ultimately, this Court's *jurisdiction* to consider NRDC's contentions – the Commission is not entitled to any deference to its view that the regulations strip NRDC of its hearing (and judicial review) rights. *E.g.*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (court will not defer to agency's interpretation of provision delimiting court's jurisdiction); *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013) (citing *Murphy Exploration & Prod. Co. v. DOI*, 252 F.3d 473, 478 (D.C. Cir. 2001)) (same).

In any event, under any standard, because the Commission's denial of NRDC's hearing rights cannot be reconciled with the governing statutes or this Court's precedents, the Commission must be reversed. This result can be accomplished by applying the Commission's existing regulatory scheme to authorize a hearing under these circumstances, which was the Board's original ruling. Alternatively, the Court could conclude that Petitioner is entitled to a *waiver* of the regulations NRC contends are the obstacle to a hearing, and afford NRDC a hearing on that basis.

However, if the Court determines that, as the Commission has insisted, the NRC's regulatory scheme bars a hearing on the new and significant information that the Commission concedes must be addressed in the renewal proceeding, the Court must find that the scheme as a whole violates NEPA and the Atomic Energy Act.

Indeed, whatever analytical path the Court follows, because relicensing requires *an entirely new NEPA process*, the Commission cannot categorically bar SAMAs or any other material issue from that process.

I. THE COMMISSION ERRED IN DETERMINING THAT ITS REGULATIONS REQUIRE NRDC TO OBTAIN A REGULATORY "WAIVER" IN ORDER TO PURSUE ITS SAMA CONTENTIONS.

A. A Hearing Must Be Provided For New And Significant SAMA-Related Issues, Which The Commission Concurs Are Material To The Relicensing Decision.

Before turning to the narrow but important dispute here – *i.e.*, whether NRDC is entitled to a hearing before the Commission (and ultimately, judicial review) over its SAMA contentions – it is helpful to begin with the matters on which the parties evidently agree. First, there is no dispute that during the NEPA process for nuclear power plant relicensing, an applicant (and ultimately, the Commission) must consider any "new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv) (setting forth this requirement for license renewal ER); *id.* § 51.95(c)(3) (same requirement for the supplemental EIS); *see also id.*§§ 51.72(a), 51.92(a)(2) (embodying this requirement in NRC's general NEPA regulations).

Second, it is common ground that among the issues governed by the new and significant information standard is the consideration of such information *related to*

SAMAs. Thus, the Commission does not dispute that, in order to comply with NEPA, the agency must "review and consider *any* new and significant information presented during the review of individual license renewal applications," even on SAMAs. CLI-12-19 ("Waiver Decision") (JA 213) at 6; CLI-13-07 ("Waiver Denial") (JA 374) at 14 ("If new and significant information is available, then the original SAMA analysis may . . . require supplementation.").

In light of the foregoing requirements, there is also no dispute that in preparing the Supplemental NEPA documentation for Limerick, Staff must *consider any new and significant information related to SAMAs for the nuclear power plant.* Thus, as the Commission explained, where there is "new information that could render invalid the original site-specific analysis" on SAMAs for Limerick, "then such information should be identified and evaluated by the Staff for its significance, consistent with our NEPA requirements." Waiver Decision at 13 n.54 (JA 225).

Accordingly, although the Commission's initial decision confusingly suggests that 10 C.F.R. § 51.53(c)(3)(ii)(L) somehow exempts the applicant and Staff from any requirement for a "site-specific supplemental SAMA analysis in conjunction with the Limerick license renewal application," Waiver Decision at 11; *see also* Waiver Denial at 2 ("The rule exempts Exelon from including in its Environmental Report a site-specific [SAMA] analysis"), in fact that is not the

Commission's position on the interplay between 10 C.F.R. § 51.53(c)(3)(ii)(L) and the obligation to consider new and significant information in the NEPA process. Rather, recognizing, as it must, that "regulations cannot trump statutory mandates," First Board Op. at 15, the Commission's final Order states unequivocally that because "*NRDC has identified information that bears consideration in our environmental review of Exelon's application*," Waiver Denial at 22, in preparing the Final Supplemental EIS the Staff must "review the significance of any new SAMA-related information in its environmental review of Exelon's license renewal application, *including the information presented in NRDC's waiver petition," and must "discuss its review in the final supplemental EIS*." *Id.* at 23 (JA 396) (emphasis added).

