UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
EXELON GENERATION COMPANY, LLC	)	**Docket No. 50-352-LR**
	)	**Docket No. 50-353-LR**
(Limerick Generating Station, Units 1 and 2)	)	

January 27, 2012

(License Renewal Application)

NATURAL RESOURCES DEFENSE COUNSEL ("NRDC")
COMBINED OPPOSITION TO MOTIONS TO STRIKE

INTRODUCTION

On November 22, 2011, the Natural Resources Defense Council ("NRDC") filed its Petition to Intervene and Notice of Intention to Participate ("Petition"), proposing four contentions. The four contentions were fully and adequately supported by bases and supporting evidence, including a Technical Declaration submitted by three NRDC experts supporting Contention 1-E, 2-E and 3-E and a separate expert Declaration by Christopher Paine supporting Contention 4-E.[1] In response Exelon filed its Answer Opposing NRDC's Petition to Intervene (Dec. 20, 2011) and the Nuclear Regulatory Commission Staff ("NRC Staff") filed its Answer to Natural Resource [sic] Defense Council Petition to Intervene and Notice of Intention to Participate (Dec. 21, 2011). These Answers totaled 126 pages and, as noted in NRDC's Combined Reply to Exelon and NRC Staff Answers to Petition to Intervene ("Combined

[1] NRDC also submitted Declarations in support of its standing to participate, an issue not in controversy.

Reply"), dated January 6, 2012, a substantial portion of those 126 pages "raise arguments that primarily address the merits of NRDC's contentions rather than their admissibility." Combined Reply at 2.

In its Combined Reply, NRDC addressed arguments raised by Exelon and NRC Staff in their answers, rebutting factual and legal assertions advanced by them. The Commission has held that "[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition *or raised in the answers to it.*" *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)(emphasis added). It has also held "[n]ew bases for a contention cannot be introduced in a reply brief." *Id.* Although the Motions to Strike assert that these restrictions have been violated, as the following discussion makes clear, Exelon and NRC Staff either misrepresent or misperceive NRDC's Combined Reply and misapply the Commission's precedents. NRDC's Reply did not seek to add bases to its Contentions and the objections raised in the Motions to Strike, even if valid - which they are not - object to the addition of supporting evidence. As explained below, these additions, which are not required to make the Contentions admissible, were necessitated by the Answers which raised challenges to the merits of the Contentions and their bases.

The underlying rationale for restrictions on the scope of a Reply is one of fairness to the other parties. *Palisades*, CLI-06-17, 63 NRC at 732. However, where, as here, the other parties stray far beyond the narrow scope of permissible Answers to challenge not merely the admissibility of a contention, but the underlying factual and legal support for the contention, a Petitioner may, as has NRDC in this case, respond as a matter of fairness to those challenges by meeting factual and legal misstatements with factual and legal accuracy.

We have included, as Attachment 1, a Table that expands upon the Table provided by Exelon in its Motion. Exelon Motion to Strike ("Exelon Motion") at 5-9. The expanded Table demonstrates the appropriateness of NRDC's Reply by identifying arguments in the Reply that were already raised in the Petition to Intervene and focuses on arguments on the merits advanced in the Answers to which the Reply responds. Contrary to the arguments advanced in the Motions to Strike, the Reply does not seek to present new support for the Petition to Intervene, except to the extent it responds to challenges on the merits to the proposed contentions, but rather focuses on arguments already made in the Petition to Intervene or arguments advanced in the Answers and rebuts them. Each challenged portion of the NRDC Reply directly rebuts an assertion made in the Answers or is an argument already advanced in the Petition to Intervene.[2]

LEGAL FRAMEWORK

The issue before the Atomic Safety and Licensing Board is whether NRDC's four Contentions are admissible. Their admissibility depends upon compliance with the requirements

[2] Had the Answers been limited to assertions that the Proposed Contentions, Bases and Supporting Evidence failed to meet the requirements of 10 C.F.R. § 2.309(f)(1), NRDC's Reply would have been limited to citing to its Petition to Intervene and arguing why it met the regulatory standards. However, once the Answers began to challenge the substance of the statements and declarations contained in the Petition to Intervene, essentially to join issue with the statements and declarations, NRDC had every right to rebut those challenges. The situation is analogous to Motions to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure where a movant's attempt to address the merits of the allegations in the Complaint converts the Motion into a Summary Judgment Motion. *See e.g. Camp v. Brennan*, 219 F.3d 279, 280 (3d Cir. 2000)("Because the district court went beyond Camp's Complaint (as do we) to consider the evidentiary matters just discussed, any Fed. R. Civ. P. ("Rule") 12(b)(6) attack is converted into one under Rule 56.") Without any disclosures of documents and prior to a ruling on the admissibility of contentions, it is premature to even consider Summary Disposition but to the extent the Answers raise factual disputes, NRDC is entitled to Reply.

of 10 C.F.R. § 2.309(f)(1). The most relevant of those requirements, to the Motions to Strike, are §§ 2.309(f)(1)(i)(ii) and (v) since the thrust of the Motions is an allegation that NRDC used its Reply to either bolster inadequate bases or inadequate supporting evidence. However, the Motions ignore the well-established principles that govern admissibility of contentions:

> An admissible contention must include not only a "specific statement of the issue of law or fact to be raised or controverted," but also a "brief explanation of the basis for the contention." When the contention admissibility standards were revised in 1989, the Commission commented that "a petitioner must provide some sort of minimal basis indicating the potential validity of the contention." This "brief explanation" of the logical underpinnings of a contention does not require a petitioner "to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention."
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> ***
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> Determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is, however, distinct from what is required to support the petitioner's case at a hearing on the merits. The petitioner does not need to prove its contention at this stage in the proceeding. While the petitioner must present adequate support and demonstrate a genuine issue of material fact, the amount of support required to meet the contention admissibility threshold is less than is required at the summary disposition stage. And, as with a summary disposition motion, a "Board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner."

