[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

REPLY BRIEF FOR PETITIONER NATURAL RESOURCES DEFENSE COUNCIL, INC.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

GLOSSARY v

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 1

I. THE COMMISSION'S DECISION THAT 10 C.F.R. § 51.53(c)(3)(ii)(L) REQUIRED NRDC TO OBTAIN A WAIVER WAS ARBITRARY AND CAPRICIOUS. 8

II. THE COMMISSION'S DECISION THAT NRDC IS NOT ENTITLED TO A WAIVER OF 10 C.F.R. § 51.53(c)(3)(ii)(L) WAS ARBITRARY AND CAPRICIOUS. 15

III. IF THE COMMISSION'S REGULATORY SCHEME MUST BE READ TO PRECLUDE NRDC FROM A HEARING ON SAMA CONTENTIONS, THE COURT SHOULD FIND IT UNLAWFUL 22

IV. THE CHOURT SHOULD VACATE THE RENEWED LIMERICK LICENSE PENDING CONSIDERATION OF NRDC'S CONTENTIONS. 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES **PAGE**

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 14

Alaska v. FERC,
980 F.2d 761 (D.C. Cir. 1992) 3, 10

Am. Farm Bureau Fed'n v. E.P.A.,
559 F.3d 512 (D.C. Cir. 2009) 14

Amherst v. Omnipresent,
173 F.3d 9 (D.C. Cir. 1999) 4

Blue Ridge Environmental Defense League v. NRC,
716 F.3d 183 (D.C. Cir. 2013) 13

Coal River Energy, LLC v. Jewell,
751 F.3d 659 (D.C. Cir. 2014) 26

FiberTower Spectrum Holdings LLC v. FCC,
782 F.3d 692 (D.C. Cir. 2015) 27

Gerber v. Norton,
294 F.3d 173 (D.C. Cir. 2002) 24, 26

Independent Cmty. Bankers v. Fed. Reserve,
195 F.3d 28 (D.C. Cir. 1999) 27

**Limerick Ecology Action, Inc. v. NRC*,
869 F.2d 719 (3d Cir. 1989)..... 20, 25

Massachusetts v. NRC,
708 F.3d 63 (1st Cir. 2013) 13, 21

*Authorities upon which we chiefly rely are marked with asterisks

Massachusetts v. United States,
522 F.3d 115 (1st Cir. 2008) 9, 10, 22

**New York v. NRC*,
681 F.3d at 471 (D.C. Cir. 2012) 25, 26, 28

**Union of Concerned Scientists v. NRC*,
735 F.2d 1437 (D.C. Cir. 1984) 4, 11

United States v. Emor,
F.3d _, 2015 WL 2061817 (D.C. Cir. May 5, 2015) 23

COMMISSION DECISIONS

In the Matter of Entergy Nuclear Power,
CLI-07-03, 2007 WL 172517 (Jan. 22, 2007) 16

In the Matter of Entergy Nuclear Generation Co.,
CLI-12-01 (Mar. 8, 2012) 19

I*n the Matter of Entergy Nuclear Generation Co.*,
CLI-12-06, (Mar. 8, 2012) 16

In the Matter of Exelon Generation Co.,
CLI-13-07, 78 NRC 199 (2013)..... 6, 8, 15, 18

STATUTES

28 U.S.C. § 2239(a)(1)(A) 6

42 U.S.C. § 4321.....2

REGULATIONS

10 C.F.R. § 2.309 6

10 C.F.R. § 2.309(f) 1, 4, 6, 13, 19

10 C.F.R. § 2.335(a).....4, 8

10 C.F.R. § 2.335(b) 15

10 C.F.R. § 51.53(c)(3)(ii)(L) 4, 7, 8, 9, 15, 17, 20, 21

10 C.F.R. § 51.53(c)(3)(iv) 4, 8, 9

GLOSSARY

BWR	Boiling Water Reactor
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NRDC	Natural Resources Defense Council
SAMAs	Severe Accident Mitigation Alternatives
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no dispute that, to date, the Nuclear Regulatory Commission ("NRC" or "Commission") has *never* considered whether the Natural Resources Defense Council's ("NRDC") SAMA contentions meet the contention admissibility factors in 10 C.F.R. § 2.309(f). Rather, while the government and Intervenor's briefs repeatedly seek to obscure this critical fact, the Commission has flatly refused to apply those factors to NRDC's contentions on the grounds that its regulatory scheme *precludes* NRDC from even *trying* to demonstrate the contentions meet admissibility requirements.

On the other hand, the *only adjudicatory body* to have considered whether NRDC's contentions satisfy the strict admissibility requirements of 10 C.F.R. § 2.309(f) – the Atomic Safety Licensing Board – explicitly found those requirements met, observing "*NRDC has shown there are numerous new SAMA* [Severe Accident Mitigation Alternative] *candidates which should be evaluated for their significance*." Exelon Generation Co., LLC (*Limerick Generating Station, Units 1 and 2*), LBP-12-8, 75 NRC 539, 557, slip op. at 21 (Apr. 4, 2012) (hereinafter "Board Op.") (emphasis added) (JA 121). For example, NRDC

identified a long list of potentially cost-beneficial SAMAs *never considered for Limerick*. *See* Motion to Intervene Decl., ¶¶ 9-15 (JA 73-78).[1]

