

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
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)	)	
(License Renewal Application)	)	
		July 9, 2012

**NRDC’S MOTION FOR LEAVE TO FILE A NEW CONTENTION  
CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF  
NUCLEAR WASTE AT LIMERICK**

**A. Introduction**

Pursuant to 10 C.F.R. § 2.309(f)(2) the Natural Resources Defense Council, Inc. (“NRDC”) seeks leave to file the accompanying new contention. The contention is based on the United States Court of Appeals for the District of Columbia Circuit’s recent decision in the matter of *New York. et al.v. NRC*, No. 11-1045 (consolidated with D.C. Cir. Nos. 11-1051, 11-1056, 11-1057) (June 8, 2012) (hereinafter the “Waste Confidence Decision”), which vacated NRC’s Waste Confidence Decision Update (“WCD”), Temporary Storage Rule (“TSR”) and the major portions of 10 C.F.R. § 51.23(a) upon which Exelon relied in issuing the Environmental Report (“ER”) in support of its license application. The decision is attached to this motion.

NRDC recognizes that because the mandate has not yet issued in the Waste Confidence Decision, consideration of this contention may be premature. Nevertheless, NRDC submits the contention within 30 days of becoming aware of the court’s ruling, in light of Commission precedents judging the timeliness of motions and contentions according to when petitioners

became aware of a decision's potential effect on their interests. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002). If the Atomic Safety and Licensing Board or Commission determines that this contention is premature and that the mandate must issue before consideration, NRDC requests that consideration of the contention be held in abeyance pending issuance of that mandate.

**B. The Contention Meets All the Requirements of 10 C.F.R. § 2.309(f)(2)**

The contention meets the requirements of 10 C.F.R. § 2.309(f)(2) for admissibility, which states in pertinent part:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

*Id.*

**1. The Information Was Not Previously Available and Is Materially Different Than Previously Available Information**

Since this contention is based upon on the DC Circuit's Waste Confidence Decision, issued June 8, 2012, the contention relies on information not previously available and thus meets the first prong of the test set forth in 10 C.F.R. § 2.309(f)(2)(i).

**2. The Information Is Materially Different Than Previously Available Information**

Until June 8, 2012, 10 C.F.R. § 51.23(a) provided that NRC had confidence that a mined geologic disposal site for spent nuclear fuel would be available when necessary and that no adverse environmental impacts would be associated with the continued storage of spent fuel at

power reactor sites for 60 years after cessation of operation. *See* 10 C.F.R. § 51.23(a); 75 Fed. Reg. 81037 (Dec. 23, 2010). Based on that confidence, memorialized in five “Waste Confidence Findings,” NRC promulgated 10 C.F.R. § 51.23(b), which stated that

as provided in §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95 and 51.97(a), and within the scope of the generic determination in paragraph (a) of this section, no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license . . . is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear reactor.

10 C.F.R. § 51.23(b). The predecessor of the current version of § 51.23(a) and the limitations on the scope of environmental impact statements in § 51.23(b) are reflected in the 1996 Generic Environmental Impact Statement (NUREG-1437) and 10 C.F.R. Part 51, Appendix B, Table B-1.

On October 9, 2008, the Commission issued a draft rule revising the waste confidence findings. With respect to Waste Confidence Finding Two, NRC proposed “remov[ing] its expectation that a repository will be available by 2025” and acknowledged that its previous finding that sufficient disposal capacity would be available within 30 years after any reactor’s licensed life “is not supportable.” *See* 73 Fed. Reg. 59551, 59558, and 59561 (Oct. 9, 2008). At the same time, the NRC also stated that it “retains confidence that spent fuel can be safely stored with no significant environmental impact until a repository can reasonably be expected to be available and that the Commission has a target date for the availability of the repository in that circumstance.” *See* 73 Fed. Reg. 59558.

The NRC also proposed revising Waste Confidence Finding Four to state that waste could be safely stored on-site for 60 years beyond the licensed operating life of a facility. 73 Fed. Reg. at 59551. The NRC also proposed amending 10 C.F.R. § 51.23 to reflect these revised

policies, stating in an open-ended fashion and without a date certain (*i.e.*, without even the 60-year reference from its proposed Finding Four revision) that “spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations until a disposal facility can reasonably be expected to be available.” 73 Fed. Reg. 59547 (Oct. 9, 2008)(“Temporary Storage Rule”).