Given this broad area of agreement, in an ordinary APA case the only question would be whether, upon *completing* the NEPA process, the NRC Staff had actually *complied* with the mandate to consider the new and significant information concerning SAMAs. *See, e.g., Jewell*, No. 12-1431, 2015 WL 967955 (challenging NEPA review over leasing program after leases were issued). However, the critical distinction between that kind of review and the review available here is that, under the Hobbs Act and its application in this Court, in order for NRDC to judicially challenge the Commission's consideration of SAMAs at the *conclusion* of the

relicensing proceeding it must have obtained admission of contentions against the ER, *prepared at the beginning of the process*. *See supra* at 10-12. Thus, by denying NRDC's petition to intervene and subsequent waiver petition, and thereby denying NRDC a hearing and party status, the Commission has precluded NRDC from challenging – not only before the Commission in a hearing, but also before this Court – whether the Final Supplemental EIS complies with NEPA, *including in its consideration of information submitted by NRDC itself*.

This anomalous result is not only illogical, it is also not permitted by the Atomic Energy Act or this Court's precedents construing it. In *UCS I*, for example, the Commission had promulgated a rule precluding interested parties from obtaining a hearing to challenge the adequacy of certain emergency preparedness exercises required before a plant is fully operational. 735 F.2d at 1438. The Commission asserted that while the adequacy of these exercises was certainly material to its licensing decision, it would be impractical to allow a hearing, given that they should occur close to the time the plant was ready to begin full operations. *Id*. at 1440-41. Therefore, the Commission reasoned, their adequacy could be considered "outside the hearing procedure . . . ." *Id*. at 1446.

This Court rejected this approach, explaining that notwithstanding the Commission's discretion to determine the matters relevant to its licensing decisions,

it may not deny interested parties a right to a hearing on an issue it deems material. *Id.* at 1446-51; *see also id.* at 1444 ("When a statute requires a 'hearing' in an adjudicatory matter, such as licensing, the agency must generally provide an opportunity for submission and challenge of evidence as to any and all issues of material fact."); *id.* at 1443 (hearing required for "all material factors bearing on the licensing decision raised by the requestor").[14]

Applying that reasoning here, NRDC is entitled to a hearing on admissible SAMA contentions. Indeed, the substantive safety matter at issue in *UCS I* was quite similar to the SAMA issue here, as both involve methods to insure, in the event of a nuclear emergency, all reasonable steps are taken to protect human health and safety – and, accordingly, as in *UCS I*, the Commission does not dispute new and significant information concerning SAMAs is material to its relicensing decision.

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14 As the Court noted, Congress itself had made it clear that a hearing is required for all material issues, precisely in order to insure accountability and ultimate judicial review:

> [T]he hearing process serves a vital function as a forum for raising relevant issues regarding the design, construction and operation of a reactor, and for providing a means by which the applicant and the Commission staff can be held accountable for their actions regarding a particular facility[and] the hearing process is essential to obtaining public confidence in the licensing process which is needed if the nuclear option is to be preserved.

Id. at 1447 (emphasis omitted) (quoting H.R. Rep. No. 97-22, Pt. 2, at 11 (1982)).

Under these circumstances, the right to a hearing provided in the Atomic Energy Act, as interpreted by this Court in *UCS I*, compels the conclusion that NRDC is entitled to hearing on otherwise admissible SAMA contentions. *See also UCS I*, 735 F.2d at 1446 ("Administrators may not lightly sidestep procedures that involve the public in deciding important questions of public policy."); *id.* at 1447 ("In sum, we find no basis in the statute or legislative history for NRC's position that Congress granted it discretion to eliminate from the hearing material issues in its licensing decision.").