Had NRDC been admitted into the proceeding to pursue its SAMA contentions against Exelon Generation Company's ("Exelon") Environmental Report when the Final Supplemental Environmental Impact Statement ("SEIS") for Limerick was issued, it would have had the opportunity to adjudicate within the agency whether the *Final* SEIS had addressed SAMAs in the manner required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*. However, contrary to the government's incongruous suggestion that NRDC somehow passed up that opportunity, NRC Br. at 23 n.69, the Commission ruled NRDC's SAMA contentions may not be litigated in the Limerick relicensing proceeding, and thus NRDC is *foreclosed* from challenging before the Commission

[1] These include various forms of alternative power or water supply to mitigate a severe accident that might disrupt primary power or water supplies essential to plant safety. *Id.; see also, e.g.*, Board Op. at 556 (slip op. at 20) (JA 120) (finding that "NRDC has provided a specific statement, as well as an adequate basis," for one contention"); *id.* at 560 (JA 124-25) (finding NRDC provided the requisite "genuine dispute on a material issue," "statement of the alleged facts or expert opinion," and "specific sources and documents on which it intends to rely"); Petitioners' Opening Brief ("Pet. Br.") at 16 and n.7 (summarizing Board opinion).

any aspect of the more than twenty pages of analysis in the Final SEIS addressing SAMAs. *See* Final SEIS at 5-3 to 5-26 (JA 677-700).[2]

Even more fundamentally, having categorically denied NRDC a hearing on these issues, the Commission has excluded NRDC altogether from obtaining *judicial review* regarding the adequacy of the Final SEIS's analysis of the SAMA issues *raised by NRDC*, because, having been denied intervenor status, NRDC is not a "party aggrieved" under the Hobbs Act. *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992)*; see also* NRC Br. at 1 n.2 (recognizing NRDC may not challenge any aspect of the license renewal because they are not parties to the proceeding). Accordingly, while it is true the Commission does not argue the Court lacks jurisdiction to hear *this* Petition, NRC Br. at 51, that is a red herring, for the salient question *here* is whether the Commission may carry out its regulatory scheme in a manner that categorically excludes administrative, and therefore later judicial, review over the agency's consideration of SAMAs in the Limerick relicensing proceeding. Only if this petition *is granted* will NRDC have the opportunity to

[2] This Petition is thus certainly *not* "*all* about the adequacy of t[he] determinations" the Commission made in completing the Limerick SEIS, as Exelon claims, Int. Br. at 35 (emphasis added); rather it concerns whether NRDC will be afforded the *opportunity* to challenge the adequacy of those determinations.

seek to pursue SAMA contentions before the Commission, and then obtain ultimate judicial review in this Court.[3]

The government's responses to NRDC's arguments on these matters only further serve to highlight that, although there are several analytical pathways available to the Court, only *one* outcome is consistent with NEPA, the Atomic Energy Act, and the Administrative Procedure Act: concluding NRDC is entitled to have its SAMA contentions considered under 10 C.F.R. § 2.309(f).[4]

The most straightforward route to that result is to conclude that, reading 10 C.F.R. § 51.53(c)(3)(ii)(L) and 10 C.F.R. § 51.53(c)(3)(iv) together, there is no basis to conclude NRDC's contentions are barred by 10 C.F.R. § 2.335(a). Rather, given that the Commission's SAMA regulation purports to rely on a SAMA analysis done in connection with the original *licensing* of the Limerick plant as the

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[3] When NRDC finally is afforded the opportunity to challenge the consideration of SAMAs in the Final SEIS, it will detail numerous deficiencies, some of which are outlined below. *See infra* at 25 n.19.

[4] Contrary to the Commission's repeated mischaracterization, NRDC does not claim an "absolute right to a hearing," *e.g.* NRC Br. at 34, but simply seeks to overcome the Commission's automatic *bar* to a hearing here. *Union of Concerned Scientists v. NRC* ("*UCS I*"), 735 F.2d 1437, 1444 (D.C. Cir. 1984) (making clear the right to a "hearing" means a chance for "submission and challenge of evidence as to any and all issues of material fact"); *cf. Amherst v. Omnipresent*, 173 F.3d 9, 14 (D.C. Cir. 1999) ("If the criteria or their administration *effectively preclude* towers no matter what the carrier does, they may amount to a ban '*in effect.*'") (emphasis added).

SAMA for relicensing, at the very least that regulation cannot be read to bar a hearing during *relicensing* over new and significant SAMA-related information.

Alternatively, the Court may find, irrespective of whether the SAMA regulation bars this result, the waiver regulation does not. Neither the government's nor Exelon's arguments persuasively explain how the Commission reasonably rejected NRDC's waiver petition on the grounds that the issues raised were not sufficiently unique to Limerick. NRC Br. at 55-60; Exelon Br. at 26-29. Characterizing a concern at a level of generality making it arguably applicable to many plants – by claiming NRDC's contentions simply involve the passage of time, NRC Br. at 55-56 – deprives the regulation of all effect. Moreover, since Limerick is the *only* Boiling Water Reactor ("BWR") subject to the regulatory exception to a SAMA analysis during relicensing, in fact the BWR issues raised in the SAMA contentions will *not* be grounds for a later waiver (and thus *are* unique), since there is going to be a *baseline SAMA analysis* conducted for the other BWRs when they undergo relicensing (since one was not done in connection with licensing).

Indeed, the Commission's arguments are irreconcilable with its conclusion, in denying the waiver request, that new and significant information concerning SAMAs *must* be considered *during relicensing for Limerick, including the very*

information NRDC sought to address in its SAMA contentions. Exelon Generating Co, LLC (*Limerick Generating Station, Units 1 and 2*), CLI-13-07, 2013 WL 5872241, slip. op. at 22-23 (Oct. 31, 2013) (JA 395-96). Under the Commission's view, while these matters *must* be considered in *this* plant-specific relicensing – and take up more than twenty pages of discussion in the Final SEIS – NRDC is entitled to neither a hearing on whether these matters were properly addressed, nor judicial review. This makes no sense, and reinforces why, at minimum, NRDC should be deemed to qualify for a waiver.