Northern States Power Co. (Prairie Island Nuclear Generating Plants Units 1 and 2), LBP-08-26, 68 N.R.C. 905, 915 and 917 (2008) (footnotes and citations omitted). NRDC's Petition to Intervene and proposed contentions fully meet these standards. However, in their Answers to the Petition to Intervene, Exelon and NRC Staff went beyond a challenge to NRDC's compliance with these admissibility standards and challenged the underlying merits of the alleged bases and supporting evidence. Those Answers warranted NRDC elaborating on supporting evidence for

its contentions. NRDC did not elaborate on the bases for any of its contentions. This distinction was ignored by the Motions to Strike which repeatedly referred to NRDC's elaboration of its supporting evidence as attempts to add to the bases for the contentions. *See, e.g.* NRC Staff Motion at 1-2. This is not merely a semantic disagreement since, if NRDC sought to expand bases, but not supporting evidence, it would arguably have to demonstrate compliance with 10 C.F.R. § 2.309(c). However, there is no restriction on expanding on supporting evidence without having to seek leave under § 2.309(c), a policy that makes eminent good sense given both the automatic disclosure requirements of 10 C.F.R. § 2.336 and the unwieldy pleadings that would occur should a motion have to be filed every time new information became available to an intervenor. In addition, NRDC does not need additional supporting evidence for its Contentions, which were adequately supported in the initial Petition to Intervene.

However, it is apparent that Motions to Strike have become *de rigeur* for applicants and NRC Staff seeking to exclude contentions from licensing hearings. But their proliferation is no justification for the filing of them where there is no substantial basis for the allegations used to support the motion. In all but a few cases, such motions are either deemed moot because the contentions are admissible or inadmissible without regard to whether allegedly objectionable material in the reply is considered, or are granted, only with regard to attempts to add additional declarations in support of the contentions or seeking to add new contentions. *See, e.g. Luminant Generation Company, LLC* (Comanche Peak), LBP-09-17, 70 N.R.C. 311, 324 (2009); *Northern States Power Co. (formerly Nuclear Management Company, LLC)* (Prairie Island Nuclear Generating Plant, Units 1 and 2) LBP-08-26*,* 68 N.R.C. 905*,* 922 (2008).

In this case, the Motions to Strike are baseless. The Motions either (1) ignore clear

evidence that the Reply legitimately elaborated on a matter raised in the initial Petition to Intervene and Declarations or (2) responded to an argument presented in the Answers. Neither Answer merely rested on an assertion that the Proposed Contentions failed to include the relevant bases or supporting evidence. Rather, each Answer went on to seek to demonstrate that NRDC was wrong, on the merits, when it asserted a basis or offered supporting evidence. Having eschewed a narrow attack in favor of a wide ranging challenge, neither Exelon nor NRC Staff have a legitimate basis to object when NRDC joins issue on the merits of that attack.

ARGUMENT[3]

I. The Motion to Strike Portions of the Reply Related to Contentions 1 and 3 Have No Merit

Exelon complains that NRDC did not specifically cite the provisions of the Administrative Procedure Act when it noted the fact that the legal status of the 1989 SAMDA had never been adjudicated (Petition to Intervene at 31, n. 9) and thus NRDC should be prohibited from including that citation in response to Exelon's assertion that the Statement of Considerations accompanying the 1996 License Renewal Environmental Regulations were essentially incorporated into 10 C.F.R. § 51.53(c)(3)(ii)(L). Exelon Answer at 18-19. However,

[3] Although Exelon raises a couple of complaints about NRDC's Reply as it relates to Contentions 1-E and 3-E, the bulk of its challenge is to NRDC's Reply with regard to Contention 4-E. NRC Staff devotes all of its objections to the Contention 4-E Reply. Since NRC Staff's objections to portions of the Reply are essentially the same as those raised by Exelon, this pleading addresses the arguments raised by Exelon and uses an expanded version of its Table to illustrate the failings of both Motions. *See* Attachment 1. NRDC's response to the Motion to Strike the Contention 1-E and 3-E Reply is included in the Table and briefly discussed below. Responses to the Motions to Strike the Contention 4-E Reply are also included in the Table. A more extended discussion is warranted because the Motions seriously distort that Contention.

for the first time in its Answer[4], Exelon argued that 10 C.F.R. § 51.53(c)(3)(ii)(L) not only established a general rule but explicitly applied that rule to Limerick. NRDC had no need to address the issue unless, and until, Exelon and/or NRC Staff argued that a portion of the statement of considerations for a regulation acts to amend the language of the regulation itself.

Exelon asserts that NRDC in its Reply argued for the first time that the collective radiation dose of the population within 10 miles of the plant was significant because the close-in population would be more vulnerable. Exelon Motion at 5. Exelon ignores the first basis asserted for Contention 1-E that stated the ER "misinterprets and/or misuses new information regarding increased population in the area within 10 miles of the plant and thus fails to account for the significant increase in total person-rems of exposure that could occur in the event of a severe accident . . . thus the ER substantially understates or fails to analyze the potential adverse impact in terms of person-rems of collective exposure from a severe accident at Limerick." Petition to Intervene at 16.