The Court's subsequent ruling in *UCS II* also supports this result. *UCS II*, 920 F.2d at 55-6. In upholding amendments to the NRC's hearing rules in that case, the Court emphasized that "any application of the rule[s] to prevent all parties from raising material issues which could not be raised prior to release of the environmental reports *will be subject to judicial review*." *Id.* at 56 (emphasis added). That is precisely the review NRDC seeks here, where the Commission has ruled that *no party* may obtain a hearing on the adequacy of the Commission's consideration of new and significant information concerning SAMAs. *See also id.* at 55 (a party is entitled to raise in a "hearing on a licensing decision a specific issue [NRC] agrees is material to that decision"); *accord Calvert Cliffs*, 449 F.2d at 1117-18 (rejecting Commission effort to place NEPA matters outside the hearing

process, explaining "[a] truly independent review provides a crucial check on the staff's" analysis, and that to put NEPA issues beyond the hearing process "makes a mockery of the Act").

B. The Commission's Regulations Do Not Bar The Hearing NRDC Seeks.

Contrary to the Commission's Orders, the denial of NRDC's request for a hearing is also not compelled by the Commission's own regulations – which, in any event, should not be construed to create a conflict with the agency's governing statute. *See infra* Section III. The Commission has relied on its ER regulation, which, again, states in full as follows:

> If the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided.

10 C.F.R. § 51.53(c)(3)(ii)(L) (Addendum at 111). For the Supplemental EIS itself, however, the relevant language is in the Appendix to the Part 51 regulations, which lists the items that must be considered in individual plant relicensing proceedings. 10 C.F.R. Pt. 51, App. B. Those regulations provide, as to "[s]evere accidents," that "alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives." *Id.*, Table B-1 ("Summary of Findings on NEPA Issues For License Renewal of Nuclear Power Plants") (Addendum at 145).

These regulations certainly make clear that SAMAs must be considered during relicensing if they have not been considered previously. However, they do not clearly state what result should ensue if a SAMA analysis *was* conducted at the original operating license stage. For several reasons, the Court should conclude that the regulations simply mean that, where a prior SAMA analysis has been conducted, an applicant may limit consideration of SAMAs to *new and significant information bearing on the adequacy of the analysis previously conducted*, and a petitioner is entitled to a hearing on the adequacy of that consideration.

First, this is the only construction that is both consistent with the plain terms of the regulation and also ensures that the regulation is consistent with NEPA, which indisputably requires that the Commission consider previously *un*considered significant information bearing on SAMAs. See First Board Op. at 19 (concluding that considering new and significant information concerning SAMAs "does not involve the same analysis as performing an entirely new SAMA analysis"); *see also, e.g.*, *Sec'y of Labor, Mine Safety & Health Admin. v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) (a "regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements") (citations omitted).

Second, while the Commission has rejected NRDC's right to a hearing, its own regulatory interpretation of the regulation, as set out in the Waiver Denial, acknowledges the agency's continuing duty to consider new and significant information, and on that basis the Commission referred NRDC's submission to the Staff for "consideration and response" in the Final Supplemental EIS. Waiver Denial at 22-23. Plainly, if the regulations precluded such consideration, there would have been no basis to direct the Staff to consider these issues. And if the regulations do not prohibit (and to the contrary require) such considerations in the Supplemental EIS, *there is simply no legitimate grounds to interpret the same regulations to bar NRDC's request for a hearing and right to ultimate judicial review*.

Third, the 1996 regulatory preamble to the regulations support this limited view of the regulatory exception embodied in these regulations. 61 Fed. Reg. 28,467, 28,470 (1996). In that preamble, the Commission more than once assured the public that under the regulations, "*any* new and significant information presented during the review of individual license renewal applications" would be considered. *Id.* at 28,468 (emphasis added); *see also, e.g.*, *id.* at 28,472 ("For individual plant reviews, information codified in the rule, information developed in the GEIS [Generic EIS], and *any significant new information introduced during the*

plant-specific review . . . will be considered in reaching conclusions in the supplemental EIS")(emphasis added); *id.* at 28,470.

