Judge Abreu, Concurring in Part, and Dissenting in Part

I. Introduction

While I agree with the majority's rulings on standing and, to a degree, contention admissibility as outlined in section III below, I must dissent from an important aspect of their contention admissibility findings because I respectfully disagree with their opinion that 10 C.F.R. § 51.53(c)(3) applies to subsequent license renewal. The plain language of the regulation states that it applies to an initial not a subsequent renewal. The APA requires a regulation adopted through notice and comment to be amended through notice and comment. Especially here, where the majority's application of the regulation creates both a significant uncertainty about what regulatory standards are applicable and an obstacle to a petitioner's ability to know how to properly frame its contentions, proper notice is essential. Although the agency's approach to subsequent license renewals may have evolved since section 51.53(c)(3) was proposed in 1991, to use that evolution as an excuse for an adjudicatory body to de facto change the regulation would subvert the intent of the APA and potentially risk the agency's credibility as to the openness, clarity, and reliability of its regulations—three of the agency's "Principles of Good Regulation."[1]

II. Analysis of Section 51.53(c)(3)

FPL and the Staff ask us to ignore the plain language of section 51.53(c)(3) because, they claim, it does not reflect the Commission's intent. They would have us ignore the word "initial" and apply the rule to subsequent license renewal applications because, as FPL and the Staff assert, reading the regulation in accordance with its plain language leads to an "absurd" result.[2] The majority likewise frames the issue before us as a "question of Commission intent"

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[1] See NRC Principles of Good Regulation (ADAMS Accession No. ML14135A076).

[2] FPL Surreply at 4; NRC Staff Response to FPL Surreply at 1–2.

and concludes that the Commission intended section 51.53(c)(3) to apply to all license renewal applications.[3] But the majority delves too deeply to find its answer. The regulation is clear on its face, and reading it in accordance with its plain language presents no absurdity or conflict with the agency's regulatory structure. Therefore, neither the Board nor the Commission has the authority to effectively amend a regulation to reflect new Commission "intent" outside of the notice and comment process.[4] When presented with an unambiguous regulation, an agency may not, "under the guise of interpreting [that] regulation, . . . create de facto a new regulation."[5] Because the NRC promulgated section 51.53(c)(3) through notice-and-comment rulemaking, it must use the same procedure if it wants to amend or repeal the rule.[6]

The "interpretation of any regulation must begin with the language and structure of the provision itself."[7] Contrary to the majority's characterization,[8] section 51.53(c)(3) is not "silent" as to its scope. The regulation is quite specific, and we must give all of its words full effect.[9] It applies to applicants: (1) seeking an "initial renewed license"; and (2) holding an operating

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3 Majority at 13.

4 See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says . . . . When the words of a statute are unambiguous, . . . 'judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))).

5 Christensen v. Harris Cty., 529 U.S. 576, 588 (2000).

6 See Perez v. Mortg. Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1206 (2015) (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)) (describing the APA's "mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

7 Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988).

8 Majority at 15.

9 Shoreham, ALAB-900, 28 NRC at 288.

license, construction permit, or combined license issued as of June 30, 1995.[10] These applicants must include in their environmental reports the information described in 10 C.F.R. § 51.53(c)(2), along with various "conditions and considerations" that, among other things, allow them to take advantage of the generic determinations in the GEIS for Category 1 environmental issues.[11] "[T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute."[12] The oft-used principle, "expressio unius est exclusio alterius" (that is, the mention of one thing is the exclusion of the other), is instructive here.[13] Of the categories of license renewal applicants, the Commission chose "initial," thus implying that this was done to the exclusion of "subsequent."[14] Had the Commission meant "initial and subsequent," it could have said just that, or "initial" simply could have been deleted.

The majority relies on Federal Express Corp. v. Holowecki to support its approach to discerning the Commission's intent regarding the scope of section 51.53(c)(3).[15] But unlike here, Holowecki involved a statute and implementing regulations whose language left some

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[10] 10 C.F.R. § 51.53(c)(3) (emphasis added).