However, if the Court were nonetheless to conclude the Commission's regulatory scheme cannot be interpreted to allow NRDC an opportunity to have its SAMA contentions judged against the admissibility requirements of 10 C.F.R. § 2.309(f), then the scheme must be deemed incompatible with NEPA and the Atomic Energy Act. NEPA's "hard look" requirement is toothless without meaningful judicial review of whether an agency has faithfully carried out NEPA's mandates. In addition, Congress dictated there should be "widespread participation" in the critical health and safety issues surrounding nuclear energy, and created an explicit hearing right to further that objective, 28 U.S.C. § 2239(a)(1)(A) – and also made the Commission's final decisions subject to judicial review. *Id.* § 2344. By creating and implementing a scheme whereby a party is

not even permitted to *attempt* to obtain a section 2.309 hearing, or obtain judicial review, the Commission is thwarting these Congressional directives.

Finally, as also further discussed below, it is no answer for the NRC to rely on the Commission's Rulemaking Petition provisions as the escape valve permitting these matters to be considered and subject to ultimate judicial review. A Rulemaking Petition is for a *generic* determination that applies to *all* plants, and seeks to change a regulation so all plants are subject to a different rule. At issue here, by contrast, is the effort to require *further consideration of SAMAs for Limerick during relicensing*. Thus, because 10 C.F.R. § 51.53(c)(3)(ii)(L) is not, in fact, a generic regulation, it makes no sense to suggest a Rulemaking Petition is the appropriate vehicle to insure SAMAs are properly considered before the Limerick plant is relicensed.[5]

[5] While the Commission also claims the SAMA issue was reconsidered in the 2013 update to the Generic EIS, NRC Br. at 48 n.131, in fact that update reiterated the long-standing position that SAMAs "cannot be a Category 1 issue because *plant-specific mitigation measures vary greatly based on plant designs, safety systems, fuel type, operating procedures, local environment, population, and siting characteristics*." Generic EIS Update NUREG-1437, Revision 1 at 1-27, *available at* http://pbadupws.nrc.gov/docs/ML1310/ML13106A241.pdf (last visited May 20, 2015) (emphasis added).

ARGUMENT

I. THE COMMISSION'S DECISION THAT 10 C.F.R. § 51.53(c)(3)(ii)(L) REQUIRED NRDC TO OBTAIN A WAIVER WAS ARBITRARY AND CAPRICIOUS.

According to the Commission, the plain language of 10 C.F.R. § 51.53(c)(3)(ii)(L) precludes NRDC's SAMA contentions. NRC Br. at 29-51. But the regulation does not and cannot bear the weight the Commission would give it.

The immediate purported bar to NRDC's challenge is 10 C.F.R. § 2.335(a), providing a petitioner may not challenge a regulation in an individual license proceeding. Thus, NRDC may not pursue its SAMA contentions (absent a waiver) if doing so would pose a challenge to 10 C.F.R. § 51.53(c)(3)(ii)(L).

No such challenge is posed here, because the Commission concurs that, despite 10 C.F.R. § 51.53(c)(3)(ii)(L), in order to comply with 10 C.F.R. § 51.53(c)(3)(iv) (concerning consideration of new and significant information during relicensing), the Limerick Environmental Report – and ultimately the Final SEIS – must take a "hard look' at potentially new and significant information regarding already-completed environmental-impact analysis," including SAMAs. CLI-13-07 at 22-23 (JA 395-96); *see also* NRC Br. at 21. Thus, because NRDC's contentions are limited to just such new and significant information – which must

be considered *despite* 10 C.F.R. § 51.53(c)(3)(ii)(L) – it makes no sense to conclude that contentions challenging whether such information was adequately considered contravenes the regulation.

As NRDC has explained, therefore, the appropriate manner to apply 10 C.F.R. § 51.53(c)(3)(ii)(L), in conjunction with 10 C.F.R. § 51.53(c)(3)(iv) and in view of NEPA's overriding obligations, is to conclude that the former regulation means a *complete* SAMA analysis must be conducted for plants that did not prepare a SAMA at the licensing phase, while plants that prepared a SAMA analysis associated with licensing may limit the analysis to the consideration of new and significant information – which then may be addressed in an individual adjudication. NRDC Opening Br. at 33-39; *see also* Waiver Pet. at 16-22 (JA 245-251) (making this argument before the Commission).[6]

The Commission argues this outcome would be inconsistent with the First Circuit's ruling on "Category 1" issues. NRC Br. at 40-41 (citing *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008)); *see also* Exelon Br. at 25. The comparison is inapt, however, for while the Commission repeatedly characterizes 10 C.F.R. § 51.53(c)(3)(ii)(L) as a "generic" determination for SAMAs (which the

[6] The Commission curiously asserts NRDC does not challenge the Commission's "reasoning" in finding the SAMA contentions barred by the regulation. NRC Br. at 34. But that is precisely what NRDC is challenging here.