In a proceeding concerning the continued viability of the Temporary Storage Rule at *Entergy Nuclear Operations, Inc.*, (Indian Point Units 2 and 3), Memorandum and Order (Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater’s Motion for Leave to Admit New Contentions) (Feb. 12, 2010) the ASLB requested:

... the Commission to advise the Board whether we should: (1) defer ruling on Clearwater’s Motion until the Commission undertakes an evaluation of the impact, if any, that these recent developments will have on the viability of the Commission’s Waste Confidence Rule; (2) rule on Clearwater’s pending motion consistent with the current language of Section 51.23; (3) admit Clearwater’s new contentions notwithstanding Section 51.23; or (4) take some other action to be specified by the Commission.

Slip op. at 2.

On July 8, 2010, in response to the Board’s certified question, the Commissioners directed the ASLB to reject the Clearwater contentions. *Entergy Nuclear Operations, Inc.*, (Indian Point Units 2 and 3), 72 N.R.C. 98, CLI-10-19, Memorandum and Order, (July 8, 2010).<sup>1</sup> The Commissioners stated:

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<sup>1</sup> NRC Commissioner Apostolakis did not participate in the ruling on this matter.

We are continuing our deliberations on the waste confidence update, and in any event will not conclude action on the Indian Point license renewal application until the rulemaking is resolved.

72 N.R.C. at 99.

NRC issued the final Waste Confidence Decision Update and Temporary Storage Rule on December 23, 2010. 75 Fed. Reg. 80132-37 (Dec. 23, 2010); 75 Fed. Reg. 80137-76 (Dec. 23, 2010). In February 2011 a coalition of environmental groups led by NRDC and a coalition of states led by New York challenged the Waste Confidence Decision Update and the Temporary Storage Rule respectively, in the D.C. Circuit. Those legal challenges were consolidated and heard together. On June 8, 2012, the D.C. Circuit vacated the Waste Confidence Decision Update and the Temporary Storage Rule as violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. 4321 *et seq.*

This information is materially different than previously available information: previously, a regulation was in place barring consideration of the impacts of on-site storage of nuclear waste in the post-operation period and the feasibility of ultimate disposal and the associated impacts if that disposal never comes to pass. And now there is no such legal bar in place. As such, reliance by Exelon’s on the WCD and TSR are misplaced and any NEPA analysis by the Staff must include a discussion of the impacts of on-site storage of nuclear waste in the post-operation period and the environmental impacts of nuclear waste disposal as directed by the DC Circuit. On this precise point the DC Circuit held “[t]he WCD must be vacated as to its revision to Finding 2 because the WCD fails to properly analyze the environmental effects of its permanent disposal conclusion.” *New York, et al. v NRC*, \_\_\_ F.3d. \_\_\_ (DC Cir. 2012), Slip op at 11.

**2. The Amended Or New Contention Has Been Submitted In A Timely Fashion Based On The Availability Of The Subsequent Information.**

This new contention has been submitted in a timely fashion based on the availability of the subsequent information. As discussed above, the D.C. Circuit filed the Waste Confidence Decision on June 8, 2012. In its May 7, 2012 scheduling order, the Board stated:

[A] party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2) or a motion for leave to file a nontimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1).

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For purposes of this proceeding, as the parties have proposed, any contention filed within 30 days of the availability of the information upon which it is based shall be deemed “timely” under 10 C.F.R. § 2.309(f)(2).

Scheduling Order (May 7, 2012) at 7-8.

This contention is timely submitted within the Board’s 30-day period from the date of the D.C. Circuit’s decision. Thus, the proposed contention meets all the requirements of 10 C.F.R. § 2.309(f)(2).

