

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)	
In the Matter of:)	Docket Nos. 50-352-LR
)	50-353-LR
EXELON GENERATION COMPANY, LLC)	
)	
(Limerick Generating Station, Units 1 and 2))	March 13, 2013
_____)	

**EXELON’S INITIAL BRIEF IN RESPONSE TO THE
REFERRAL OF LBP-13-1 TO THE COMMISSION**

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I. INTRODUCTION

In accordance with the Secretary's February 26, 2013 Order,¹ Exelon Generation Company, LLC ("Exelon") submits its initial brief responding to the Atomic Safety and Licensing Board's ("Board") referral of LBP-13-1² to the U.S. Nuclear Regulatory Commission ("Commission" or "NRC"). In LBP-13-1, the Board denied the Natural Resources Defense Council's ("NRDC") petition to waive 10 C.F.R. § 51.53(c)(3)(ii)(L) as it applies to Exelon's license renewal application ("LRA") for Limerick Generating Station, Units 1 and 2 ("Limerick").³ The Board determined that NRDC's Waiver Petition failed to demonstrate that strict application of Section 51.53(c)(3)(ii)(L) in this proceeding would frustrate the regulation's intended purpose and, therefore, NRDC did not satisfy its burden for waiver under 10 C.F.R. § 2.335(b).⁴ In so ruling, however, the Board referred its decision to the Commission under 10 C.F.R. § 2.323(f)(1) because, in the Board's view, the "legal issue presented by NRDC's petition is novel and worthy of the Commission's immediate attention."⁵

In particular, the Board perceived a "Catch-22 situation" with the interplay between the waiver provisions in Section 2.335(b) and Section 51.53(c)(3)(ii)(L). The latter expressly provides that applicants for license renewal at plants for which the NRC Staff already has considered severe accident mitigation alternatives ("SAMAs"), under the National Environmental Policy Act ("NEPA"), need not perform another SAMA analysis to support the

¹ Sec'y Order (Feb. 26, 2013) ("February 26 Order"), *available at* ADAMS Accession No. ML13057A822 (granting Exelon's unopposed request for briefing on the ruling referred to the Commission in LBP-13-1).

² *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), LBP-13-1, 76 NRC ___, slip op. (Feb. 6, 2013) ("LBP-13-1").

³ [NRDC's] Petition, By Way of Motion, For Waiver of 10 C.F.R. § 51.53(C)(3)(ii)(L) as Applied to Application for Renewal of Licenses for Limerick Units 1 and 2 at 2 (Nov. 21, 2012) ("Waiver Petition"), *available at* ADAMS Accession No. ML12326A976.

⁴ LBP-13-1, slip op. at 12-13.

⁵ *Id.* at 1.

NEPA process for license renewal.⁶ The Board concluded that Section 51.53(c)(3)(ii)(L) was “unwaivable” given its purpose to except certain applicants, like Exelon for Limerick, from performing another SAMA analysis at the license renewal stage.⁷

In summary, and as demonstrated below, the Board appears to have misconstrued the rationale underlying Section 51.53(c)(3)(ii)(L) in concluding that it is unwaivable. The Commission contemplated that limited, special circumstances would justify a waiver of Section 51.53(c)(3)(ii)(L); namely, the existence of major design changes or major plant modifications that are cost-beneficial. Exelon discussed these limited, special circumstances in its Answer to NRDC’s Waiver Petition, and provided a quantitative discussion of such changes in its Counter Affidavit supporting that Answer.⁸ The Board appears to have overlooked that discussion.

Consistent with customary practice, the Commission should accept review of LBP-13-1.⁹ Further, the Commission should clarify that there is no conflict between Section 2.335(b) and the exception to performing a SAMA analysis contained in Section 51.53(c)(3)(ii)(L). Finally, the Commission should then affirm the Board’s denial of NRDC’s Waiver Petition for failure to meet the stringent criteria under Section 2.335(b).

II. BACKGROUND

A. NRDC’s Contentions and the Board’s Ruling

On June 22, 2011, Exelon requested renewal of the Limerick operating licenses for an additional twenty years (*i.e.*, until midnight on October 26, 2044, for Unit 1, and midnight on

⁶ See *id.* at 9-10.

⁷ *Id.* at 10, 13.

⁸ Exelon Response Opposing NRDC’s Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) at 24-27 (Dec. 14, 2012) (“Exelon Answer”), *available at* ADAMS Accession No. ML12349A327; Exelon’s Counter Affidavit Supporting Exelon’s Response Opposing NRDC’s Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), at ¶¶ 19-30 (Dec. 14, 2012) (“Exelon’s Counter Affidavit”), *available at* ADAMS Accession No. ML12349A328.

⁹ See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59 NRC 203, 209 (2004).