First Circuit ruled cannot be raised in an individual licensing hearing), in fact the Generic EIS and associated rulemaking expressly determined SAMAs may *not* be resolved generically. Envt'l. Review for Renewal of Nuclear Power Plant Op. Licenses, 61 Fed. Reg. 28,467, 28,480 (June 5, 1996) (JA 602); Generic EIS at 5-116 (JA 584) (discussing need for "site-specific analysis of measures that could mitigate severe accidents"); *see also* Generic EIS Update NUREG-1437, Rev. 1 at 1-27, *available at* http://pbadupws.nrc.gov/docs/ML1310/ML13106A241.pdf (last visited May 20, 2015) (reiterating that "plant-specific mitigation measures vary greatly based on plant designs, safety systems, fuel type, operating procedures, local environment, population, and siting characteristics").[7]

Accordingly, NRDC is not seeking to "relitigate" a Category 1 issue, NRC Br. at 36 (citations omitted), for NRDC has never, until the Limerick relicensing

[7] The First Circuit also has a significantly different approach to ultimate judicial review under the Hobbs Act, applying a "functional test to determine whether one is a 'party aggrieved' for Hobbs Act purposes" – a test that does "not equate the regulatory definition of a 'party' in an (agency) proceeding with the participatory status required for judicial review." *Mass.*, 522 F.3d at 131(citations omitted). If that approach were not foreclosed in this Circuit, which it is, *see Alaska*, 980 F.2d at 763, NRDC here arguably could have challenged the *substantive adequacy* of the SAMA analysis in the Limerick SEIS, despite having been denied the opportunity to do so in the adjudicatory process.

proceeding, had an opportunity to address whether SAMAs are being adequately considered during relicensing.[8]

To be sure, the Generic EIS and the SAMA regulation provide that a new baseline SAMA analysis for relicensing is not required if one was done during licensing. But there is nothing "generic" about that determination, which, unlike Category 1 issues, has nothing to do with resolving something as to *all plants*. Thus, even assuming *arguendo* the First Circuit correctly ruled petitioners who possess new and significant information pertaining to a Category 1 issue during relicensing may only pursue the issue through a Rulemaking Petition, that reasoning simply has no application here because it is based on the premise that the issue is *generic for all plants*, while the Commissions has repeatedly, and uniformly, taken the position that SAMAs are *not* a generic issue.[9]

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[8] The Commission's effort to distinguish *UCS I*, 735 F.2d 1437, on the grounds that the safety matter at issue there was not a generic issue resolved in a generic EIS, NRC Br. at 34-35, therefore also fails because, in fact, SAMAs *were not resolved in the Generic EIS here*.

[9] As we have explained, Pet. Br. at 36 n.16, even subsequent to the 1996 Generic EIS, the Commission has twice rejected the precise argument that SAMAs have been adequately addressed generically and should be *removed* from the NEPA relicensing process. These rejections make the Commission's extended discussion of SAMA developments that occur *outside* the NEPA process, NRC Br. at 6, 12; *see also* Int. Br. at 8-9, 28, entirely irrelevant, for, again, the Commission has conclusively determined that these developments are *not sufficient* to deem SAMAs an issue beyond the scope of the NEPA process for relicensing. Indeed, if

In reality, what the Commission is attempting to do is to rely on the Limerick *licensing* EIS, and in particular the SAMA analysis there, as the basis for its SAMA analysis for *relicensing*. But this gives SAMAs less consideration than *every other issue considered during relicensing*, for as to all other issues the matter is *either* resolved in the Generic EIS or addressed on a site-specific basis in the relicensing Supplement. Again, particularly given the fact that, unlike *every other issue*, the Commission seeks to rely on the *original NEPA review* for its NEPA coverage on SAMAs for relicensing, the regulatory scheme should be read to permit a hearing over whether new and significant information bearing on SAMAs has emerged *since licensing*.[10]

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the fact that the Commission determined that additional "analysis of mitigation alternatives would provide too little value" were dispositive of the Commission's NEPA obligations, NRC Br. at 12, then it would not have made sense to require *any* of the plants to conduct site-specific SAMA analyses at the relicensing stage.

[10] By contrast, the new and significant information question for Category 1 issues is tied to information *since the Generic EIS was issued*. *See* 61 Fed. Reg. at 28,470 (JA 592). Thus, recognizing relicensing is a new "major federal action" for all other issues, the Commission completes an entirely fresh NEPA review, resolving some matters in the Generic EIS and the remainder in the site-specific Supplement for each plant. NRC Br. at 8 (explaining the Generic EIS and site-specific Supplement "forms the full EIS" for each plant). Only as to *SAMAs*, and only as to three plants (only one of which is a BWR), does the Commission purport to exclude the issue from consideration during relicensing.

The Commission's reliance on *Massachusetts v. NRC*, 708 F.3d 63 (1st Cir. 2013) and *Blue Ridge Environmental Defense League v. NRC*, 716 F.3d 183 (D.C. Cir. 2013) is also misplaced. NRC Br. at 44-45. In the First Circuit case, the Commission had *done* a SAMA analysis in the site-specific relicensing SEIS because one had not been conducted at the licensing stage, and petitioners had not filed initial SAMA contentions.[11] Petitioners were thus seeking to invoke the especially stringent standards for *reopening* a proceeding based on new information subsequent to the SEIS, *see* 708 F.3d at 76-78 – standards not at issue here.

Similarly, the *Blue Ridge* case in this Circuit did not concern whether the Commission could categorically bar a hearing on an issue material to relicensing, but rather, the straightforward question whether petitioners had satisfied the contention admissibility requirements of Section 2.309(f). 716 F.3d at 196-200. Again, in this case the only body to have considered NRDC's SAMA contentions under those factors – the Atomic Safety Licensing Board – determined the contentions should be admitted.

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[11] *See* NUREG-1437, Supplement 29, Final Supplemental EIS for Pilgrim Nuclear Power, at Section 5.2, *available at* http://pbadupws.nrc.gov/docs/ML0719/ML071990020.pdf (last visited May 19, 2015). That SAMA analysis revealed seven potentially cost-effective SAMA measures. *Id.* at 5-5.