In light of inevitable technological and other changes that would occur over time, the Commission also explained, "10 years is a suitable period" to demarcate the *outer bounds* of when the Commission would assume that additional NEPA review on resolved issues is not required. *Id.* at 28,471 ("10 years is a suitable period considering the extent of the review and the limited environmental impacts observed thus far, and given that the changes in the environment around nuclear power plants are gradual and predictable with respect to characteristics important to environmental impact analyses."). Here, where the original SAMA analysis for Limerick occurred *in 1989* (JA 405) – more than twenty-five years ago – and even the Generic EIS itself was prepared eighteen years ago[15] – the Commission certainly contemplated that new and significant information related to SAMAs would be considered during individual plant relicensing.[16]

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15 Although the Commission "updated" the Generic EIS in 2013, SAMAs were not considered further at that time. 78 Fed. Reg. 37,282 (2013).

16 Indeed, after the 1996 regulations were published, industry complained that SAMAs should not require consideration in individual plant relicensing decisions at all because plants are considering these matters in Individual Plant Examinations or Individual Plant Examinations of External Events. In a Federal Register notice the Commission rejected this argument, reiterating that these issues must be considered in site-specific NEPA reviews, and that these examinations do

Finally, even if 10 C.F.R. § 51.53(c)(3)(ii)(L) could be construed as providing that no further consideration of SAMAs is necessary for the Limerick relicensing proceeding, the regulation would be flatly at odds with *other* Commission's regulations stating unequivocally that each license renewal will consider any "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R. §§ 51.72(a) (JA 119); 51.92(a)(2); *see also id.* § 51.53(c)(3)(iv) (embodying that principle for the Environmental Report); *id.* § 51.95(c)(3) (same for Supplemental draft and final Supplemental EIS). As this Court has explained, it is "arbitrary and capricious agency action" for an agency to "maintain two irreconcilable policies." *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 935 (D.C. Cir. 2008).

Indeed, reading 10 C.F.R. § 51.53(c)(3)(ii)(L) to foreclose significant new information bearing on SAMA's would not only conflict with the Commission's other regulations and the Atomic Energy Act, it would also create an irreconcilable conflict with NEPA scheme as construed by the courts. As noted, that scheme *requires* that new and significant information be considered in a supplemental

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not substitute for NEPA's requirements. 61 Fed. Reg. 66,537, 66,540 (Dec. 18, 1996). Even more recently, the Nuclear Energy Institute submitted a formal rulemaking petition *again* seeking to remove SAMAs from individual plant decision-making. In another Federal Register notice the Commission expressly rejected that proposal. 66 Fed. Reg. 10,834 (Feb. 20, 2001).

NEPA analysis, *e.g.*, *Deukmejian*, 751 F.2d at 1298, and further contemplates judicial review of agency compliance with the statute, which is completely foreclosed here if NRDC is precluded from intervening as to NEPA compliance issues. *E.g.*, *Calvert Cliffs*, 449 F.2d at 1117-18 (rejecting effort to place NEPA compliance beyond the hearing process and judicial review); *see also* 40 C.F.R. § 1500.1 (explaining "the federal agencies *and the courts* share responsibility for enforcing [NEPA] so as to achieve the [Act's] goals") (emphasis added).

In short, the Court should adopt the only construction of 10 C.F.R. § 51.53(c)(3)(ii)(L) that harmonizes it with other NRC regulations, as well as with the statutory schemes with which the Commission must comply. *E.g.*, *Auer v. Robbins*, 519 U.S. 452, 463 (1997) (while agency "is free to write [ ] regulations as broadly as [it] wishes," that discretion is cabined by "the limits imposed by the statute"); *Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 194 (D.C. Cir. 2014) ("Although the EPA's interpretation of its own regulation is ordinarily entitled to controlling weight . . . we cannot defer where, as here, the interpretation 'violate[s] the very statute the agency administers.'") (quoting *City of Idaho Falls v. FERC*, 629 F.3d 222, 230 (D.C. Cir. 2011)).

Accordingly, the applicable regulations should be interpreted to require that both (a) during license renewal the applicant, and ultimately the Commission, must

consider any new and significant information bearing on SAMAs *and*, therefore, (b) an interested party who meets the hearing eligibility criteria is entitled to a hearing on the adequacy of that consideration so as to ensure that the interested party may fully present its views concerning the adequacy of NEPA compliance to the Commission and, ultimately, a reviewing court.

II. IF A REGULATORY "WAIVER" IS REQUIRED FOR NRDC TO PURSUE ITS SAMA CONTENTIONS, THE COMMISSION ERRED IN DENYING THE WAIVER REQUEST.