Finally Exelon asserted that NRDC added a new regulatory citation in support of Contention 3-E in its Reply when it referenced 10 C.F.R. 51.53(c)(3)(iii). Exelon Motion at 6. Exelon ignores the fact that Contention 3-E incorporated by reference the deficiencies identified in Contention 2-E as supporting Contention 3-E. Petition to Intervene at 31. Contention 2-E alleged, *inter alia*, that the 1989 SAMDA analysis was deficient because it "fails to comply with 10 C.F.R. §§ 51.45, 51.53(c)(2) and 51.53(c)(3)(iii)". Petition to Intervene at 19.

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[4] Although Exelon references Federal Register issuances in its ER (*see e.g.* ER at 1-2, 1-3 and 3-22) it never cites the Federal Register for the proposition that the Commission has specifically exempted Limerick from SAMA requirements. *See* ER at 4-49 and 5-4 to 5-9.

II. The Motions to Strike Portions of The Reply Related to Contention 4-E Have No Merit

A. Contention 4-E is Admissible

Contention 4-E is a contention of omission. It is a contention of omission because in place of a dedicated discussion of the No Action Alternative, the ER incorporates by reference the results of its tightly circumscribed consideration of alternatives for central station power generation to replace Limerick, based on assumptions that are inappropriate for consideration of the No Action Alternative. As NRDC noted in its original filing the "Applicant's Environmental Report (§ 7.2) Fails to *Adequately* Consider the No Action Alternative in Violation of 10 C.F.R. §§ 51.45 (c), 51.53(c)(2) and 51.53(c)(iii)[sic]."[5] Petition to Intervene (Contention 4-E) at 23 (emphasis added). Both the Contention and the supporting Expert Declaration of Christopher Paine identified in the first instance fundamental deficiencies in Exelon's No Action Alternative analysis and reference the GEIS:

- the ER unreasonably misapplies NRC guidance from the 1996 Generic Environmental Impact Statement (GEIS) that limits the set of reasonable alternatives for meeting "a defined generating requirement… to analysis of single, discrete electric generation sources." (GEIS, 1996, cited at ER, 7-2). Paine Declaration at 2-3.

- the required NEPA consideration of "No Action" cannot reasonably be equated with "replacing the generating capacity of LGS," or limited to an analysis of this particular problem. Paine Declaration at 3.

- Unlike consideration of reasonable alternatives to meet the "defined generating requirement" represented by a particular "baseload" nuclear power plant, mandatory consideration of the environmental impacts of the No Action Alternative -- defined as a decision not to relicense LGS Units 1 and 2 -- necessarily involves making an informed projection of the likely

[5] As NRC Staff helpfully noted (NRC Staff Motion at 40, n. 77), this last citation was a typo and should have been 51.53(c)(3)(iii).

portfolio of PJM electricity system resources available in the region served by LGS beginning 13 years and 18 years hence that could reasonably be expected to supply the energy services currently supplied by LGS. These reasonably foreseeable system resources include all forms of Demand Side Management (DSM), waste heat co-generation, combined heat and power, and distributed renewable energy resources, in addition to the "single, discrete electric generation sources" reviewed by the Applicant as reasonable alternatives to extended operation of Limerick's base load capacity. Paine Declaration at 3-4.

- The ER violates 10 C.F.R. § 51.53(c) by failing to thoroughly consider the environmental impacts and likely consequences under the No Action alternative of denying relicensing now, 13 years before the existing license for Limerick 1will expire and 18 years before the existing license for Limerick 2 will expire, including the expected growth in demand side management and renewable energy sources, and fails to quantify and balance the environmental costs of those consequences against the environmental costs of relicensing the Limerick reactors, including the properly analyzed cost of a severe accident. Petition to Intervene at 24.

Thus, the core of Contention 4-E, which Staff and Exelon generally did not address in their Answers, is that (1) the ER does not even attempt to justify its claim that the alternatives it considers in the alternatives analysis portion of the ER represent the reasonably likely consequences if the No Action Alternative were adopted; and (2) the ER improperly limits its evaluation of the No Action Alternative by the following statement:

> Unless replacement generating capacity is provided as part of the no-action alternative, a large amount of base-load generation would no longer be available, and the alternative would not equivalently satisfy the purpose and need for the proposed action. For this reason, the no-action alternative is defined as having two components—replacing the generating capacity of LGS and decommissioning the LGS facility. (ER at 7-3)

This was cited in the Paine Declaration at 3. In short, NRDC contends that limiting consideration of the No Action Alternative to "replacing the generating capacity of LGS" is illegal and violates NEPA and NRC regulations and distorts GEIS guidance.

Because Staff and Exelon Answers went beyond challenges to the fundamental bases for Contention 4-E, NRDC addressed issues on the merits rather than leave those inaccurate assertions unchallenged. The following discussion demonstrates how the scope of the Reply was within the permitted boundaries by either further development of arguments already advanced or responses to arguments on the merits raised in the Answers.

B. The Motions to Strike Misapprehend Contention 4-E

1. Exelon's Motion Misapprehends Contention 4-E

The essence of Exelon's challenge to Contention 4-E in its Answer was the erroneous assumption that NRDC is alleging that Exelon failed to include any discussion of renewable energy and DSM in its ER. Exelon Answer at 58 ("[t]he contention also is inadmissible because the ER contains the very information regarding renewable energy resources and DSM that NRDC alleges is missing"). The bulk of the Exelon Answer is focused on demonstrating that it did discuss these matters while ignoring the core of Contention 4-E. Specifically, the contention alleged that Exelon omitted consideration of likely consequences of license renewal denial other than creating alternative large scale generating capacity to meet the same energy needs met by Limerick. Further, even when Exelon discussed renewable energy and DSM, it did so by testing their feasibility against the assumed need to replace Limerick's generating capacity with a similar large scale generating system.