June 22, 2049, for Unit 2).¹⁰ NRDC filed its “Petition to Intervene and Notice of Intention to Participate” on November 22, 2011.¹¹ It proposed four NEPA-related contentions. The two contentions relevant to the Waiver Petition are Contention 1-E and 3-E, which challenge the discussion of “new and significant” information regarding SAMAs as set forth in the Environmental Report (“ER”).¹² Specifically, in the Waiver Petition, NRDC alleges that the mere assertion of the following new information in Contention 1-E warrants waiver:

(1) potential SAMA candidates previously considered for other Boiling Water Reactors (“BWRs”) with Mark II Containments post-dating the 1989 severe accident mitigation design alternatives (“SAMDA”) analysis performed for Limerick;¹³ and (2) updated data on economic cost risk.¹⁴ Likewise, NRDC asserts that new information regarding modern techniques for assessing whether newly-identified SAMA candidates are cost-beneficial, which is one of the bases for Contention 3-E, justifies waiver of Section 51.53(c)(3)(ii)(L).¹⁵

In LBP-12-8, the Board granted NRDC’s Petition to Intervene and admitted a narrowed and re-worded version of only Contention 1-E.¹⁶ The Board first determined that SAMA analyses are not a Category 1 issue for Limerick, and therefore are litigable in a license renewal

¹⁰ See Letter from M. Gallagher, Vice President, Exelon, to NRC, Application for Renewed Operating Licenses (June 22, 2011), *available at* ADAMS Accession No. ML11179A096.

¹¹ [NRDC] Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011) (“Petition to Intervene”), *available at* ADAMS Accession No. ML11326A320 .

¹² *Id.* at 16-19, 21-23. Exelon submitted the ER to the NRC in support of its LRA for Limerick.

¹³ NUREG-0974, Supplement, Final Environmental Statement related to the operation of Limerick Generating Station, Units 1 and 2 (Aug. 1989), *available at* ADAMS Accession No. ML11221A204.

¹⁴ Waiver Petition at 3, 20-22.

¹⁵ *Id.* at 21-22.

¹⁶ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), LBP-12-08, 75 NRC ___, slip op. at 24-25, 40 (Apr. 4, 2012) (“LBP-12-08”).

proceeding.¹⁷ The Board entirely denied Contention 3-E on the ground that NRDC erroneously claimed that the Section 51.53(c)(3)(ii)(L) exception did not apply to Limerick.¹⁸

With respect to Contention 1-E, the Board determined that NRDC failed to provide sufficient support for its claims that Exelon should have considered (1) population through 2049, (2) historical data for core damage frequency, and (3) impacts on the human environment.¹⁹ For two bases of Contention 1-E, however, the Board concluded that NRDC provided sufficient support to render those portions of the Contention admissible. First, the Board admitted NRDC's claim that Exelon should consider SAMAs evaluated by license renewal applicants for other BWR Mark II containments.²⁰ Second, the Board admitted NRDC's claim that Exelon should not have relied on Three Mile Island ("TMI") for its economic cost assessment.²¹ The Board concluded that NRDC provided sufficient support to show that economic costs vary widely, and that TMI is not a good basis for comparison because: (1) it is a Pressurized Water Reactor and thus has correspondingly different accident scenario source terms, and (2) the urban center near TMI (*i.e.*, Harrisburg) is smaller and less urban than that near Limerick (*i.e.*, Philadelphia).²²

Exelon and the NRC Staff filed timely appeals of LBP-12-08.²³

¹⁷ *Id.* at 12-16.

¹⁸ *Id.* at 34. The Board also generally found that the 1989 SAMDA analysis for Limerick is not at issue in this licensing proceeding and rejected Contention 2-E in its entirety on that ground. *Id.* at 29-30. With respect to the energy alternatives contention proffered by NRDC (Contention 4-E), the Board denied this contention because it was not supported by an adequate basis. *Id.* at 38-39.

¹⁹ *Id.* at 17-18, 22-23, 26-27.

²⁰ *Id.* at 19-20. The Board rejected the aspect of this basis suggesting that Exelon should consider new accident scenarios raised by the accident at Fukushima based on the Commission's holding that, at this time, those events do not raise new and significant information under NEPA. *Id.* at 21-22.

²¹ LBP-12-08, slip op. at 25.

²² *Id.* at 24. The Board, however, rejected as unsupported NRDC's claim that Exelon should have considered higher cleanup costs for Philadelphia. *Id.* at 25-26.

²³ See Exelon Notice of Appeal of LBP-12-08 and Supporting Brief at 22-27 (Apr. 16, 2012), *available at* ADAMS Accession No. ML12107A417; NRC Staff's Notice of Appeal of LBP-12-08 at 10-19 (Apr. 16, 2012) *available at* ADAMS Accession No. ML12107A406.

B. The Commission's Appellate Decision

In CLI-12-19, the Commission reversed LBP-12-8.²⁴ The core issue on appeal was whether an applicant's consideration of new and significant information, related to a matter resolved by rule, is litigable in a license renewal proceeding, absent a waiver. The Commission, *inter alia*, held that the Board should have applied to the current proceeding the Commission's rulings in the *Vermont Yankee* and *Pilgrim*²⁵ license renewal proceedings regarding Category 1 determinations.²⁶ Therein, the Commission determined that the new and significant information requirement in Section 51.53(c)(3)(iv) does not override a Category 1 determination because, "[a]djudicating Category 1 issues site by site based merely on a claim of 'new and significant information,' would defeat the purpose of resolving generic issues in a [Generic Environmental Impact Statement]."²⁷

In CLI-12-19, the Commission ruled that the exception to performing a SAMA analysis contained in Section 51.53(c)(3)(ii)(L) "operates as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in [the Limerick license renewal proceeding], as well as certain other, case-by-case license renewal adjudications."²⁸ However, the Commission remanded the proceeding to the Board for the limited purpose of providing NRDC with an

²⁴ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 75 NRC __ (Oct. 23, 2012) ("CLI-12-19").