According to the Commission, although new and significant information concerning SAMAs must be considered in the Limerick relicensing NEPA review, there is no incongruity in applying Commission NEPA regulations to preclude NRDC's request for a hearing on those precise issues, because the Commission has a *different* regulatory vehicle for such situations; where one or more aspects of the Commission's regulatory scheme preclude an applicant's right to a hearing, the applicant may seek a "waiver" of those regulations. Waiver Decision at 13-16 (citing 10 C.F.R. § 2.335(b)). Under the waiver scheme, regulations barring a hearing may be waived, and a hearing permitted, where "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.335(b) (Addendum at 64).

As noted, *see supra* at 19-21, although NRDC, at the Commission's invitation, formally requested a waiver of the regulations the Commission interpreted to otherwise preclude NRDC from a hearing on its SAMA contentions, the Commission *denied* the waiver request. Waiver Denial (JA 374). According to the Commission, the waiver regulation requires a showing that the matter sought to be considered is "unique" to the facility, which, in the Commission's view, bars consideration of any matter that *could* come up for another facility. *Id.* at 17-23. Thus, because the Commission concluded that all of the issues NRDC sought to raise could apply to other facilities in the future, the agency denied the waiver request. *Id.*

If the Court agrees with the Commission that the waiver regulation is the appropriate vehicle for NRDC to pursue SAMA contentions, for many of the same reasons previously set forth, this aspect of the Commission ruling must be reversed, and the Commission should be ordered to grant a waiver. NRDC satisfies the waiver regulation, and any application of the regulatory scheme to require a waiver, but deny NRDC's request for one here would be inconsistent with NRDC's rights to a hearing under the Atomic Energy Act, the APA, and the NEPA scheme. *E.g.*, *UCS I*, 735 F.2d at 1438.

A. NRDC Satisfies The Criteria For A Waiver.

Nothing in the waiver regulation requires the issue to be "unique" to the facility at issue. Rather, the Commission has inserted that requirement into the regulation through a series of Commission rulings. *See* Waiver Denial at 9 (citing NRC precedents).[17]

Applying the plain language of the regulation – which, again, provides for a waiver where "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted," 10 C.F.R. § 2.335(b) (Addendum at 64) – NRDC is entitled to a waiver if one is necessary to obtain a hearing. The "special circumstances" here are that, as the Commission recognizes, NRDC has "identified information that *bears consideration* in [NRC's] environmental review of Exelon's application" for a renewed license at Limerick. Waiver Denial at 22 (emphasis added). Indeed, the Commission stated unequivocally "NRDC *may challenge the adequacy of the new information* [on SAMAs] provided in the Limerick Environmental Report."

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17 Indeed, in amending the regulations in 2012, the Commission *rejected* a request for the agency to expressly incorporate the uniqueness requirement into the regulations. 77 Fed. Reg. 46,562, 46,567 (2012). Moreover, while the Commission may be entitled to some deference for its view of its own regulatory requirements, no deference is due where, as here, the result is to delimit the scope of this Court's jurisdiction. *See supra* at 26 (citing cases).

Waiver Decision at 13 (emphasis added) (JA 225). In light of these findings by the Commission, NRDC has certainly shown there are "special circumstances" regarding the Limerick relicensing that warrant a hearing, irrespective of other regulatory restrictions.

Moreover, it certainly would not "serve the purposes for which" the Commission adopted its SAMA-related regulations, 10 C.F.R. § 2.335(b), to, on the one hand, conclude that the Commission must consider new and significant SAMA-related information during relicensing while, at the same time, preclude NRDC from a *hearing* on that consideration. Indeed, the regulations on which the Commission relies *do not speak to an applicant's entitlement to a hearing at all*. Rather, they simply address the scope of *analysis* related to SAMAs required in the relicensing process. *See* 10 C.F.R. § 51.53(c)(3)(ii)(L); *id.* App. B, Table B-1 (providing, as to "[s]evere accidents," "alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives").