Finally, as NRDC alleged, the ER analysis of the No Action Alternative, was focused wholly on replacing the generating capacity of Limerick, and thus omitted any consideration of the likely consequences of 13 to 18 years of lead time to prepare for Limerick shutdown. ER at 7-3 ("the no-action alternative is defined as having two components—replacing the generating

capacity of LGS and decommissioning the LGS facility.") This distorted focus of the No Action Alternative and the omission of a proper discussion of the No Action Alternative caused by Exelon's assumption that the only consequence of denial of license renewal would be "replacing the generating capacity" of Limerick, was one of the bases for Contention 4-E. Exelon also assumed that because it had some discussion of some renewable energy and DSM in its "alternatives" discussion, it had met its duty to evaluate the likely consequences of the No Action Alternative. NRDC challenged the omission of any evidence or analysis of the likely consequences of denial of license renewal. Rather than demonstrate where the ER had actually considered the likely consequences of denial of license renewal, which would have been a way to challenge Contention 4-E on the basis that the claim of omission was erroneous, Exelon choose instead to argue about the merits of its discussion of alternatives, claiming that its discussion of alternatives represented the necessary discussion of the likely consequences of license renewal denial, although that claim was never supported by any evidence or analysis. Thus, Exelon sought to convert Contention 4-E into a contention challenging the adequacy of the information presented rather than the omission of the necessary analysis of likely consequences. That line of argument by Exelon, which went beyond the scope of NRDC's contention of omission, necessitated NRDC addressing the merits of the alternatives analysis. Asserting that the ER contains the missing information, when it clearly does not, is the kind of merits arguments that must be answered.

2. Staff's Motion Misapprehends Contention 4-E

In both the Motion to Strike and its Answer, NRC Staff misapprehends both Contention 4-E and the requirements for consideration of the No Action Alternative. NRC Staff asserted in

its Answer that "Mr. Paine does not present a viable no-action alternative and does not support his claims." NRC Staff Answer at 50. But, as NRDC alleged, "no action" *itself* is the alternative and the analysis required is an assessment of the likely consequences that will follow if NRC rejects license renewal. Paine Declaration at 3-4. It is the ER that fails to provide a justification for its assertion that the alternatives it examined, including combined alternatives, are either viable or likely consequences of license renewal denial 13 to 18 years before Limerick would be shut down. It was never incumbent upon Mr. Paine, in a declaration supporting admission of NRDC's contention, to present the ER's missing analysis, but rather to draw attention to its absence, and to the legal requirement that it be provided.

NRC Staff's misapprehension of the issue then leads it to engage in an extended argument about why the electricity generation "alternatives" analyzed in the ER represent full consideration of what is required for the No Action Alternative analysis. NRC Staff Answer at 48-51. It is those arguments by NRC Staff and similar arguments by Exelon (Exelon Answer at 63-66) that led to NRDC's focus on the adequacy of the specific energy generation alternatives discussed in the ER. Without those arguments from Exelon and NRC Staff, NRDC would have rested its case on the central allegations that (1) Exelon failed to properly evaluate the consequences of the No Action Alternative because it arbitrarily assumed that if license renewal were turned down alternative central station generating capacity of equivalent scale would have to be provided and (2) Exelon failed to provide a rational analysis of why the results it alleged would occur if license renewal were denied - i.e. the "reasonable alternatives" scenarios for energy generation incorporated by reference - represent the likely consequences of denial of license renewal. The ER omitted an analysis of facts of this case, where 13 to 18 years of lead

time will exist *before* Limerick would actually have to shut down.

C. The Motions To Strike Should Be Denied

Although Exelon and NRC Staff Answers assert that NRDC provided no support for its contention or bases, in fact the Declaration of its expert, Christopher Paine and the cited statutory and regulatory provisions, provided ample support. Mr. Paine's analysis was anything but speculative. First, he pointed to the ER discussion of alternatives and the DSM to illustrate the limitations of the ER discussion of the likely consequences of the No Action Alternative. Paine Declaration at 3-4. Then he noted that the ER failed to provide a discussion of the likely consequences of the No Action Alternative and thus the ER failed to provide a basis to justify Exelon's assumption that the "alternatives" it analyzed would be likely to be adopted should license renewal be rejected 13 to 18 years before Limerick would be shut down. *Id*. at 2-3; *see also* NRDC Petition at 24.

The ER does not include an analysis of the likely outcome in the event that license renewal is denied. Rather, it treats selected energy generation technologies as "alternatives" to license renewal, assuming that continuing the Limerick electric output was essential, without ever justifying the assumption that if license renewal were denied, use of those alternatives would be the likely result. As noted above, NRDC focused its Petition to Intervene and the Paine Declaration on this failure of the ER and relied on 10 C.F.R. §§ 51.45 (c), 51.53(c)(2) and 51.53(c)(3)(iii) in support. It was when NRC Staff sought to use the GEIS, particularly Sections 8.1-8.3, which as Exelon correctly notes is only guidance and not binding (Exelon Answer at 69), that NRDC particularly addressed those portions of the GEIS.