[11] Id.

[12] Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878).

[13] See, e.g., Christensen, 529 U.S. at 582–83.

[14] The force of the "expressio unius" principle depends on context; the analysis "will turn on whether, looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded." Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998). As discussed below, "initial," by definition, necessarily precludes "subsequent," and the regulatory history further supports its preclusive effect. Therefore, based on context, it is fair to say that the Commission, in choosing to include the word "initial," considered but nevertheless excluded all other alternatives. See id.

[15] See Majority at 15.

room for interpretation: what constitutes a "charge" when alleging unlawful age discrimination.[16] Here, using the word "initial" by definition limits the regulation's scope. Something is either "initial," i.e., first, or it is not.[17] No room exists for anything else.

Resorting to regulatory history is unnecessary when the meaning of a regulation is clear.[18] But even so, the regulatory history here supports an interpretation of the word "initial" as a limitation on the application of section 51.53(c)(3). In the Statements of Consideration for the 1991 proposed rule, the NRC anticipated that a licensee might file multiple license renewal applications, but nevertheless limited application of the efficiencies to be gained by the Part 51 amendments. The NRC stated that the safety considerations for license renewal application reviews outlined in Part 54 "could be applied to multiple renewals of an operating license for various increments," but in the very next sentence stated that the environmental considerations in the Part 51 amendments would apply only "to one renewal of the initial license for up to 20 years beyond [its] expiration."[19] This history of the Part 51 amendments demonstrates that the word "initial" in section 51.53(c)(3) was used with forethought. In 1991, the agency intended the Part 51 amendments for license renewal reviews to apply to one renewal, not multiple renewals.

When the final rule was promulgated in 1996, the Statements of Consideration analyzed the comments received and explained major changes in response to those comments—for example, the agency's decision to prepare a supplemental environmental impact statement for

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16 Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008).

17 Initial, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) (defining "initial" to mean "of or relating to the beginning . . . placed at the beginning: first").

18 See, e.g., Conn. Nat'l Bank, 503 U.S. at 253–54.

19 Proposed Rule, Environmental Review for Renewal of Operating Licenses, 56 Fed. Reg. 47,016, 47,017 (Sept. 17, 1991) (emphasis added) [hereinafter 1991 Proposed Rule].

each license renewal application, rather than an environmental assessment.[20] The NRC did not repeat the "one-renewal" rationale, but to do so was not necessary; no comments about the one-renewal limitation on Part 51 were reported.[21] And the NRC reaffirmed that the changes in the final rule, while substantial, did not alter "the generic approach and scope" of the 1991 proposed rule.[22] Significantly, the final rule retained the word "initial" in section 51.53(c)(3).[23] Moreover, despite several changes to Part 51 since 1996, including changes to section 51.53(c)(3), "initial" remains in the rule to this day.[24]

Notably, in the 2009 proposed rule that accompanied the agency's proposed revisions to the GEIS, the NRC repeated the scope of section 51.53(c)(3) in the Statements of Consideration, explaining that it applies to "initial license renewal."[25] This slight phrasal change

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20 See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,468 (June 5, 1996) [hereinafter 1996 Final Rule].

21 See generally "Public Comments on the Proposed 10 CFR Part 51 Rule for Renewal of Nuclear Power Plant Operating Licenses and Supporting Documents: Review of Concerns and NRC Staff Response," NUREG-1529, vols. 1 & 2 (May 1996) (ADAMS Accession No. ML16362A344 (package)).

22 1996 Final Rule, 61 Fed. Reg. at 28,468.