Finally, there is also no basis to the Commission's refrain that the Court should defer to its "expertise" and "scientific judgment" on these matters. NRC Br. at 27-28. Where, as here, the fundamental issue concerns the proper interpretation of Petitioner's statutory rights – and particularly where, as here, the agency's interpretation is dispositive of the Petitioner's rights to *judicial review* – the agency is not entitled to deference, let alone the kind of extra deference afforded to scientific judgments. *See, e.g.*, *Am. Farm Bureau Fed'n v. E.P.A.*, 559 F.3d 512, 6 (D.C. Cir. 2009) (explaining deference due where an issue implicates an agency's "scientific judgment"); *see also, e.g.*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).[12]

[12] The Commission seeks to distinguish the cases cited by NRDC on the grounds that while those "implicated federal court jurisdiction," this case only concerns "an agency's determination of whether a party is entitled to a hearing *under* [the agency's] *own regulations* . . . ." NRC Br. at 29 (emphasis in original). This reasoning overlooks the critical fact that NRDC's obtaining an adjudicatory hearing is *dispositive* of its rights to ultimate judicial review of the merits of its SAMA contentions, and thus the agency's implementation of its scheme is inextricably intertwined with this court's jurisdiction to review the agency's decision-making. Thus, while the Court might have reason to defer to the agency's technical judgment as to the adequacy of the SAMA analysis conducted in the Limerick SEIS, there is no basis for that kind of deference in resolving whether that analysis is even subject to review at all, the only question at stake here.

II. THE COMMISSION'S DECISION THAT NRDC IS NOT ENTITLED TO A WAIVER OF 10 C.F.R. § 51.53(c)(3)(ii)(L) WAS ARBITRARY AND CAPRICIOUS.

If 10 C.F.R. § 51.53(c)(3)(ii)(L) is a bar to having SAMA contentions heard in the Limerick relicensing proceeding, then NRDC is entitled to a waiver of that regulation under 10 C.F.R. § 2.335(b), which allows a contention to be pursued despite a regulatory bar based on "special circumstances with respect to the subject matter of the particular proceedings . . . ." *Id.* As a threshold matter, while the Commission argues NRDC cannot meet the waiver criteria because NRDC did not raise issues that belong in the particular Limerick relicensing proceeding, it entirely fails to explain how that position can be reconciled with its own instructions to the Staff to consider *all the issues* raised in NRDC's SAMA contentions *in the site-specific Limerick Final SEIS*. See CLI-13-07 at 23 (JA 396) ("[W]e *direct* 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.") (emphasis in original). Having determined NRDC's SAMA issues were appropriately considered *in the Limerick SEIS* (and thus outside the rulemaking petition and generic rule context), the Commission necessarily recognized NRDC was raising issues that could have a material bearing

on the decision to relicense the Limerick plant *in particular*. By the same token, this means NRDC should have obtained a waiver.

While the Commission and Exelon repeatedly argue this case is controlled by the First Circuit's rulings (*e.g.* NRC Br. at 54; Exelon Br. at 23-25), there is a critical distinction: in *none* of the Commissions decisions at issue in those cases did the Commission direct that the issues raised by Massachusetts *be considered in the specific relicensing proceeding*. To the contrary, in each case the Commission determined the issues should only be considered as to *all plants*, and thus a Rulemaking Petition was the appropriate vehicle to address the Commonwealth's concerns. *See Entergy Nuclear Power* (Vermont Yankee Nuclear Power Station), CLI-07-03, 2007 WL 172517, *3 (Jan. 22, 2007) ("It makes more sense for the NRC to study whether, as a technical matter, the agency should modify its requirements relating to spent fuel storage *for all plants across the board.*") (emphasis added); *Entergy Nuclear Generation Co.*, CLI-12-06, slip op. at 15-16 (Mar. 8, 2012) ("Because the concerns that Massachusetts raises apply generically to *all* spent fuel pools at all reactors, they are more appropriately addressed via rulemaking or other appropriate generic activity") (citations omitted) (emphasis in original). Again, had the Commission here in fact concluded that NRDCs SAMA issues had no application specific to Limerick, there would have been no basis to

direct that they be addressed in the Final Limerick SEIS. But, having directed that the issues be addressed *in the Final SEIS*, the Commission erred in concluding NRDC could not obtain a waiver.

The Commission's responses concerning the specific SAMA issues raised by NRDC are similarly unpersuasive. NRC Br. at 56. It makes no sense to suggest the issues specific to BWR plants could come up for other BWR plants, *id.*, since Limerick is the *only BWR plant subject to the regulatory exception in* 10 C.F.R. § 51.53(c)(3)(ii)(L).[13] Thus, when *every other* BWR comes up for license renewal, the Commission will be required to conduct a full SAMA analysis, and the regulation will pose no bar to adjudicating its adequacy – and hence addressing BWR-related SAMAs during the Limerick relicensing could not "swallow the rule," NRC Br. at 58, because, as to BWR issues, the rule *only applies to Limerick*.