In its opposition to Contention 4-E Exelon focused on the fact that it had discussed some

energy alternatives and demand side management ("DSM") in the ER and had cross-referenced them in the No Action Alternative discussion, making it appear that NRDC objected to cross-referencing. Exelon Answer at 63-69. However, Contention 4-E does not object to cross-referencing but rather to the ER insistence on evaluating the viability of renewable energy and DSM as alternatives to the meet the stated purpose of license renewal -- *i.e.* providing ongoing base load capacity -- when the issue urged in Contention 4-E is that this test is wrong, and that the No Action Alternative requires considering the consequences of no action, not alternatives to meet the alleged purpose of the proposed license renewal. NRDC support for this Contention was both the Paine Declaration and the reasoning - not any bald assertions - contained in that Declaration, and in the statutory and regulatory citations to both NRC and Council on Environmental Quality ("CEQ") regulations as well as to NEPA.

The essence of the Motions to Strike portions of NRDC's Reply regarding Contention 4-E is that NRDC should have cited the specific provisions of the GEIS it referenced in its Reply as support for Contention 4-E, in its initial Petition to Intervene and Expert Declaration, even though NRDC had referenced the GEIS as an authority in support of Contention 4-E. Paine Declaration at 2-3, 7. NRC Staff quoted the ASLB for the proposition that "boards do not sit to 'flyspeck' environmental documents or to add details or nuances." *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP), CLI-05-29, 62 NRC 801, 811 (2005). NRC Staff Answer at 48. That sage observation applies with equal force to Motions to Strike which, at most, quibble with NRDC's failure to cite to specific provisions of the GEIS in its Petition and Declaration. We further note that NRC Staff cannot credibly claim to be surprised by NRDC citations to a document it had itself authored and repeatedly cited in its Answer,

Although Exelon asserts in its Motion to Strike that it was unaware of reliance on the GEIS to support Contention 4-E, even though NRDC referenced the GEIS with the same precision used by Exelon in its ER -- *i.e.* a general reference to the GEIS -- in fact Exelon knew exactly what NRDC meant and sought to rebut NRDC's reliance on the GEIS to support the view that DSM must be considered as a reasonable consequence of the No Action Alternative and not as an alternative to replace Limerick's generating capacity. "Reliance on the GEIS is not dispositive because the GEIS itself is clear that, as a guidance document, it carries no binding legal requirement with respect to the alternatives analysis . . ." Exelon Answer at 69 (footnotes omitted). NRC Staff was more direct, devoting several pages to its interpretation of the meaning of the GEIS language regarding the No Action Alternative and relying on that language to challenge Contention 4-E. NRC Staff Answer at 44-51.

In both instances, Exelon and NRC Staff sought to challenge NRDC's Contention 4-E on the merits by arguing that it was acceptable to analyze the No Action Alternative in the manner used in the ER, as if the only choices were between replacing the base load capacity of Limerick or relicensing Limerick, ignoring an evaluation of the likely consequences of the No Action Alternative. For instance, although NRC Staff claimed "[t]he no action alternative, denial of a renewed license, results in removal of base-load nuclear power from the grid and therefore likely requires other electric generating sources, power purchases, or conservation to replace it. See GEIS at 8.1, 8.2" (NRC Staff Answer at 46), it now asserts NRDC is barred from answering those misapplications of the cited GEIS sections in Reply. NRC Staff Motion to Strike at 5-9.

In its Reply, NRDC took issue with the assertions by Exelon and NRC Staff in their Answers regarding the adequacy of the ER discussion of alternatives and its alleged sufficiency

for purposes of the No Action Alternative analysis. NRDC challenged both the assertion that the GEIS provided support for (1) Exelon's distorted perception of its responsibilities and (2) to Exelon and NRC Staff attempts to demonstrate that the truncated and unrealistic discussion of energy alternatives and DSM in the ER represented a discussion that met the requirements of 10 C.F.R. §§ 51.45 (c), 51.53(c)(2) and 51.53(c)(3)(iii).

Neither Exelon nor NRC Staff challenged NRDC's allegation that the ER is deficient because it narrowly confines the analysis of consequences of rejection of license renewal to adoption of large discrete energy generating alternatives. Additionally, neither Exelon nor Staff challenged NRDC's assertion that the ER is deficient for failing to provide an analysis of the *likely* consequences of denial of license renewal. Finally, neither party challenged NRDC's allegation that the ER discussion of the No Action Alternative fails to provide the NRC with "sufficient data to aid the Commission in its development of an independent analysis." 10 C.F.R. § 51.45(c). Rather, Exelon and NRC Staff focused on the argument that the ER analysis of energy alternatives as substitutes for Limerick today was sufficient to meet NRC's NEPA requirements for alternative analyses, disregarding whether those analyses fulfilled the separate requirements for consideration of the No Action Alternative. NRDC has every right to confront these arguments on the merits. If NRC Staff and Exelon did not want NRDC to rebut its arguments, they should not have made merits arguments in the first instance, confining their Answers to the assertion that NRDC had failed to provide sufficient bases or supporting evidence for their contention. Apparently aware of the weakness of that argument, Exelon and NRC Staff went further and opened the door to the NRDC Reply.

CONCLUSION

For all the reasons discussed *supra* the Motions to Strike should be denied.