²⁵ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) and *Entergy Nuclear Vt. Yankee, LLC. & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13 (2007).

²⁶ CLI-12-19, slip op. at 12. Part 51 divides the environmental impacts from license renewal into Category 1 and Category 2 issues. See *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28,467, 28,467 (June 5, 1996). Category 1 issues are those typically resolved for *all* plants by the Generic Environmental Impact Statement and as such, Category 1 issues need not be addressed in plant-specific license renewal ERs. See *id.* at 28,474. In comparison, Category 2 issues require plant-specific review. See *id.*

²⁷ CLI-12-19, slip op. at 10 (citations omitted).

²⁸ *Id.* at 13.

opportunity to submit a waiver petition with respect to portions of Contention 1-E, 2-E, and 3-E.²⁹

C. NRDC's Waiver Petition

In response to CLI-12-19, NRDC filed a waiver petition on November 21, 2012 as to the portions of Contention 1-E originally admitted by the Board and Contention 3-E. In the Waiver Petition, NRDC argued that it would be contrary to the purpose of Section 51.53(c)(3)(ii)(L) to preclude litigation of its proffered contentions for three reasons.

First, NRDC contended that application of the Section 51.53(c)(3)(ii)(L) exception in the instant license renewal proceeding would frustrate the intended purpose of Section 51.53(c)(3)(ii)(L) because the Limerick ER “ignores new [SAMAs] previously considered for other BWR Mark II Containment reactors.”³⁰ In support of the argument, NRDC identified approximately fifty SAMA candidates that its experts assert were found to be cost-beneficial or potentially cost-beneficial at other BWRs of various designs.³¹

Second, NRDC asserted that Exelon's reliance on data from TMI as a substitute for site-specific economic risk calculations for Limerick justifies waiver of the Section 51.53(c)(3)(ii)(L) exception.³² Finally, NRDC argued that the availability of “more accurate and reliable methods” for assessing the consequences of a severe accident compared to those used in the 1989 SAMDA

²⁹ *Id.* at 15. The Commission allowed NRDC to address two contentions originally denied by the Board (2-E and 3-E) in a waiver petition, to the extent the Board dismissed them as challenges to the rule codified in Section 51.53(c)(3)(ii)(L). The Commission made no representations regarding the merits of granting waiver in this case.

³⁰ Waiver Petition at 20.

³¹ Declaration of Christopher J. Weaver, Ph.D., on Behalf of the [NRDC] in Support of Motion for Waiver at ¶¶ 7-12 (Nov. 21, 2012) (“Weaver Declaration”), *available at* ADAMS Accession No. ML12326A974; Declaration of Geoffrey H. Fettus, Counsel for the [NRDC], Regarding Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) as Applied to Application for Renewal of Licenses for Limerick Units 1 and 2 at ¶ 1 (Nov. 21, 2012) (“Fettus Declaration”), *available at* ADAMS Accession No. ML12326A975.

³² Fettus Declaration at ¶ 2; *see also* Waiver Petition at 20-21.

analysis demonstrates that application of Section 51.53(c)(3)(ii)(L) to Limerick would not serve its intended purpose.³³

NRDC premised all of the foregoing arguments on its interpretation of the purpose of the rule: to exempt certain applicants, like Exelon for Limerick, from reconsidering specific SAMA *candidates* previously considered at that site.³⁴

Both the NRC Staff and Exelon filed timely responses on December 14, 2012, opposing the Waiver Petition and explaining why NRDC did not meet the standards for granting waivers under 10 C.F.R. § 2.335(b).³⁵ Exelon also filed a lengthy Counter Affidavit.³⁶ Exelon and the NRC Staff argued that the purpose of Section 51.53(c)(3)(ii)(L) was to exempt those applicants from preparing another site-specific SAMA *analysis* for license renewal.³⁷

In response to these Answers, NRDC filed a Reply.³⁸ It did not file an affidavit with its Reply to respond to Exelon's Counter Affidavit. NRDC justified not filing an affidavit with its Reply because it argued that the technical arguments raised in Exelon's Counter Affidavit were "premature."³⁹

D. The Board's Denial of the Waiver Petition in LBP-13-1

In LBP-13-1, the Board denied NRDC's Waiver Petition pursuant to 10 C.F.R. § 2.335(b) because NRDC failed to show that strict application of Section 51.53(c)(3)(ii)(L) would not

³³ Waiver Petition at 21; Fettus Declaration at ¶ 3.