Accordingly, given the Commission's position that new and significant information related to SAMAs must be considered, it would not be consistent with the purpose of the regulation to deny NRDC a right to a hearing. Thus, if the regulations somehow bar NRDC's right to a hearing, as the Commission asserts, they must be waived.

B. The Commission Erred In Concluding That NRDC's Waiver Request Was Not Sufficiently "Unique" To The Limerick Facility.

NRDC would also be entitled to a waiver under the Commission's own judicially-created waiver standards, requiring an applicant to demonstrate the issue sought to be raised is "unique" to Limerick. That standard – embodied in what is known as the "*Millstone* factors" – requires that the applicable "special circumstances" be "unique to the facility rather than common to a large class of facilities." Waiver Denial at 9 (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 559-60 (2005) ("*Millstone*")). According to the Commission, where a challenge applies to many facilities, "the rulemaking process, as opposed to a site-specific licensing proceeding, is the appropriate venue" to address the issue. Waiver Denial at 20.

The Commission concluded that NRDC could not meet this standard for SAMA contentions. Rather, the Commission claimed new and significant information related to SAMAs could not be unique because similar arguments *could* be made in the future for other plants. Waiver Denial at 18-20; *id.* at 21 ("Given that similar updated information *could* be used for other plants that qualify for the SAMA-analysis exception, there is nothing unique about the information that

NRDC identifies to justify waiving the rule for this particular adjudicatory proceeding.") (emphasis added).[18]

Of course, however, *any* issue presently unique to Limerick "could" come up at another plant in the future. Thus, requiring an applicant to demonstrate that the issue could *never* arise at another plant is functionally the same as concluding that a waiver may *never be granted*.

The Commission's approach is also inconsistent with both the Commission's own standard for a "unique" issue, and the Third Circuit's earlier ruling mandating a SAMA analysis be conducted as part of Limerick's original licensing process. *Limerick Ecology*, 869 F.2d at 738-39. As noted, this *Millstone* factor excludes issues "common to a large class of facilities," because the Commission has found such issues more suitable to rulemaking. *Millstone*, 62 N.R.C. at 559-60.

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18 The Commission's ruling also suggests that NRDC failed to prove its Contentions. Waiver Denial at 18-21. As noted, however, *see supra* at 21 n.11, this discussion was only in connection with whether NRDC had demonstrated the issues are unique; to date the Commission has not considered whether NRDC has satisfied the threshold contention eligibility criteria. Moreover, it is well-established that an agency may not dismiss a NEPA issue on the grounds that a party must *prove* the environmental impact at the outset, which is the very purpose of the agency's NEPA obligations. *E.g.*, *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033 (D.C. Cir. 2008) ("[T]he basic thrust of the agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects fully known" and to require a "precondition of certainty before initiating NEPA procedures would jeopardize NEPA's purpose to ensure that agencies consider environmental impacts before they act rather than wait until it is too late") (citations omitted).

However, the Commission did not suggest – nor could it – that NRDC had raised issues common to many facilities. To the contrary, the agency simply said aspects of the issues NRDC raised *might* apply to certain other facilities in the future. Waiver Denial at 19-22. This approach subverts the agency's own standard for allowing regulations to be waived where an applicant seeks a hearing on matters which, at the time the application is submitted, apply to that particular facility rather than "a large class of facilities." *Id.* at 9. In short, had the agency's own waiver standard been faithfully applied the waiver would have been granted.[19]

The court's ruling in *Limerick Ecology* also compels this result. As noted, *see supra* at 13-14, in that case the Commission had similarly declined to consider SAMAs for Limerick on the grounds there were "no special or unique circumstances about the Limerick site" that warranted their consideration on a site-specific basis. *Limerick Ecology*, 869 F.2d at 731-32. The court, however, *rejected this precise argument*, explaining that the kind of risks addressed in a SAMA will "vary tremendously," because "potential consequences will largely be the product of the location of the plant" – *a variable of particular import for Limerick itself, "built near densely populated areas*." *Id.* at 738 (emphasis added); *see also Phila. Elec.*

19 Although the Commission did not reach them, NRDC also satisfied the other *Millstone* factors. *Compare* Waiver Denial at 9 (listing other factors) *with* Waiver Petition at 15-27 (JA 244-256) (detailing NRDC's satisfaction of all standards).