Respectfully Submitted,

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Filed this 27th day of January, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Natural Resources Defense Council ("NRDC") Combined Opposition to Motions to Strike was served via the Electronic Information Exchange (EIE) on the 27th day of January 2012, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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ATTACHMENT 1

TABLE COMPARING PORTIONS CHALLENGED IN EXELON MOTION TO STRIKE WITH NRDC PETITION TO INTERVENE, NRDC DECLARATIONS AND ANSWERS

Location of New Information in NRDC's Combined Reply	Exelon's Description of New Information	NRDC's Petition To Intervene and Declaration	Exelon Answer	NRC Staff Answer
Contention 1-E • The text on page 19 beginning with "By not notifying the public," through the parenthetical quote ending with "'provide interested persons an opportunity to comment.' (Citations omitted))" on page 20.	These portions of the Combined Reply raise a new legal argument that was not identified in the Petition. The Petition (at 2-3, 31) argued that the 1989 SAMDA in the Limerick FES Supplement could not be relied upon because it was not adjudicated, but NRDC did not provide any legal citation for this argument. In the Combined Reply, NRDC seeks to bolster Contention 1-E by, for the first time, citing the Administrative Procedures Act ("APA") (5 U.S.C. §§ 553(b), 554(b) and 554(c)(2)) as requiring adjudication of the adequacy of the 1989 SAMDA to trigger the exception for Limerick under 10 C.F.R. § 51.53(c)(3)(ii)(L). Neither the Petition nor supporting affidavits mentioned the APA or 5 U.S.C. § 553 or 554.	In the argument portion of the Petition to Intervene, but not in either the bases or supporting evidence, NRDC noted the fact that the legal sufficiency of the 1989 SAMDA had never been adjudicated. Reply at 2-3 and 31 n. 9. That fact is not disputed by Exelon or Staff.	In its Answer Exelon asserted that the statement in the GEIS Statement of Considerations was a binding determination of the status of the 1989 SAMDA. NRDC replied to this assertion, raised for the first time in Exelon's Answer and not asserted in its ER, by arguing that the SOC was not a binding determination because it failed to comply with the APA. That argument was only ripe when Exelon sought to use the SOC statement to avoid having to produce new and significant information relevant to the 1989 SAMDA.	Staff made the same argument. NRDC replied to this assertion in the same manner as it did to Exelon.
Contention 1-E • The text on page 23 beginning with "But that argument misses" and ending with "understating the impact of a severe accident. Id."	These portions of the Combined Reply provide new information and arguments that were not identified in the Petition. Contention 1-E raised arguments regarding the purported inadequacy of Exelon's population estimates in the 10-mile and 50-mile radius surrounding Limerick, but did not assert that collective dose would be more significant within 10 miles of a nuclear reactor site than at other locations. NRDC cites to NRDC E Declaration at 22-30 for support, but those paragraphs of the Declaration do not provide support that the 10-mile radius is the "most vulnerable zone."	A basis for Contention 1-E is that the ER "misinterprets and/or misuses new information regarding increased population in the area within 10 miles of the plant and thus fails to account for the significant increase in total person-rems of exposure that could occur in the event of a severe accident . . . thus the ER substantially understates or fails to analyze the potential adverse impact in terms of person-rems of collective exposure from a severe accident at Limerick". Pet. at 16. The Reply reaffirmed that the mistake in population within ten miles results in "substantially" understating the collective exposures noting that "since a significant component of the human exposure, i.e. collective dose, is expected within 10 miles of the plant, the key figure is the population within that 10 mile zone". Reply at 23. Since the significant component of the dose is within 10 miles, it is the "most vulnerable".		
Contention 3-E • The text on page 37 beginning with "The applicable standard for	This sentence of the Combined Reply provides a new argument and reference that was not identified in the Petition. Contention 3-E in the Petition (at 21-	The legal argument supporting Contention 3-E, specifically referenced all of the deficiencies identified in		

application of the", including the quotation of 10 C.F.R. § 51.53(c)(3)(iii), and ending with "an adequate analysis of severe accident mitigation alternatives."	22) only alleged a deficiency to meet NEI-05-01 Rev. A; it did not discuss or reference 10 C.F.R. § 51.53(c)(3)(iii) as the legal standard for applying the Section 51.53(c)(3)(ii)(L) exception to Limerick. The supporting Declaration also fails to mention Section 51.53(c)(3)(iii) to support Contention 3-E. Discussion of Section 51.53(c)(3)(iii) was limited to Contention 2-E in the Petition	Contention 2-E. "The deficiencies identified in Contention 2-E, coupled with the total failure to consider critical factors that are essential for a valid consideration of mitigation alternatives, as set forth in Contention 3-E, provide ample basis to reject the 1989 FES Supplement as meeting the NEPA standards." Pet. at 31.		