**C. The Contention Meets All the Requirements of 10 C.F.R. § 2.309(f)(1)**

**1. The Contention Is Within the Scope of License Renewal**

The NRC must comply with NEPA, and the NRC’s own NEPA regulations, before it can issue a renewed operating license. See 10 C.F.R. §51. A prerequisite to NRC compliance with these mandates is that an Applicant must submit ER that addresses all the issues that Staff will ultimately be required to address. 10 C.F.R. §§ 51.45 and 51.53(c). Because of the structure of 10 C.F.R. § 2.309(f)(2) environmental contentions, even those that challenge compliance with

NEPA, must begin as challenges to the ER and thus much of this contention relates to inadequacies of the NEPA analysis, based on the ER, as though it were the draft or final supplemental impact statement. This contention speaks directly to the adequacy of the ER and Staff's NEPA compliance, asserting that Staff must perform the adequate NEPA analysis of the long term, post-operation on-site storage of nuclear waste and a full analysis of the environmental impacts of nuclear waste disposal that the D.C. Circuit required NRC to do in the Waste Confidence decision and in its previous decision in *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).<sup>2</sup> Moreover, even the storage of nuclear waste during the period of an extended license has been recognized as a Category 1 issue in the GEIS for license renewal, confirming that the storage of waste, for any time period, much less indefinitely, is within the scope of license renewal. Whereas the time period for analysis of the storage of waste was limited only to the operating period under 10 C.F.R. §51.23 prior to the rule being vacated, the time period for consideration in the ER and Staff's NEPA analysis now includes the post-operating period as well as the possibility that a permanent repository never exists. *New York v. NRC*, No. 11-1045 (June 8, 2012). As such, this contention is squarely within the scope of license renewal.

**2. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding**

Similarly, the issues raised in this contention are material to the findings the NRC must make to support the action that is involved in this proceeding, in that the NRC must render findings pursuant to NEPA covering all potentially significant environmental impacts and must

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<sup>2</sup> The Board could take administrative notice that, prior to issuance of the Waste Confidence decision by the D.C. Circuit, Staff rejected contentions for analysis of the environmental impacts of spent fuel storage beyond the end of the operating life of a nuclear reactor and any analysis of alternatives to mitigate those impacts, relying instead on the GEIS (see NUREG-1437, Volume 1 at pp. 6-85 and 6-91) and 10 C.F.R. § 51.23.

pass on the adequacy of the ER and its compliance with NRC regulations. The storage and ultimate disposal of nuclear waste has been recognized as within the scope of license renewal. *See* 51.23(c), which was not challenged by the petitioners in *State of New York v. NRC* and which therefore remains valid. In the absence of the Temporary Storage Rule (10 C.F.R. § 51.23(a), (b)) and the Waste Confidence Decision, it is clear that this contention addresses a material omission in the applicant's ER and the Staff's expected environmental review pursuant to NEPA and that this license renewal proceeding cannot be concluded until the legally required environmental analyses have been integrated into the decision making process regarding the Limerick license renewal application. *See also*, 10 C.F.R. §§ 51.20(b)(2), 51.95(c) and 51.101(a).

Exelon's ER and existing NRC environmental review of the generic matter of spent nuclear fuel storage and disposal and the specific application to operate two power reactors at Limerick for an additional twenty years does not now include an analysis of the environmental impacts caused by the storage of nuclear waste at Limerick following the end of the requested operating license nor does it contain an analysis of the environmental effects of failing to establish a repository. *See, New York et al. v. NRC*, slip op. at 12. It also fails to include an analysis of the alternatives to mitigate these impacts. The absence of such an analysis violates NEPA and related regulations. Because neither the ER nor the GEIS (NUREG-1437), nor the NRC in any other context has examined these impacts, and because the United States Court of Appeals for the District of Columbia Circuit recently vacated the findings and regulations that NRC relied on to bar consideration of such impacts in license renewal, such analysis is now required in this proceeding.