Co., 23 N.R.C. at 128-29 (Commissioner Asselstine's dissent before the Commission, explaining, "particularly at high-population sites, such as Limerick and Indian Point, consideration should be given to additional accident prevention and mitigation measures because of the uncertainties associated with estimating risk and because of the high cost to society should a serious accident occur at such a site"). Accordingly, it flies in the face of the court's ruling in *Limerick Ecology* for the Commission to refuse to allow a hearing on new and significant SAMA-related information on the grounds that NRDC has not – and presumably cannot – identify new and significant information that would only be applicable to Limerick.

In sum, if a waiver is necessary here, even under the Commission's *own* standard for granting a waiver, NRDC is entitled to a waiver of the regulations that the Commission interprets to bar NRDC from otherwise obtaining a hearing on new and significant information concerning SAMAs for the Limerick relicensing process.

III. IF THE COMMISSION'S REGULATORY SCHEME PRECLUDES NRDC FROM A HEARING ON SAMA CONTENTIONS, THAT SCHEME VIOLATES NEPA AND THE ATOMIC ENERGY ACT, AND CANNOT LAWFULLY BE APPLIED TO PROHIBIT NRDC FROM OBTAINING A HEARING.

If, despite the foregoing, the Court were to conclude that the Commission faithfully applied its regulatory scheme to preclude NRDC from a hearing on its SAMA contentions, the Court should find that the scheme violates NEPA, the APA, and the Atomic Energy Act.

As noted, nuclear power plant relicensing is indisputably a major federal action significantly affecting the quality of the human environment, requiring preparation of a full-blown EIS, 10 C.F.R. § 51.95(c), and the NRC's approach to relicensing consists of a Generic EIS for issues common to all plants, followed by site-specific Supplemental EISs for issues to be addressed on a plant-specific basis. *See supra* at 8-9. Thus, for example, while the potential impacts from bird collisions with cooling towers were sufficiently uniform at all plants to be addressed generically in the Generic EIS, *see* Second Board Op. at 11 (JA 310), potential impacts on threatened and endangered species must be considered in the individual plant Supplemental EISs. *Id.*

Crucially, the issue of SAMAs *was not resolved generically in the relicensing Generic EIS*. *See* JA 581 ("it would be premature to generically conclude that a

consideration of severe accident mitigation is not required for license renewal"). Rather, recognizing that SAMAs are not amenable to generic consideration, the Commission determined that they must be considered in individual plant Supplemental EISs, which is why SAMAs are a Category 2 issue. *See* 61 Fed. Reg. 28,467, 28,480 (1996) ("a site-specific consideration of alternatives to mitigate severe accidents will be required at the time of license renewal"); *see also Massachusetts v. NRC*, 708 F.3d 63, 68 (1st Cir. 2013) ("The report for a license renewal must analyze the environmental impacts of the proposed action and include a severe accident mitigation alternatives ('SAMA') analysis.").[20]

However, if SAMAs were not considered generically in the Generic EIS, and, pursuant to 10 C.F.R. § 51.53(c)(3)(ii)(L), are not considered anew in the site-specific Supplemental EIS for Limerick (and/or the adequacy of that consideration may not be challenged by anyone in an agency hearing or in court), *then the Commission has not complied with its NEPA obligations with respect to SAMAs for Limerick during license renewal*, for again, while SAMAs may have

20 Indeed, while the Proposed Rules had designated SAMAs a Category 1 issues for license renewal, 56 Fed. Reg. 47,016, 47,022 (Sept. 17, 1991), the Commission *specifically reversed course* in the Final Rules, making SAMAs a Category 2 issue.

been considered for the initial license phase, license renewal is a *new* NEPA process and thus all issues must be meaningfully considered.[21]

The Commission's effort to rely on regulations that purport to limit the SAMA issue for license renewal to "new and significant information," and to preclude a hearing over SAMAs, is thus doubly flawed. While issues resolved *generically* in the Generic EIS might be limited during the site-specific reviews to "new and significant information," and while the Commission's regulations have been elsewhere interpreted to restrict site-specific hearings over those Category 1 issues, *see Massachusetts*, 708 F.3d 63 (affirming rejection of hearing request over Category 1 issue), there is no basis for such an approach for an issue, such as SAMAs, that were not resolved in the Generic EIS. As with other Category 2 issues, they must be fully addressed in the site-specific NEPA review during relicensing, regardless of their consideration during the initial license phase.