Location of New Information in NRDC's Combined Reply	**Exelon's Description of New Information**	NRDC's Petition To Intervene and Declaration	Exelon Answer	NRC Staff Answer
<u>Contention 4-E</u> • References to Section 8.2 of the GEIS in the following sentences: o The last full sentence on page 53 beginning with "The GEIS outlines the necessary scope" and ending on page 54 with "in a manner that supports NRDC's contention." o On page 55, the phrase "but also fails to consider . . . as called for in the GEIS. GEIS at 8-2." o The second to last full sentence on page 56 beginning with "Moreover, in the case of no action" and ending with the cite "GEIS at 8-2 (emphasis added)." o On page 67, the last full paragraph, beginning with "Finally" and ending with "several of them are not." • References to Section 8.3 & 8.3.14 of the GEIS: o On page 57, beginning with "In fact, the GEIS recognizes" and ending with "municipal solid waste combination 'would be the preferred set of alternatives to replace a single nuclear plant.' GEIS at 8-16"; and the third and fourth full sentences on page 66 that discuss and contain references to Section 8.3 of the GEIS beginning with "However, as already noted" and ending with "and 'commercially viable.'". o On the bottom of page 69, references to and discussion of Section 8.3.14 of the GEIS, beginning with: "But this contravenes the findings of the GEIS" ending with ". . . nuclear plant'(GEIS at 8.3.1.4).."; and the last full sentence on page 71 beginning with "The GEIS assumes" and ending with ". . . nuclear plant. GEIS at 8.3.14.". • General, new references to the GEIS: o The phrase "which is governed by other GEIS determinations" on the top of page 57. o On page 70, the phrase "and cited to portions of the GEIS that Exelon failed to follow", and the last full sentence beginning with "But, contrary to NRC Staff's" and ending with "No Action Alternative.".	These portions of the Combined Reply provide new arguments and references to the GEIS to support Contention 4-E. When referring to the GEIS, the Petition (at 24) and the Paine Declaration (for example, paragraph 4) limit their arguments to the GEIS' guidance of limiting an alternative to "analysis of single, discrete electric generation sources." They cite to no other portions of the GEIS to support their arguments. Contention 4-E, however, now references other portions of the GEIS. This includes the guidance that an alternative be "technically feasible and commercially viable" (GEIS, § 8.1), discussion of the No-Action Alternative (GEIS, § 8.2), preferred sets of alternatives (GEIS, § 8.3) and conservation technologies (GEIS, § 8.3.14). Contention 4-E, as initially proffered, nowhere mentions these sections of the GEIS or otherwise quotes or references those sections of the GEIS on which NRDC now belatedly relies. Furthermore, the Petition unambiguously characterized Contention 4-E as a contention of omission (Petition at 31), and now NRDC contends for the first time that the ER's existing discussion of reasonable alternatives and demand-side management ("DSM") contravenes the findings of the newly-cited provisions of the GEIS.	NRDC made reference to the GEIS in support of Contention 4-E. The Paine Declaration cites the GEIS in his decl. on pg. 7, and lists it as a Reference. *Id*. at 7. However, both Exelon and the NRC Staff cited and quoted from Sections in part 8 of the GEIS in their Answers. NRDC's Reply addressed this GEIS reliance and demonstrated how Exelon and NRC Staff were misapplying the GEIS. In addition, Exelon and NRC Staff made arguments on the merits in an attempt to defend the ER discussion of the no-action alternative which arguments were rebutted by NRDC by, in part, citation to portions of the GEIS. Exelon and NRC Staff attempted to justify the discussion of alternatives in the ER as fulfilling the obligation to consider the likely consequences of the no-action alternative and attacked NRDC for not challenging those specific discussions. Exelon Answer at 61-63; NRC Staff Answer at 48-51, However, Contention 4-E was not focused on the inadequacy of the analysis of the chosen alternatives but on the method by which they were chosen – i.e. only alternatives that would meet the same need as Limerick and without any consideration of whether they would represent likely consequences of license renewal denial.	Exelon Answer refers to Section 8.2 of the GEIS on pg. 68: "The Board in Indian Point interpreted Section 8.2 of the GEIS to mean that the No-Action alternative must consider the market's response to denial of the license renewal application — specifically, the possibility of increased energy conservation measures."	The NRC Staff Answer references and quotes from Sections 8.0, 8.1, 8.2 and 8.3 of the GEIS. The NRC Staff Answer references the GEIS Sections 8.0 and 8.1 on page 42. On page 44, the NRC Staff Answer quotes from Section 8.1 of the GEIS: "To determine alternatives to license renewal, the GEIS defines the purpose and need of the action as providing "an option that allows for power generation capability beyond the term of a current nuclear power plant operating license to meet future system generating needs" as such needs may be determined by state, utility, or federal regulators. GEIS at 8.1" Also on page 44, the NRC Staff Answer quotes from Section 8.2 of the GEIS: "Accordingly, the GEIS identifies the no-action alternative for license renewal as "denial of a renewed license." GEIS at 8.2." On page 47 of the NRC Staff Answer, the GEIS Section 8.3 is quoted: As the GEIS recognizes, the environmental impacts of alternative energy sources such as those as analyzed in Section 8.3 of the GEIS are "equally applicable to the no-action alternative in that the alternatives analyzed in this section are all possible actions resulting from denial of a renewed license."