³⁴ Waiver Petition at 17-19; Reply of [NRDC] in Support of Petition, by Way of Motion for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) as Applied to Application for Renewal of Licenses for Limerick Units 1 and 2 at 9, 11 (Dec. 21, 2012) ("Reply"), *available at* ADAMS Accession No. ML12356A493. As distinguished from a SAMA analysis, SAMA candidates are individual SAMAs, such as changes to written operating procedures, personnel training and installation of equipment.

³⁵ *See generally* NRC Staff Answer to [NRDC] Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) (Dec. 14, 2012) ("Staff Answer"), *available at* ADAMS Accession No. ML12349A384; Exelon Answer.

³⁶ *See generally* Exelon's Counter Affidavit.

³⁷ Exelon Answer at 19-23; Staff Answer at 12-20.

³⁸ *See generally* Reply.

³⁹ *See* Reply at 14-15.

serve the purpose of the rule.⁴⁰ The Board rejected NRDC's interpretation, stating that the purpose of the rule is to exempt certain license renewal applicants from considering *any* SAMA candidates if the NRC Staff has previously considered SAMAs for the applicant's plant.⁴¹ Significantly, the Board observed that the purpose of the Section 51.53(c)(3)(ii)(L) exception "evidences a Commission determination that, in effect, one SAMA analysis is enough."⁴²

The Board then found that the new information alleged by NRDC cannot provide the basis for a successful waiver petition because the Commission understood when it enacted Section 51.53(c)(3)(ii)(L) that technology would change and that new SAMA candidates could emerge over time, but "was confident that processes other than the SAMA analysis process would adequately address any such developments."⁴³ By contrast, according to the Board, the Commission's generic environmental findings that are designated as Category 1 issues in Part 51 of NRC regulations are based on "*then-current* factual information" and scientific analysis and therefore, new information may be presented in a waiver petition.⁴⁴ To illustrate the purported distinction between Section 51.53(c)(3)(ii)(L) and other Category 1 issues, the Board cited bird collisions with cooling towers⁴⁵ as an example of a Category 1 issue for which new information regarding the factual support for such generic environmental finding (in the case of bird collisions, changes to migratory patterns) could satisfy the Section 2.335(b) waiver criteria.⁴⁶

⁴⁰ LBP-13-1, slip op. at 12-13.

⁴¹ *Id.* at 8-10.

⁴² *Id.* at 9.

⁴³ *Id.* at 12 (citing Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,481).

⁴⁴ *Id.* at 11-12 (emphasis added).

⁴⁵ 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1 ("These collisions have not been found to be a problem at operating nuclear power plants and are not expected to be a problem during the license renewal term.").

⁴⁶ LBP-13-1, slip op. at 11.

The Board concluded there was a “Catch 22” situation whereby the intended purpose of the Section 51.53(c)(3)(ii)(L) exception would not be frustrated even upon a showing that “there exists a group of cost-effective SAMA candidates that would greatly reduce the impacts of severe accidents and that have not been considered in the previous analysis.”⁴⁷ In the Board’s view, that “Catch 22” effectively renders a successful waiver petition “impossible.”⁴⁸ For that reason, the Board concluded that it was “compelled” to refer its decision to the Commission under 10 C.F.R. § 2.323(f)(1).⁴⁹

As discussed below, the regulatory history of Section 51.53(c)(3)(ii)(L) reveals that the Board’s hypothetical “Catch-22” is created by its apparent misunderstanding of the Commission’s rationale for the rule.

III. LEGAL STANDARDS

A. Referred Decisions Under 10 C.F.R. § 2.323(f)(1)

It is the Commission’s customary practice to accept licensing board certifications or referrals.⁵⁰ In its 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, the Commission encouraged licensing boards to refer “novel issues that could benefit from early review.”⁵¹ Consistent with that policy statement, the Commission assigns considerable weight to the licensing board’s view of whether the ruling merits immediate review.⁵² On review, the Commission is “free to affirm a Board decision on any ground finding support in the record,

⁴⁷ *Id.* at 10, 12-13.

⁴⁸ *Id.* at 13.

⁴⁹ *Id.*

⁵⁰ *Catawba*, CLI-04-11, 59 NRC at 209.

⁵¹ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998).

⁵² *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 467-68 (2004); *Conn. Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374-75 (2001).

whether previously relied on or not.”⁵³ When the Commission accepts review of a referred ruling, the Commission has generally provided interested parties an opportunity for briefing prior to resolving the questions or issues referred by the licensing board.⁵⁴ In accordance with the briefing schedule established in the February 26 Order, Exelon’s views concerning the Board’s referred ruling denying NRDC’s Waiver Petition and, in particular, the certified question concerning the interplay between 10 C.F.R. §2.335(b) and 10 C.F.R. § 51.53(c)(3)(ii)(L) are set forth below.

B. Criteria for Waiver Under 10 C.F.R. § 2.335

In order to seek waiver of a rule in a particular adjudicatory proceeding, a petitioner must submit a petition pursuant to 10 C.F.R. § 2.335(b):

The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.

Further, such a petition,

must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.⁵⁵

⁵³ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-01, 61 NRC 129, 166 (2005).