23 See id. at 28,487.

24 See generally Final Rule, Miscellaneous Corrections, 79 Fed. Reg. 66,598 (Nov. 10, 2014) (making minor revisions for clarity and to correct typographical errors) [hereinafter Final Rule, Miscellaneous Corrections]; Final Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013) (updating the number and scope of the environmental issues to be addressed in license renewal proceedings consistent with the revised GEIS); Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed Reg. 49,352, 49,432 (Aug. 28, 2007) (adding "combined licenses" to section 51.53(c)(3)) [hereinafter Final Rule, Licenses, Certifications, and Approvals]; Final Rule, Changes to Requirements for Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 64 Fed. Reg. 48,496 (Sept. 3, 1999) (expanding generic findings regarding transportation of spent fuel and waste); Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 66,537 (Dec. 18, 1996) (making "minor clarifying and conforming changes and add[ing] language inadvertently omitted from Table B-1" of the 1996 final rule).

25 Proposed Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117, 38,128 (July 31, 2009).

from the rule's text (i.e., "initial renewed license") demonstrates the agency's awareness of the rule's scope, revealing much more than would a rote copy-and-paste, and shows that the rule means what it says: it applies to "initial license renewal," not to "any" renewal.[26]

It is quite a stretch to interpret the agency's failure to repeat the "one-renewal" rationale for Part 51 in the 1996 Statements of Consideration as signaling a complete abandonment of its original position. Nor does it make sense to further assume that retention of the word "initial" in the final rule was a mere ministerial error. Rather, it makes far more sense to assume that the agency meant what it said originally. Had the NRC abandoned its one-renewal limit on the 1991 Part 51 amendments without expressly explaining why, the agency's action would have been subject to challenge as "arbitrary and capricious."[27] And even if we assume that the word "initial" had been retained by mistake for several years, the Commission could have, and still could, fix the error with the same notice process it has used with past Part 51 changes.[28]

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[26] Despite this, the majority maintains that there is "nothing in the regulatory history indicating that the scope of section 51.53(c)(3)—in 1996 or thereafter—was intended to be restricted to initial license renewals," Majority at 16 n.33, and avoids mentioning that nothing in the post-1996 regulatory history directly indicates that the regulation applies to subsequent license renewal. Moreover, the majority's observation is off target. Because the rule's stated application only to initial license renewals is unchanged to this day, the relevant regulatory history is the expressed intent when the rule was promulgated.

[27] See 5 U.S.C. § 706(2)(A).

[28] See, e.g., Final Rule, Miscellaneous Corrections, 79 Fed. Reg. at 66,600 (direct final rule; good cause found to waive notice and comment). If, as the majority asserts, the 1996 final rule's lack of mention of section 51.53(c)(3)'s "initial" qualifier shows intent not to limit the application of this regulation to one renewal, then why wasn't 51.53(c)(3) changed to reflect that intent in one of the several amendments that were made since 1996? See Majority at 16. Even if the lack of change was a simple oversight, the proper way to correct that oversight is through rulemaking. While the agency could try to justify a "good cause" waiver of the notice requirements in 5 U.S.C. § 553 for a quick fix to the rule, see 5 U.S.C. § 553(b)(3)(B), in my view, removing "initial" would have a substantive impact on subsequent license renewal applicants and hearing petitioners, thus requiring notice-and-comment rulemaking, but that is for the agency to decide.

FPL and the Staff can conceive of no reason why the Commission might place a limit on the use of the GEIS determinations in the environmental report beyond one renewal of a power reactor license.[29] Similarly, the majority finds that reading the rule consistent with its plain language would "undermine the regulatory purpose" of injecting efficiencies into the license renewal process.[30] But limiting the use of the rule for preparation of environmental reports to one license renewal was not an unreasonable approach for the agency to take, considering its obligations under NEPA. The Commission has recognized "the NRC's continuing duty to take a 'hard look' at new and significant information for each 'major federal action' to be taken."[31] So the agency reasonably could have determined that after a certain point—here, following the term of the initial license plus twenty years—the environmental impacts of license renewal should be considered afresh in the environmental report. The GEIS (in its original and revised form) bears this out. As Petitioners point out, references throughout the GEIS indicate that it contemplates only the forty-year term of the original license plus twenty years, for a total of sixty years—not the eighty or more years allowed for subsequent license renewal.[32] Of note, as part of the discussion of severe accidents, the revised GEIS expressly states that "the revision only

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29 See FPL Surreply at 4, 9–10; NRC Staff Response to FPL Surreply at 11–13.