The Commission's further claim that the mere fact that SAMA information may be *new* is insufficient because it would mean a waiver might always have to be granted based on new information, makes the waiver test unpassable. NRC Br. at 57-58. Indeed, what else could possibly form the basis for a waiver request than

[13] *See* 61 Fed. Reg. at 28481 (JA 603) (identifying the three plants for which the Commission conducted a SAMA analysis at the licensing stage as Limerick, Companche Peak 1 and 2, and Watts Bar).; *see also* List of Power Reactor Units, http://www.nrc.gov/reactors/operating/list-power-reactor-units.html (last visited May 20, 2015) (identifying Comanche Peak and Watts Bar as Pressure Water Reactors ("PWR")).

some new information on an issue pertinent to relicensing? In sum, the Commission's effort to recast NRDC's specific new and significant information for Limerick into generic "new information" closes the entire window the waiver regulation was designed to (and is required to) leave open to allow issues to be raised in site-specific adjudications.[14]

The Commission also ignores that, as regards the contention involving economic costs, its final decision denying the waiver request recognized NRDC had "provide[d] data that *is specific* to Limerick and the surrounding area . . . ." CLI-13-07 at 20 (JA 393) (emphasis added). Rather than find it was not unique, the decision appears to have rejected this economic issue as insufficient *on the merits.*[15] The Commission does not defend this aspect of the Denial. That is

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[14] For example, under the Commission's logic, if the agency decided to ignore during relicensing new scientific data revealing the Limerick plant is on a previously unknown seismic fault, thus exponentially increasing the likelihood of a severe nuclear accident, no one could obtain a waiver – and thus a hearing and judicial review – over that decision, which would merely raise "new information alone." CLI-13-07 at 19 (JA 392). Simply to tease out the elements of the Commission's logic is to recognize that while the agency gives lip service to a "waiver" as a means to satisfy its obligation to provide a hearing on material issues, as applied by the Commission the waiver criteria can never be satisfied.

[15] *See* CLI-13-07 at 21 (JA 394) (rejecting economic arguments on the grounds that "[t]o litigate SAMA-related issues in an adjudicatory proceeding, however, we require the demonstration of 'a potentially significant deficiency' in the SAMA analysis – 'that is, a deficiency that credibly could render the SAMA analysis unreasonable under NEPA standards.'") (quoting Entergy Nuclear Generation Co.

telling, for, again, the Commission never *considered* whether NRDC meets the 10 C.F.R. § 2.309(f) contention admissibility factors. And again, the only body to have considered those factors – the Board – found NRDC satisfied each factor. *See supra* at 1-2 & n.1.[16]

The Commission also does not explain how the decision that NRDC's arguments were insufficiently "unique" can be reconciled with the fact that SAMAs are a Category 2 issue for relicensing. Indeed, when the Commission issued its *proposed* relicensing scheme, it initially decided that the Generic EIS would adequately consider matters related to SAMAs, and that no further work would be necessary on a site-specific basis. Environmental Review for Renewal of

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(*Pilgrim Nuclear Power Station*), CLI-12-01 (Mar. 8, 2012); *see also id.* at 25 ("[U]nless a contention . . . raises a potentially significant deficiency in the SAMA analysis . . . a SAMA-related dispute will not be material to the licensing decision, and is not appropriate for litigation in an NRC proceeding."). It bears noting that the Pilgrim decision on which the Commission relied (CLI-12-01), was itself not a *waiver case*, but rather concerned whether the SAMA contentions met the contentions admissibility requirements. *Id.* (deeming the SAMA issues raised in the Pilgrim proceeding to not be "material" to the relicensing decision).

[16] The Court should therefore not be misled by Exelon's arguments that the SAMA issue was adequately addressed in the Environmental Report, and has now been adequately addressed in the Final SEIS. Int. Br. at 10-14. While NRDC disagrees, those matters *are not at issue in this Petition*, since NRDC has not yet obtained a hearing to challenge those conclusions and hence also cannot seek judicial review with regard to them. Exelon's arguments that NRDC's contentions were not admissible under the admissibility factors, Int. Br. at 11-13 are similarly irrelevant, because, again, the Atomic Safety Licensing Board found the criteria satisfied and the Commission has not found otherwise.

Operating Licenses, 56 Fed. Reg. 47,016, 47,022 (Sept. 17, 1991). However, the Commission reversed course, determining in the Final Rule that – to comply with NEPA and *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989) – "a site specific consideration of alternatives to mitigate severe accidents will be required at the time of license renewal." 61 Fed. Reg. at 28,480 (JA 602).

To be sure, in these regulations, and the Generic EIS, the Commission *also* concluded that SAMAs would not have to be considered from scratch during license renewal if they were considered at the licensing stage. *E.g.*, 61 Fed. Reg. at 28,480 (JA 602). That is the basis for 10 C.F.R. § 51.53(c)(3)(ii)(L). However, the agency cannot reconcile how, on the one hand, it found NRDC's new and significant information concerning SAMAs to be generic, while at the same time concluding that new and significant information bearing on SAMAs are *a site-specific issue* that should be considered on a site-specific basis for each plant. *See also, e.g., Limerick Ecology Action,* , 869 F.2d at 737-39.[17]

Indeed, the Commission's effort to contrast the waiver petition (which it says is unavailable to NRDC) with a Rulemaking Petition (which it claims is the

[17] The Commission's effort to distinguish *Limerick Ecology*, NRC Br. at 58-60, altogether ignores the specific portions of that decision on which we rely, *see* Pet. Br. at 45-46, where the Court rejected the Commission's argument that there were no "unique circumstances" at Limerick, 869 F.2d at 731-32, finding that SAMA issues "vary tremendously" among plants. *Id.* at 738.

appropriate vehicle for NRDC's concerns), NRC Br. at 60, only further serves to confirm the illogic of the agency's approach. Under the Commission's rules, a rulemaking petition is appropriate "for impacts that are generic to all plants of a particular type." *Massachusetts*, 708 F.3d at 68. Thus, for example, in *Massachusetts*, the Court rejected Massachusetts's waiver petition because it concluded the spent fuel accident issues the State sought to pursue had been resolved by a rule that applied to *all* plants, and thus that the appropriate vehicle to change that rule was through a Rulemaking Petition. *Id.* at 74-75.