⁵⁴ *See, e.g., Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-02-3, 55 NRC 155, 156-57 (2002) (accepting review of a referred ruling denying admission of a late filed contention relating to the threat of a terrorist attack and establishing a briefing schedule “to ensure that all interested parties are afforded an opportunity to provide their views to the Commission before the Commission finally decides these important and substantial matters”).

⁵⁵ 10 C.F.R. § 2.335(b).

A petition to waive a Commission regulation “can be granted only in unusual and compelling circumstances.”⁵⁶ This standard presents a significantly higher burden than that applicable to contention admissibility. The requisite factual support for an admissible contention under Section 2.309(f)(1)⁵⁷ is “a minimal showing that material facts are in dispute.”⁵⁸ Such factual support “need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.”⁵⁹

By contrast, a waiver petition “must be accompanied by an affidavit.”⁶⁰ And consistent with NRC precedent, a licensing board can only certify a waiver petition to the Commission after finding that the petitioner “has met ‘extremely high standards’ showing the existence of ‘compelling circumstances in which the rationale of [the regulation] is undercut.’”⁶¹ The high

⁵⁶ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988) (internal quotations omitted), *aff’d*, CLI-88-10, 28 NRC 573 (1988), *reconsideration denied*, CLI-89-3, 29 NRC 234 (1989). The Appeal Board explained that the “relatively small number of waiver petitions filed in NRC adjudicatory proceedings and the fact that few, if any, such petitions have been successful evidence the difficulty of meeting the waiver standard.” *Id.*

⁵⁷ Section 2.309(f)(1) requires a petitioner to: (1) state the specific legal or factual issue sought to be raised; (2) briefly explain the basis for the contention; (3) demonstrate that the issue raised is within the proceeding’s scope; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner’s position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi). The seventh contention admissibility requirement—10 C.F.R. § 2.309(f)(1)(vii)—is only applicable in proceedings arising under 10 C.F.R. § 52.103(b) and, therefore, has no bearing on the Waiver Petition.

⁵⁸ *Gulf States Utils. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994) (internal citations and quotations omitted); *see also NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-12, 73 NRC 28, 50-51 (2012) (rejecting applicant’s and NRC Staff’s arguments that improperly addressed the merits of petitioner’s energy alternatives contention).

⁵⁹ Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

⁶⁰ 10 C.F.R. § 2.335(b).

⁶¹ *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-10-12, 71 NRC 656, 662 (2010) (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 245 (1989)).

standards established by Section 2.335(b) “are intended to ensure that duly promulgated regulations are not lightly discarded.”⁶²

In the *Millstone* license renewal proceeding, the Commission clarified that a waiver may be granted only if the following four criteria are met: (1) the rule’s strict application “would not serve the purposes for which [it] was adopted”; (2) the petitioner has alleged “special circumstances” that were “not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived”; (3) those circumstances are “unique” to the facility rather than “common to a large class of facilities”; and (4) a waiver of the regulation is necessary to reach a significant environmental problem (hereinafter referred to as “*Millstone Factors*”).⁶³

In LBP-13-1, the Board described an apparent discrepancy between the *Millstone Factors* and Section 2.335(b).⁶⁴ However, because the Board rejected the Waiver Petition based solely on Section 2.335(b), the Commission need not address the Board’s comparison of Section 2.335(b) against the *Millstone Factors* in order to affirm the Board’s rejection of the Waiver Petition.

IV. ARGUMENT

A. There is No Conflict Between the Commission’s Waiver Rules and Section 51.53(c)(3)(ii)(L)

The threshold legal issue that the Board referred to the Commission is whether there is a conflict between the waiver provisions in 10 C.F.R. § 2.335(b) and 10 C.F.R. § 51.53(c)(3)(ii)(L)

⁶² *Seabrook*, ALAB-895, 28 NRC at 16.

⁶³ *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (citing *Seabrook*, CLI-89-20, 30 NRC at 235; *Seabrook*, CLI-88-10, 28 NRC at 597).

⁶⁴ LBP-13-1, slip op. at 7. According to the Board, the *Millstone Factors* establish a higher burden for waiver than 10 C.F.R. § 2.335(b). Nonetheless, the Board held that NRDC did not satisfy Section 2.335(b), which it viewed as a lower threshold.

that would effectively render the latter rule unwaivable. As explained in Section II.D above, in the Board’s view, it is “unclear” how any petitioner could ever demonstrate that the purpose of Section 51.53(c)(3)(ii)(L) is frustrated by application of the regulatory exception to excuse certain license renewal applicants, including Exelon for Limerick, from performing another SAMA analysis.⁶⁵ Exelon disagrees with the Board’s conclusion that obtaining waiver of Section 51.53(c)(3)(ii)(L) under Section 2.335(b) is “impossible.”⁶⁶

As explained in detail below, to demonstrate circumstances which would justify waiver of Section 51.53(c)(3)(ii)(L), NRDC must identify *major* design changes or *major* plant modifications that would be cost-beneficial at Limerick. This position is consistent with the regulatory history of Section 51.53(c)(3)(ii)(L) in which the Commission acknowledged that site-specific SAMA analyses at the license renewal stage may identify cost-beneficial improvements, but concluded that such changes “generally would be procedural and programmatic fixes with any hardware changes being only minor in nature and few in number.”⁶⁷

As an initial matter, Exelon agrees that identifying cost-beneficial SAMAs is not enough to support a successful waiver petition in light of the Commission’s recognition that new SAMA candidates would emerge over time. However, the Board appears to misconstrue the Commission’s expectations for SAMA analyses for those license renewal applicants who previously considered SAMAs. As the Commission explained in the *Statements of Consideration* accompanying Section 51.53(c)(3)(ii)(L) (“1996 SOC”), cost-beneficial improvements identified in SAMA analyses at the license renewal stage generally would be

⁶⁵ *Id.* at 10.