Along with the now-vacated WCD and TSR, Exelon relied on regulation to excuse consideration of long-term spent fuel storage and disposal impacts. *See* 10 C.F.R. §51.53(c)(2)



(“[t]he environmental report need not discuss any aspect of the storage of spent fuel for the facility within the scope of the generic determination in §51.23(a) and in accordance §51.23(b).”); *see also, cf.* 10 C.F.R. §51.45 for ER requirements tracking NRC’s NEPA obligations. Exelon also relied on the GEIS for exclusion of “Category 1” issues, which include analysis of the environmental impacts of spent fuel storage and disposal. *See, “Category 1 and NA license renewal issues,”* (“[f]or the 54 Category 1 issues that are applicable to Limerick, Exelon Generation has reviewed the NRC findings at Table B-1 in Appendix B to 10 CFR Part 51 and has not identified any new and significant information that would make the NRC findings, with respect to those Category 1 issues, inapplicable to LGS. Therefore, Exelon Generation adopts by reference the NRC findings for the 54 applicable Category 1 issues.”). ER Section 4.0, p. 4-2. However, this statement can only relate to the environmental impact of spent fuel storage at the Limerick site during the period of license renewal, and not the period after plant operations cease. As the GEIS states in several instances,

The Commission's waste confidence finding at 10 CFR 51.23 leaves only the on-site storage of spent fuel during the term of plant operation as a high-level waste storage and disposal issue at the time of license renewal.

*See* GEIS at xvlii-xvliii, 6-85, and 6-91. Exelon, which does not discuss the environmental impacts of spent fuel at Limerick beyond the end of plant operations, relies on the GEIS and 10 C.F.R. § 51.23 to exclude any analysis of spent fuel impacts after license cessation from consideration. However, 10 C.F.R. § 51.23 and the portions of the GEIS that rely on that regulation have now been invalidated by the D.C. Circuit’s vacatur of both the WCD and TSR, and the environmental impacts associated with storage of spent fuel at Limerick after plant operations cease and alternatives to mitigate those impacts must now be evaluated in their absence.

### **3. Adequate Bases Have Been Provided For the Contention**

The bases for this contention are detailed and meet the regulatory requirement for a “brief explanation.” In its bases, NRDC has detailed the history of the waste confidence findings and the temporary storage rule, including both their regulatory history and statements made by the Commission regarding its intention to issue renewed licenses only once the waste confidence and temporary storage rulemaking had been concluded. As a result of the ruling by the D.C. Circuit, vacating and remanding for further proceedings, the rulemaking is not concluded. NRDC has also included in their bases a discussion of the challenge to the waste confidence findings and the temporary storage rule, and the resulting federal appellate court ruling invalidating it. NRDC has also included a discussion of the places where the applicant relies on the now-vacated 10 C.F.R. § 51.23 and WCD, indicating areas which now require full environmental analysis.

### **4. A Concise Statement of Facts Support the Contention, and No Expert Opinion Is Necessary Here Since the D.C. Circuit Court of Appeals Has Spoken on the Issue**

NRDC today supplies a concise statement of facts, together with references to the specific sources and documents on which we intend to rely to support our position on the issue, in support of the contention. Again, we have included a detailed history of the waste confidence findings and the temporary storage rule, including both their regulatory history and the history of the issue as presented to the Board and the Commission, including citations to regulations, Board and Commission decisions, court cases, and statements made by the Commission regarding its intention to issue a renew licenses only once the waste confidence and temporary storage rulemaking had been concluded. We have also included in our bases a discussion of the challenge to the waste confidence findings and the temporary storage rule, and the resulting

federal appellate court ruling vacating them.

NRDC submits that no expert opinion is necessary to support this contention, which is a legal contention and a contention of omission. No expert witness is required to support this contention because the United States Circuit Court for the District of Columbia Circuit has opined on the issue, and it is this opinion on which NRDC rests its motion and contention.

**5. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact**

Exelon's ER relied on 10 C.F.R. § 51.23 and the Waste Confidence Findings, which were both valid when the company originally filed its ER. However, § 51.23 and Waste Confidence Findings (2 and 4) are no longer valid, and thus the Supplemental Environmental Impact Statement, which will supplant the ER in this proceeding as the controlling environmental analysis document once it is finalized, may not rely on regulations and final agency actions that are no longer valid (nor, for that matter, may Exelon rely on the invalid portions of the GEIS, NUREG 1437, which must also be revisited accordingly).