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<u>Contention 4-E</u> • On page 55, the first full sentence beginning with "Items 1, 2, and 3" and ending with "as described in the GEIS"; and the phrase "but also fails to consider a 'combination of these different outcomes' as called for in the GEIS. GEIS at 8-2", which discuss combinations of resources. • The second to last full sentence on page 56 beginning with "Moreover, in the case of no action" and ending with the cite "GEIS at 8-2 (emphasis added)"; and the sentence on page 57 beginning with "The GEIS goes on to postulate" and ending with the cite "GEIS at 8-16", which discuss combinations of resources under the No-Action alternative. • The phrases "combinations of" and "with conventional nonrenewable technologies" at the bottom of page 57. • The text on page 62 beginning "(a) to comply with existing PJM-area state renewable mandates" and ending with the word technologies" on the top of page 63.	These portions of the Combined Reply provide new arguments and information that were not identified in the Petition. NRDC asserts for the first time in the Combined Reply that the ER omitted discussion of combinations of the PJM energy portfolio and other resources, and provides new facts as to what Exelon should have considered in its ER. This is the first time NRDC has raised the purported missing discussion of combinations (other than a single ambiguous reference in the Paine Declaration to "combined heat and power"), including DSM combined with conventional nonrenewable technologies. And this is the first time that NRDC argued facts related to other factors that Exelon should have considered, such as evolution of gas prices.	This objection is, at best, semantic. What the Paine Declaration said was that ER failed to make "an informed projection of *the likely portfolio of PJM electricity system resources* available in the region served by LGS beginning 13 years and 18 years hence that could reasonably be expected to supply the energy services currently supplied by LGS". Paine Declaration at 3-4 (emphasis added). There is no difference between a portfolio of system resources and a combination of alternatives. The factual discussion in the Reply was responsive to Exelon's attempt to prove that it had considered "reasonable alternatives."	Exelon Answer on page 52: "And Exelon evaluated the environmental impacts of combinations of generation sources, including combinations of renewable energy sources as reasonable alternatives by 2024." And in a footnote on page 57: "Contrary to NRDC's assertion, the power generation alternatives considered in the ER are not limited to "single discrete generation sources". See ER at 7-13 to 7-15 (considering several combinations of renewable energy sources as reasonable alternatives)."	NRC Staff Answer at 44: "Because denial of a license renewal 'as a power generating capability may lead to a variety of potential outcomes,' the GEIS states that the no-action alternative should include 'selection of other electric generating sources to meet energy demands' or 'conservation measures and/or decisions to import power, or 'a combination of these different outcomes.'" (Quotation marks as provided in the original)
<u>Contention 4-E</u> • The first full paragraph on page 56, beginning with "While employing" and ending with "playing a larger role in the future." • The first full paragraph on page 61 beginning with "In the introduction to its alternatives analysis" and ending with "would do so. ER at p. 7-10."; and the second full sentence on page 65 beginning with "On the contrary" and ending with "'not 'feasible' and indeed, 'speculative'", which discuss the ER's use of hypothetical scenarios in its alternatives analysis.	These portions of the Combined Reply provide new arguments and information that were not identified in the Petition. Contention 4-E as submitted in the Petition does not challenge any aspect of the ER's consideration of reasonable alternatives, including the use of hypothetical scenarios.	Contrary to these assertions, the arguments are not new but respond to contrary arguments by NRC Staff and Exelon to the following statement in the . Paine decl. at pg.4: "The ER's analysis of the No Action Alternative fails to consider the environmental impacts of this reasonably foreseeable portfolio of PJM system resources, and thus fails to make the required comparison between the environmental impacts of No Action and the continued operation of LGS for an additional 20 years." Pet. at 23: "The ER violates 40 C.F.R. § 1502.14(d) and 10 C.F.R. Part 51, Subpart A, Appendix A, § 4, by improperly and illogically narrowing discussion of the No Action alternative…"		

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Contention 4-E • The phrase "decentralized and" in the second full sentence on page 56; and the phrase "massive but wildly unrealistic centralized" on page 57. • All but the first paragraph of Section III.B.4 of the Combined Reply, beginning on page 58, challenging the ER's discussion of and conclusions regarding reasonable alternatives, including solar photovoltaic generation. • The phrase on the top of page 61: "nor do they plausibly represent the way in which these resources will be deployed and integrated in the future if relicensing is denied". • The paragraph beginning "As noted above" on the bottom of page 61 through the sentence ending "to assume a portion of the system load now served by LGS" on the middle of page 62, discussing solar photovoltaic generation and battery storage systems. • The phrase "either alone or in combination with distributed renewable generation or other electricity resources, such as natural gas-fired generation or Canadian hydropower imports" on the bottom of page 69.	These portions of the Combined Reply provide new arguments and information that were not identified in the Petition. Instead of confronting directly the substance of the ER discussion on renewable energy alternatives and DSM, NRDC's general approach in the Petition was to insist that the ER omitted these subjects. Now that the NRDC has realized that these alternatives were actually cross-referenced in the discussion of the No-Action Alternative, it contends that the existing discussion of the purported missing information is not adequate, in an attempt to rehabilitate its deficient contention of omission. In addition, the new claims in the Combined Reply relating to decentralized generation, solar photovoltaic energy, wind energy, battery storage systems, natural gas-fired generation and Canadian hydropower imports impermissibly expand Contention 4-E to the point that it barely resembles the original contention contained in the Petition.	Paine acknowledges that the ER contains analysis of discrete replacement sources for Limerick but does so without providing an analysis that the demonstrates those resources and combinations are the reasonably likely results of the No Action Alternative: Paine decl. pg. 3: "Unlike the Applicant's selection of individual utility-scale power plant alternatives that it subjectively deems reasonable and appropriate to its own business purpose of generating and selling electricity to replace LGS…" And Paine decl. pg. 4: "in addition to the "single, discrete electric generation sources" reviewed by the Applicant as reasonable alternatives to extended operation of Limerick's base load capacity." Thus, the Paine Declaration highlights the omissions in the ER – failure to demonstrate that the scenarios discussed are reasonable and only consideration of alternatives that will meet Limerick's current generating capacity.		
Contention 4-E • On page 63, the text beginning "thereby providing a *bona fide* basis" through the end of the paragraph ending "minimize environmental harm'."	This portion of the Combined Reply provides a new argument and legal reference that was not identified in the Petition. Contention 4-E in the Petition did not discuss or reference 10 C.F.R. § 51.103(a)(4) as a legal standard for analysis of the No-Action Alternative.	NRDC used almost identical language to 51.103: "The ER violates 10 C.F.R. § 51.45(c) because it unreasonably and arbitrarily limits its analysis of the No Action alternative in a manner that fails, "to the fullest extent practicable, [to] quantify the various factors considered" and neglects discussion of "important qualitative considerations or factors that cannot be quantified." Paine Expert Decl. at ¶¶ 4-10." – Pet. at pg. 23.	In fact Exelon answer refers to 10 C.F.R. § 51 in its entirety: "Part 51 codifies a standard that federal courts have applied consistently in reviewing agency environmental impact statements." Exelon answer at 59.	