⁶⁶ *Id.* at 13.

⁶⁷ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,481.

procedural and programmatic fixes or minor plant changes.⁶⁸ That conclusion is based on the SAMDA analyses completed at the time of the rulemaking, the Containment Performance Improvement program, and “other ongoing regulatory programs [including the Individual Plant Examination and Individual Plant Examination for External Events] whereby licensees search for individual plant vulnerabilities to severe accidents and consider cost-beneficial improvements.”⁶⁹ Notably, the Commission relied, in part, on the 1989 SAMDA analysis for Limerick, which identified only plant procedural changes as cost-beneficial despite Limerick being located in an area of high population.⁷⁰

The Commission does not explicitly delineate “special circumstances” that could justify waiver of Section 51.53(c)(3)(ii)(L) in the 1996 SOC. However, although considered unlikely, the Commission left the door open for a petitioner to identify major plant changes in the future. Specifically, the NRC stated: “The Commission believes it unlikely that any site-specific consideration of [SAMAs] for license renewal will identify major plant design changes or modifications that will prove to be cost-beneficial for reducing severe accident frequency or consequences.”⁷¹ The Commission, therefore, rejected the need for further consideration of SAMAs at the license renewal stage, absent a petitioner identifying a major plant design change or modification.

Consistent with this regulatory history, Exelon submits that cost-beneficial, major design changes and major plant modifications constitute special circumstances that may justify waiver

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (“Because risk is generally proportional to the population around a plant, [the Limerick] analysis suggests that other sites are unlikely to identify significant plant modifications that are cost-beneficial.”).

⁷¹ *Id.*

under Section 2.335(b) of the Section 51.53(c)(3)(ii)(L) exception.⁷² Therefore, contrary to the Board’s assumption, waiver of Section 51.53(c)(3)(ii)(L) is not impossible. Exelon’s position is further supported by the Commission’s remand of this proceeding in CLI-12-19 for the express purpose of providing NRDC with the opportunity to submit a waiver petition for Board consideration.⁷³ Even though it did not address the merits of waiver in this proceeding, the Commission clearly thought that waiver of Section 51.53(c)(3)(ii)(L) was a possibility. As a consequence, the Board’s concern regarding a potential “Catch 22” situation is misplaced.

The Board’s oversimplified analogy to bird collisions with cooling towers does not support its view that it would be impossible for any petitioner to be granted a waiver of Section 51.53(c)(3)(ii)(L). The Board hypothesizes that a petitioner could successfully seek a waiver of the Category 1 finding that bird collisions “are not expected to be a problem” for plants during the license renewal term by showing changes in the migratory patterns of certain bird species.⁷⁴ The Board, however, does not explain how changes in migratory habits for bird collisions are any different than major design changes or major plant improvements for SAMA analyses, which the Commission determined would be “unlikely” to be identified for license renewal.

In short, the Board’s opinion that Section 51.53(c)(3)(ii)(L) is unwaivable is unfounded because it is inconsistent with the regulatory history. The 1996 SOC reasonably supports a position that new information that would unearth cost-beneficial, major design changes or major plant modifications could provide the basis for granting waiver of Section 51.53(c)(3)(ii)(L).

⁷² In Paragraph 20 of Exelon’s Counter Affidavit, Exelon’s experts “selected a 50% reduction in the maximum averted cost risk (“MACR”) as the threshold for what may be ‘significant.’” Exelon Counter Affidavit at ¶20; *see also id.* at ¶¶21-26 (providing quantitative analysis supporting selection of a 50% reduction in the MACR for the “significance” threshold).

⁷³ CLI-12-19, slip op. at 17 (“[W]e remand the proceeding to the Board for the limited purpose of considering a waiver petition in accordance with section 2.335(b) through (d), which NRDC may submit by Tuesday, November 27, 2012.”).

⁷⁴ 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1; LBP-13-1, slip op. at 11.

Accordingly, the Commission should clarify that no conflict exists between the high standards for rule waiver under Section 2.335(b) and Section 51.53(c)(3)(ii)(L).