By contrast, here the Rulemaking Petition the Commission insists NRDC should file would not seek to change a rule applicable to all plants, but rather would address a regulation that *only applies to a single BWR*, the Limerick Plant. It simply makes no sense to suggest that such a concern is appropriately addressed through a Rulemaking Petition rather than through all of the other procedural mechanisms that NRDC tried and was rebuffed on, including the waiver petition that the Commission invited NRDC to pursue and then rejected.

Accordingly, to the extent the Court concludes that NRDC may not obtain a hearing absent a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), the Commission erred in denying the waiver.[18]

III. IF THE COMMISSION'S REGULATORY SCHEME MUST BE READ TO PRECLUDE NRDC FROM A HEARING ON SAMA CONTENTIONS, THE COURT SHOULD FIND IT UNLAWFUL.

The Commission asserts that, while its regulations preclude NRDC's SAMA contentions from being adjudicated, and NRDC is not entitled to a waiver, the regulatory scheme is lawful because NRDC has "multiple opportunities to challenge the Commission's conclusions about the allegedly new and significant information on which NRDC's petition for review is based." NRC Br. at 63. Once again, however, each of the Commission's purported "opportunities" are, in fact, regulatory dead-ends, and none provides NRDC the opportunity to seek to

[18] Exelon also urges that the Commission's approach is lawful in light of the *non*-adjudicatory means for SAMAs to be addressed in relicensing. Int. Br. at 28-29. This ignores NRDC's right to obtain a *hearing* – and judicial review – if the regulations allowing a hearing are satisfied, an issue which, again, the Commission has not yet reached. *See Mass.*, 522 F.3d at 130 ("In theory, what fetters the agency's decision-making process and ensures ultimate compliance with NEPA *is judicial review*.") (emphasis added). In this regard it is critical to reiterate that, under the Commission's view, even if the Staff had completely *ignored* the Commission's instruction to consider NRDC's information in the Final SEIS, or relied on patently frivolous reasons for dismissing it, NRDC would have no recourse because it may not obtain a waiver and thus a hearing, prerequisites to ultimate judicial review.

challenge the adequacy of the more than twenty pages of discussion of SAMAs contained in the Final Limerick SEIS.

First, the Commission claims it is somehow sufficient that it acquiesces in the Court's jurisdiction over *this Petition*. NRC Br. at 61; *see also id.* at 51 ("The very existence of the instant lawsuit also further confirms that NRDC has not been denied rights to judicial review."). But as the Commission elsewhere recognizes, NRC Br. at 2 n.4, *this Petition* only addresses whether the Commission erred in ruling that NRDC is categorically barred from a hearing on its SAMA Contentions, *and does not and cannot address* the adequacy of the SAMA analysis contained in the Limerick Final SEIS – an analysis the Commission has precluded NRDC from challenging. Thus, the fact that the Court has jurisdiction over this *threshold* issue obviously does not mean that Commission should prevail on the grounds that NRDC is not being denied judicial review *over the merits* of the SAMA arguments they want the Commission to consider. Indeed, a very similar "heads the government wins and tails [Petitioner] loses" argument was just recently rejected by this Court. *See United States v. Emor*, No. 13-3071, _ F.3d _, 2015 WL 2061817, *1 (D.C. Cir. May 5, 2015).

Second, the Commission rehashes its argument that NRDC, after exhausting every other procedural avenue merely to get its SAMA contentions before the

NRC (and a reviewing court), failed to select the one route that the Commission would actually entertain – a Rulemaking Petition. But not only is that position difficult to take seriously given the record before the Court – in which NRDC tried multiple pathways, including one invited by the Commission itself, only to run into successive dead-ends – but it makes especially little sense in the context of what NRDC is attempting to accomplish here. As we have explained, it would make no sense to submit a Rulemaking Petition where NRDC's concerns *are* specific to the Limerick Plant (which, again, is why the Commission itself sent them to Staff for consideration in the Limerick Final SEIS). Plainly, the Commission is playing little more than a "bureaucratic game of hide and seek," *Gerber v. Norton*, 294 F.3d 173, 183 (D.C. Cir. 2002) (internal quotation omitted), in contending that if only NRDC had tried yet one more procedural avenue, it would finally have hit pay dirt.

Third, the Commission asserts that NRDC's "opportunity" to obtain a waiver demonstrates that the regulatory scheme is lawful. NRC Br. at 62. But, again, if, as we have demonstrated, the waiver rule is a regulatory dead end, that is not the kind of opportunity that can save the Commission's regulations.

Finally, the Commission relies on the fact that it directed the Staff to consider NRDC's materials in the Final SEIS, NRC Br. at 62, once again ignoring

both the incompatibility between that action and the finding that the issues raised do not pertain specifically to Limerick, and the fact that the pertinent question is whether NRDC may *challenge* whether Staff adequately considered those materials. Indeed, both the Commission and Exelon invite the Court to consider the analysis done by Staff in the Final SEIS, *see, e.g.*, NRC Br. at 22, but in doing so ignore that the entire basis for this Petition is that, under the Commission's implementation of its regulations, NRDC itself is categorically *barred* from challenging that analysis before the Commission or the Court.[19]