To be sure, this result would mean finding the NRC's regulatory scheme invalid here, on the grounds that it improperly denies NRDC's right to a hearing on

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21 While this Court has previously found that a party is not entitled to a hearing on issues already resolved in the licensing process, *see Nuclear Info. Res. Serv. v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992), that logic certainly cannot extend to permit the exclusion of issues during license *renewal* that were resolved during the initial license phase, for that is contrary to the basic premise that relicensing a nuclear power plant is a *separate major federal action* (requiring a new EIS), 10 C.F.R. § 51.95(c), rather than simply the extension of an existing action.

whether the Commission properly considered SAMAs during license renewal. However, if the Court finds that a necessary interpretation of the regulations is that NRDC is foreclosed from a hearing on new and significant information bearing on SAMAs, then this result is both legally inevitable and entirely appropriate. *See, e.g.*, *AT&T v. FCC*, 978 F.2d 727, 734 (D.C. Cir. 1992) ("a rule may be reviewed when it is applied in an adjudication"); *Indep. Cmty Bankers of Am. v. Bd. Of Governors*, 195 F.3d 28, 34 (D.C. Cir. 1999) ("We have frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule").

Indeed, were it otherwise, the end result here would be that NRDC would have no opportunity to challenge – either before the agency, or before this Court – whether the Commission meaningfully considered SAMAs during the relicensing of the Limerick Plant, which cannot be consistent with this Court's precedent mandating that the Commission's obligation to "grant a hearing" to interested parties, 42 U.S.C. § 2239(a)(1)(A), encompasses a hearing on any issue material to the matter pending before the agency. *UCS I*, 735 F.2d 1437; *UCS II*, 920 F.2d at 54-56.[22]

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22 Although, given these statutory constraints, it is not necessary for the Court to consider NRDC's constitutional rights, it bears mentioning that denying a hearing and judicial review over these important issues also implicates NRDC's

IV. APPROPRIATE RELIEF

Given the foregoing, the Court should vacate the Limerick License Renewal, pending a remand for the Commission to reconsider NRDC's hearing request on its SAMA contentions. *See, e.g., Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("[A plaintiff who] prevails on its APA claim . . . is entitled to relief under that statute, which normally will be a vacatur of the agency's order."); *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1374-5 (D.C. Cir. 2007); *Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-1 (D.C. Cir. 1993).

Because the existing license will remain in effect for more than a decade, vacatur will have no disruptive impact on plant operations. *See* 76 Fed. Reg. 52,992 (2011) (JA 664). However, vacatur is not only the presumptive remedy here, *e.g. Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998), it is vital to insure that NRDC obtains a fair and meaningful hearing on its SAMA contentions. *See, e.g., Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (explaining that NEPA review

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constitutional right to due process, especially since the NRC has not denied that the Commission and its members have concrete interests that are threatened by the renewal decision. *E.g., Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 205 (D.C. Cir. 2001) (reiterating that rights to "notice and hearing" are part of "the fundamental norm of due process clause jurisprudence"); *see also Stinson v. United States*, 508 U.S. 36, 45 (1993) (no deference to an agency's interpretation of its own regulation where the interpretation "violate[s] the Constitution or a federal statute.").

cannot be permitted to occur *after* a decision has been made); *accord* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available . . . *before* decisions are made and before actions are taken") (emphasis added).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to grant this Petition for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify that the foregoing Opening Brief for Petitioner Natural Resources Defense Council, Inc. contains 11,903 words excluding the parts of the brief exempted by the Federal Appellate and Circuit Rules.

/s/ Howard M. Crystal
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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2015, undersigned counsel for Petitioner Natural Resources Defense Council, Inc. filed the foregoing Opening Brief For Petitioners, Addendum, and Joint Appendix with the U.S. Court of Appeals for the District of Columbia Circuit by filing the same with the Court's CM/ECF filing system. The following counsel will be served through this filing:

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