B. The Board’s Denial of NRDC’s Waiver Petition Is Correct and Should Be Affirmed

1. The Board Properly Rejected NRDC’s Interpretation of the Purpose of Section 51.53(c)(3)(ii)(L)

The Board correctly held, consistent with the Commission’s decision in CLI-12-19,⁷⁵ that NRDC’s “strained and inappropriate” interpretation of Section 51.53(c)(3)(ii)(L) is contrary to the plain language of the regulation.⁷⁶ Namely, Section 51.53(c)(3)(ii)(L) explicitly excuses applicants who previously considered SAMAs in a NEPA document from performing another SAMA analysis at the license renewal stage. Precisely as the Board noted, there is nothing in the plain text of the regulation suggesting that the scope of the exception is limited to previously-considered SAMA candidates or issues.⁷⁷

There also is strong support for the Board’s conclusion in the regulatory history of Section 51.53(c)(3)(ii)(L). In the 1996 Part 51 rulemaking, the Commission determined that one site-specific SAMA analysis is sufficient to satisfy NEPA. To that end, in the 1996 SOC, the Commission explained that a site-specific consideration of SAMAs is required at license renewal only for those plants for which such consideration was not previously performed under NEPA:

⁷⁵ CLI-12-19, slip op. at 11 (finding that “Exelon is permitted, by rule, not to prepare a site-specific supplemental SAMA analysis in conjunction with the Limerick license renewal application”).

⁷⁶ LBP-13-1, slip op. at 9.

⁷⁷ *Id.* (noting that “the Commission did not say that those [SAMAs] considered in the previous analysis need not be reconsidered”) (emphasis in original). NRDC’s characterization of Exelon’s position regarding “new and significant” information concerning SAMAs for Limerick is inaccurate. Reply at 3, 5-9. Exelon made clear – as did the NRC Staff – that Exelon and the NRC Staff have obligations to address new and significant information related to SAMAs in their NEPA analyses but that there is no inherent right under NEPA to litigate an ER’s discussion of new and significant information. Exelon Answer at 6, 16, 46-48; Staff Answer at 9-11. Contrary to NRDC’s contention, the mere assertion of new and significant information does not automatically require the Commission to waive its regulations or otherwise permit NRDC to litigate SAMA issues in this adjudicatory proceeding. Exelon Answer at 46-48. Rather, to do so, NRDC must show that its allegations meet the stringent requirements in 2.335(b). The Board correctly concluded that NRDC did not do so.

The Commission has determined that a site-specific consideration of alternatives to mitigate severe accidents will be required at the time of license renewal unless a previous consideration of such alternatives regarding plant operation has been included in a final environmental impact statement or a related supplement. Because the third criterion required to make a Category 1 designation for an issue requires a generic consideration of mitigation, the issue of severe accidents must be reclassified as a Category 2 issue that requires a consideration of [SAMAs], provided this consideration has not already been completed.

* * *

Therefore, the Commission has reclassified severe accidents as a Category 2 issue, requiring only that alternatives to mitigate severe accidents be considered for those plants that have not included such a consideration in a previous EIS or supplemental EIS.⁷⁸

The absence of qualifying language from that determination unmistakably indicates the Commission's intent to exempt applicants, such as Exelon for Limerick, from conducting a new SAMA analysis in conjunction with license renewal – not simply to exclude from consideration specific SAMA candidates previously considered, as NRDC suggests.⁷⁹ As discussed in Section IV.A above, the Commission's stated intent to exempt Exelon for Limerick (and similarly-situated applicants) from performing *another* SAMA analysis is rooted in its conclusion that any cost-beneficial improvements identified in SAMA analyses performed at the license renewal stage “generally would be procedural and programmatic fixes, with any hardware changes being only minor in nature and few in number.”⁸⁰

⁷⁸ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,481 (emphasis added).

⁷⁹ Additionally, the 1996 SOC does not state that plants for which the NRC Staff has already considered SAMAs need not reassess only those alternatives evaluated previously. If this was the intent of the NRC, it could have specifically provided caveats or limits to the scope of the Section 51.53(c)(3)(ii)(L) exception in the regulatory language or the 1996 SOC. It did neither. In fact, in stating that it did not intend to prescribe by rule the scope of an acceptable SAMA analysis, the Commission explicitly noted that it also does not “intend to mandate consideration of alternatives identical to those evaluated previously.” *Id.* Tellingly, the Commission does not employ similar language when explaining its conclusion that a SAMA analysis need not be performed for Limerick and similarly-situated plants for license renewal.

⁸⁰ *Id.*

For the foregoing reasons, the Commission should affirm the Board's rejection of NRDC's interpretation of the purpose of Section 51.53(c)(3)(ii)(L).