30 Majority at 18.

31 Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 216 (2013) (quoting Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989)).

32 See Pet'rs. Response to FPL Surreply at 5–8. As its discussion makes clear, see Majority at 18–19, the majority basically accepts FPL's argument that "[t]he Commission's decision to retain the 10-year GEIS review and update provision in its 2013 revisions to Part 51 would make no sense if it had intended for the GEIS and Table B-1 to apply only to initial operating license renewals." FPL Surreply at 6. But the fact that the Commission expressed an intent to update the GEIS periodically in no way means that the GEIS analyses cover the temporal scope of a subsequent license renewal. Rather it simply means that when the GEIS is used the information it contains is reasonably up-to-date. Certainly, an applicant may reference the GEIS to make preparation of its environmental report more efficient, but it may not use section 51.53(c)(3)'s protections until the regulation is updated to include subsequent license renewals.

covers one initial license renewal period for each plant (as did the 1996 GEIS)," confirming that both the revised and the original GEIS look only at the temporal period of one license renewal.[33]

FPL and the Staff nonetheless assert, and the majority agrees, that the plain language of section 51.53(c)(3), with its use of the word "initial" in the environmental report instructions, cannot be reconciled with the rules governing the preparation of an environmental impact statement in sections 51.71(d), 51.95(c), and 10 C.F.R. Part 51, Subpart A, Appendix B, which refer generally to license renewal.[34] FPL and the Staff argue that the Staff is required to incorporate information from the GEIS for Category 1 issues for all power plant license renewal applications, initial and subsequent.[35] But the more general reference to license renewal in sections 51.95 and 10 C.F.R. Part 51, Subpart A, Appendix B dates to the 1991 proposed rule when the NRC explained that the "[P]art 51 amendments apply to one renewal of the initial license for up to 20 years."[36] And the 1996 final rule included 10 C.F.R. § 51.71(d) and the general reference to the "license renewal" stage, but within the context of a rule that retained the same "generic approach and scope" of the proposed rule.[37] The use of the plural to describe the amendments to Part 51 as a whole, not just section 51.53(c)(3), is telling. Therefore, if one wanted to resort to regulatory history, as the majority does, to reconcile the language of these sections in a manner consistent with each other, the word "initial" would need to be read into sections 51.71(d), 51.95(c), and 10 C.F.R. Part 51, Subpart A, Appendix B, rather than out of

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33 2013 GEIS at E-2.

34 See FPL Surreply at 7–9; NRC Staff Response to FPL Surreply at 16–19; Majority at 17–18 & n.35.

35 See FPL Surreply at 8–9; NRC Staff Response to FPL Surreply at 16–17.

36 1991 Proposed Rule, 56 Fed. Reg. at 47,017 (emphasis added); see also id. at 47,029.

37 1996 Final Rule, 61 Fed. Reg. at 28,468.

section 51.53(c)(3), as the majority effectively suggests, even though that is not the outcome they seek.[38]

The Staff further argues that section 51.53(c)(3) must apply to subsequent license renewal applications, notwithstanding the word "initial," because "the Commission has not promulgated any other requirements that specifically apply to an environmental report submitted for [a subsequent license renewal application]."[39] But this is not really an issue.[40] Applicants seeking a subsequent license renewal still must meet the requirements in 10 C.F.R. § 51.53(c)(1) and (c)(2). Section 51.53(c)(2) requires a license renewal applicant to include in the environmental report a description of the proposed action, a detailed description of the "affected environment around the plant," "the modifications directly affecting the environment or any plant effluents, and any planned refurbishment activities," as well as "the environmental impacts of alternatives and any other matters described in [10 C.F.R.] § 51.45."[41] Section 51.45, in turn, provides general requirements for environmental reports, with the exception, cross-referenced as section 51.53(c) and reflected in section 51.53(c)(2), that license renewal