[19] Once NRDC has that opportunity, it will demonstrate fundamental inadequacies in the twenty pages of SAMA discussion in the Final SEIS, which must be reconsidered. For example, the Final SEIS discussion repeatedly relies on SAMA-related improvements made *outside the NEPA process* as a basis to conclude that there is no new and significant information on SAMAs to be considered. *E.g.* Final SEIS at 5-12 (JA 686) (claiming "mitigating strategies . . . would be implemented as part of the current licensing basis"). This flies in the face of the Commission's repeated determination (as dictated by *Limerick Ecology*, 869 F.2d 719) that SAMAs *may not be excluded from the NEPA process. See also, e.g.*, Final SEIS at 5-21 (JA 695) (discussing Limerick "Individual Plant Examination" and other non-NEPA developments); *accord New York v. NRC*, 681 F.3d 471, 479 (D.C. Cir. 2012) (rejecting Commission claim that an environmental issue will be resolved outside the NEPA process). As another example, in purporting to "consider" whether there is new and significant information concerning SAMAs implemented for other BWR plants that might be relevant to Limerick, the Final SEIS adopts Exelon's proposal that the threshold for a SAMA that *may* meet this significance criteria is one that produces at least a *50% reduction in risk.* Final SEIS at 5-21 (JA 695). Particularly given the consequences of a severe accident, the Final SEIS entirely fails to justify why a measure that would reduce the risk by, say, more than 30% should not be considered. *See* Exelon Letter of Mar. 2, 2014, Enclosure at 9 (cited in Final SEIS

In short, this Court cannot sanction an outcome whereby the Commission successfully insulates itself from *any* judicial review over the adequacy of its consideration of SAMAs in the Limerick relicensing SEIS, a matter the Commission specifically directed its Staff to address *in response to the issues raised by NRDC*, by interpreting its regulatory scheme to preclude NRDC from becoming a party to the proceeding, and thereby precluding judicial review. If that is the only permissible reading of the Commission's regulations, the Court should deem them incompatible with NEPA, the Atomic Energy Act, and the Administrative Procedure Act. *See, e.g.*, *Coal River Energy, LLC v. Jewell*, 751

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at 5-20 (JA 694)) (identifying potential, unimplemented Limerick SAMA measure that would reduce risk by 33.9%) (*available at* http://pbadupws.nrc.gov/docs/ML1407/ML14071A378.pdf) (last visited May 19, 2015); *see also New York*, 681 F.3d at 478 (reiterating that an impact may be dismissed as not significant only if it is "remote and speculative") (citations omitted). These and other issues will form the bases for NRDC's contentions against the Final SEIS SAMA discussion, supported by appropriate expert submissions, in the event this Court determines that, contrary to the Commission's rulings, NRDC is entitled to pursue admissible SAMA contentions against this portion of the Final SEIS, which it has been precluded from pursuing to date. *See, e.g.*, Pet. Br. at 19 n.10 (citing Orders precluding NRDC from presenting SAMA contentions); *Cf. Gerber* 294 F.3d at 182-84 (finding plaintiff is entitled to have its concerns addressed by the agency, despite agency's "post hoc" claim that those concerns would not have changed the outcome).

F.3d 659, 664 (D.C. Cir. 2014) (deeming a regulation unlawful where inconsistent with applicable statute). [20]

IV. THE CHOURT SHOULD VACATE THE RENEWED LIMERICK LICENSE PENDING CONSIDERATION OF NRDC'S CONTENTIONS.

The Commission ignores Petitioner's request for relief, but Intervenors argue that at most a remand is appropriate. Exelon Br. at 34-37. To the contrary, it is well-established that vacatur is the presumptive remedy for the legal violation at issue here, *see* Pet. Br. at 51 (citing precedents), and Intervenor does not demonstrate otherwise. *See also FiberTower Spectrum Holdings LLC v. FCC*, 782 F.3d 692, 694 (D.C. Cir. 2015) (vacating and remanding Commission orders "so the Commission can rule on" the issues before it "based on an accurate understanding of the record"). Indeed, given that this Court had no difficulty

[20] While Exelon passingly suggests NRDC is raising arguments for the first time, Int. Br. at 33, in fact NRDC has always maintained that the Commission's regulatory scheme cannot be applied to bar NRDC's contentions, and that such an interpretation would be inconsistent with statutory requirements. *See, e.g.*, NRDC Waiver Pet. at 13-14 (JA 242-43) (arguing that reading the regulations to preclude a hearing "would violate NEPA"). It is also perfectly appropriate for NRDC to raise this argument at this time, when the Commission's scheme is being applied in violation of NRDC's rights to participate under NEPA and the Atomic Energy Act. *See, e.g.*, *Independent Cmty. Bankers v. Fed. Reserve*, 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, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits.") (citations omitted).

vacating the Commission's Waste Confidence Determination concerning spent nuclear fuel upon finding further NEPA review required, *New York*, 681 F.3d at 483, an outcome that had immediate bearing on the licensing process for many plants, *see*, *e.g.*, LBP-14-15 at 4-5 (Oct. 7, 214) (JA 400-01) (discussing impact of the ruling in the Limerick proceeding), there is no basis for a different result here, particularly given that vacatur will have no disruptive effects. *See* Exelon Br. at 37 n.123 (explaining that the plant would operate under the original license in the event of vacatur); Pet. Br. at 51 (explaining the existing license extends for more than a decade).

CONCLUSION

The Petition for Review should be granted.

Respectfully submitted,

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May 21, 2015

CERTIFICATE OF COMPLIANCE
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I hereby certify that the foregoing Reply Brief for Petitioner Natural Resources Defense Council, Inc. contains 6,919 words excluding the parts of the brief exempted by the Federal Appellate and Circuit Rules.

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2015, undersigned counsel for Petitioner Natural Resources Defense Council, Inc. filed the foregoing Reply Brief For Petitioners 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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