2. NRDC Failed to Allege the Existence of Cost-Beneficial Major Plant Design Changes or Modifications

As explained in Section III above, the burden of proof to obtain a waiver is on NRDC. And this burden is extremely high. Contrary to NRDC's assertions,⁸¹ the burden for obtaining a waiver from a Commission regulation is higher than contention admissibility. As a result, NRDC needed to lay the proper foundation in its Waiver Petition by identifying major design changes or plant improvements that would be cost-beneficial at Limerick. They did not do so. The Board correctly determined that the Waiver Petition is fatally defective because NRDC fails to demonstrate that application of 10 C.F.R. §51.53(c)(3)(ii)(L) to Limerick's LRA would frustrate the intended purpose of the exception from the SAMA analysis requirement.⁸²

Relying on its erroneous interpretation of the purpose of Section 51.53(c)(3)(ii)(L), NRDC failed to offer any information that undercuts the rule's rationale. Exelon, in its Answer, demonstrated that NRDC fails to allege, much less demonstrate, that any of the newly-identified SAMA candidates cited by its experts⁸³ are major design changes or major plant modifications at those BWRs, let alone at Limerick.⁸⁴ As detailed in Exelon's Counter Affidavit, none of the approximately fifty SAMAs identified by NRDC as potentially cost-beneficial is a major design or plant modification, which Exelon's experts defined as a plant change that results in the permanent installation of a new structure, system, or a redundant train of an existing system that

⁸¹ Waiver Petition at 15 n. 8 (claiming that NRDC "need not demonstrate that it meets the significant new information standard, as the merits of NRDC's contentions are not at issue, but rather whether the waiver criteria are satisfied"); Reply at 14-15 (arguing that Exelon's arguments regarding major modifications are "premature").

⁸² LBP-13-1, slip op. at 12-13.

⁸³ See Weaver Declaration at ¶¶ 11-12.

⁸⁴ Exelon Answer at 25-26.

changes the footprint of the facility.⁸⁵ Table A accompanying the Counter Affidavit then explains why each of those SAMA candidates is not a major modification. For example, Table A provides that the SAMA candidate, “Procure Spare 480V AC Portable Station Generator” – offered by NRDC as a cost-beneficial change for the Susquehanna plant (a BWR of the same design as Limerick) – is not a major improvements because it involves solely procedural changes and procurement of portable equipment.⁸⁶ As shown on Table A, all of the approximately fifty SAMAs that purportedly provide the basis for waiver of Section 51.53(c)(3)(ii)(L) in this case are either: (a) procedural and programmatic fixes (*e.g.*, changes to written procedures and operator training), or (b) minor plant changes, including adding portable equipment, cross-ties of existing systems, or adding cables.⁸⁷

Additionally, in its Answer, Exelon points out that NRDC fails to allege or provide support that use of an “off-site economic cost ratio higher than the TMI value (*i.e.*, 72.1%) would actually uncover major, cost-beneficial plant improvements applicable to Limerick that have not already been implemented.”⁸⁸ The Weaver Declaration merely reproduces a table included in the expert declaration supporting NRDC’s Petition to Intervene that presents the ratio of economic cost risk to exposure cost risk for eight BWR units, showing a wide variation in cost ratios ranging from -16.0% to 238.4%.⁸⁹ Likewise, as explained in Exelon’s Answer, NRDC does not present any information regarding how the use of new techniques for assessing the consequences

⁸⁵ Exelon Counter Affidavit at ¶¶ 17-18.

⁸⁶ *Id.* at tbl. A.

⁸⁷ *Id.* at ¶ 16, tbl. A.

⁸⁸ Exelon Answer at 26-27.

⁸⁹ Weaver Declaration at ¶ 20.

of a severe accident would actually yield additional major plant improvements that are cost-beneficial for Limerick.⁹⁰

NRDC did not provide an affidavit with its Reply and, accordingly, left the technical arguments in Exelon's Counter Affidavit unchallenged. Rather, in its Reply, NRDC directly acknowledges Exelon's arguments, but states that resolution of whether NRDC has demonstrated that the alleged new information regarding SAMAs "will lead to major changes at Limerick" is "premature."⁹¹ NRDC is wrong. As discussed above, NRDC has the burden to proffer major design changes or major plant modifications that are cost-beneficial. The standards for waiver require a significantly higher burden than contention admissibility.

Accordingly, the Commission should affirm the Board's determination that "NRDC has not presented a prima facie case that it has satisfied 10 C.F.R. § 2.335(b)" and corresponding denial of the Waiver Petition.⁹²

V. CONCLUSION

For the foregoing reasons, Exelon respectfully requests that the Commission enter an Order that: (a) accepts review of the referred ruling in LBP-13-1 as certified by the Board, consistent with the Commission's customary practice; (b) clarifies that there is no conflict between the Commission's waiver rules and 10 C.F.R. §51.53(c)(3)(ii)(L); and (c) affirms the Board's holding in LBP-13-1 that NRDC has not presented a *prima facie* case for waiver under 10 C.F.R. §2.335(b).

⁹⁰ Exelon Answer at 27.

⁹¹ Reply at 14-15.

⁹² LBP-13-1, slip op. at 13.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

Signed (electronically) by Alex S. Polonsky

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Dated in Washington, D.C.
this 13th day of March 2013

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

_____)	
In the Matter of)	
)	Docket Nos. 50-352-LR
EXELON GENERATION COMPANY, LLC)	50-353-LR
)	
(Limerick Generating Station, Units 1 and 2))	March 13, 2013
_____)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that on March 13, 2013, Exelon served a copy of “**EXELON’S INITIAL BRIEF IN RESPONSE TO THE REFERRAL OF LBP-13-1 TO THE COMMISSION**” in this proceeding through the NRC’s E-Filing system.

Signed (electronically) by Brooke E. McGlinn
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