As we have in this proceeding and in several others, NRDC acknowledges that, as a private entity, Exelon is not directly bound by NEPA. However, pursuant to 10 C.F.R. § 2.309(f)(2), NRDC has styled this NEPA contention as against the ER. *See id.* ("On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report."). Because an applicant's ER generally serves as the basis for the Commission's eventual Draft SEIS, NRDC raises this NEPA concern at this time in order to preserve any objections it may have.

#### **D. Conclusion**

For the reasons stated, NRDC respectfully requests that the Atomic Safety and Licensing Board grant leave to file the accompanying contention.

Respectfully submitted,

***Signed (electronically) by***

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Geoffrey H. Fettus  
Senior Attorney  
Natural Resources Defense Council  
1152 15<sup>th</sup> St. NW, Suite 300  
Washington, D.C. 20005  
(202) 289-2371  
gfettus@nrdc.org

***Signed (electronically) by***

---

Anthony Roisman  
National Legal Scholars Law Firm,  
P.C.241 Poverty Lane, Unit 1  
Lebanon, NH 03766  
(603)443-4162  
[aroisman@nationallegalscholars.com](mailto:aroisman@nationallegalscholars.com)

**CERTIFICATION REGARDING  
CONSULTATION PURSUANT TO 10 C.F.R. § 2.323**

I certify that on July 6, 2012, via electronic mail co-counsel Anthony Roisman contacted counsel for Exelon and NRC Staff to seek their position on this motion. Counsel for Exelon stated to me this day stated that Exelon intends to oppose the filing of this motion. Counsel for the NRC Staff stated to me this day that NRC Staff does not oppose the filing of the motion, but based on the representation in the original email, the Staff does not have enough information to take a position on the admissibility of the proposed contention. The Staff will respond to the contention in accordance with 10 C.F.R. 2.309 when filed.

Electronically signed by  
Geoffrey H. Fettus

Signed this day of July 9, 2012

### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing *Motion For Leave To File A New Contention* in the captioned proceeding were served via the Electronic Information Exchange (EIE) on the 9<sup>th</sup> day of July 2012, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Administrative Judge  
William J. Froehlich, Chair  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: William.Froehlich@nrc.gov

U.S. Nuclear Regulatory Commission  
Office of the Secretary of the Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
hearingdocket@nrc.gov

Administrative Judge  
Dr. William E. Kastenber  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: William.Kastenber@nrc.gov

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
E-mail: OCAAMail@nrc.gov

Administrative Judge  
Michael F. Kennedy  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Michael.Kennedy@nrc.gov

Matthew Flyntz  
Law Clerk  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [Matthew.Flyntz@nrc.gov](mailto:Matthew.Flyntz@nrc.gov)

Alex S. Polonsky  
Kathryn M. Sutton  
Anna V. Jones  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
E-mail: [apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)

J. Bradley Fewell  
Vice President and Deputy General Counsel  
Exelon Generation Company, LLC  
200 Exelon Way  
Kennett Square, PA 19348  
E-mail: [Bradley.Fewell@exeloncorp.com](mailto:Bradley.Fewell@exeloncorp.com)

Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15D21  
Washington, DC 20555-0001  
[OGCMailCenter@nrc.gov](mailto:OGCMailCenter@nrc.gov)  
Catherine Kanatas  
[Catherine.Kanatas@nrc.gov](mailto:Catherine.Kanatas@nrc.gov)  
Brian Newell  
[Brian.Newell@nrc.gov](mailto:Brian.Newell@nrc.gov)  
Maxwell Smith  
[Maxwell.Smith@nrc.gov](mailto:Maxwell.Smith@nrc.gov)  
Mary Spencer  
[Mary.Spencer@nrc.gov](mailto:Mary.Spencer@nrc.gov)  
Ed Williamson  
[Edward.Williamson@nrc.gov](mailto:Edward.Williamson@nrc.gov)  
Lauren Woodall  
[Lauren.Woodall@nrc.gov](mailto:Lauren.Woodall@nrc.gov)

/Signed (electronically) by/  
Geoffrey H. Fettus

July 9, 2012