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[38] See 1991 Proposed Rule, 56 Fed. Reg. at 47,017. Further, section 51.53(c)(3)'s greater specificity, that it applies only to initial renewal, rather than any renewal, is an indicator that "initial" should not be ignored. "Ordinarily, where a specific provision conflicts with a general one, the specific governs." Edmond v. United States, 520 U.S. 651, 657 (1997) (citing Busic v. United States, 446 U.S. 398, 406 (1980)); see also Union of Concerned Scientists v. NRC, 711 F.2d 370, 381 (D.C. Cir. 1983) (determining that between the general provisions in the APA and the more specific requirements in the Atomic Energy Act, the Atomic Energy Act controls). To be clear, I do not advocate that "initial" should now be read into other sections of Part 51. I am simply saying that the 1991 proposed regulations had inconsistencies. Given that, we must look at the plain language, which is supported by the Statements of Consideration, for the foundation of the interpretation of section 51.53(c)(3), regardless of the inconsistencies. These inconsistencies must be addressed through rulemaking.

[39] NRC Staff Response to FPL Surreply at 10 (emphasis omitted).

[40] And if it were an issue, the agency would need to promulgate regulations through the rulemaking process.

[41] 10 C.F.R. § 51.53(c)(2).

environmental reports "need not discuss the economic or technical benefits and costs of either the proposed action or alternatives except if these benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation."[42] Sections 51.53(c)(1) and (c)(2), together with the cross-reference to the general requirements in section 51.45, thus would seem to ensure that sufficient information is available to aid the Staff in the development of an environmental impact statement, which as the majority notes, is the intended purpose of an environmental report.[43]

Even if applying the plain language of section 51.53(c)(3) may be inefficient in some instances, applying the regulation as written is not what produces a "discordant," "untenable," or even an "absurd" result, as the majority asserts.[44] Instead, what has created this inefficiency is the agency's change of policy without a parallel change to the implementing regulation. As discussed above, the agency made the conscious policy decision to limit the use of the Part 51 amendments to one renewal per reactor unit when the rule was proposed in 1991, which was not changed in the 1996 final rule. But if the agency now finds this policy objectionable or inefficient, we are not the ones to provide a remedy in this adjudication. When faced with a similar choice in Griffin v. Oceanic Contractors, the Court declined to ignore the plain language of a statute, observing that it has "refus[ed] to nullify statutes, however hard or unexpected the particular effect."[45] The Court further reasoned that "'[l]aws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be

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42 Id. § 51.45(c); see also id. § 51.53(c)(2).

43 See Majority at 17–18.

44 Id. at 24–25.

45 458 U.S. 564, 575 (1982) (holding under terms of statute, district court was required to impose $300,000 penalty on ship owner for failing, without good cause, to promptly pay a seaman $412.50 in earned wages).

mischievous, absurd or otherwise objectionable. But in such case, the remedy lies with the law making authority, and not with the courts.'"[46]

Just as the "remedy for . . . dissatisfaction with the results [of applying the plain language of a statute] lies with Congress, and not with th[e] Court," the remedy for dissatisfaction with the results of applying section 51.53(c)(3) according to its plain text lies with the NRC in its rulemaking authority, not the Board.[47] If the Commission wishes to abandon its "initial renewal" provision, it has a clear path to do so: the NRC must amend the regulation the same way in which the regulation was adopted—through the rulemaking process.[48]

FPL and the Staff also claim, and the majority agrees, that the Staff Requirements Memorandum for SECY-14-0016 compels an interpretation of the regulations that would require use of the GEIS determinations when preparing the environmental report in subsequent license renewal proceedings.[49] This argument fails for two reasons. First, the documents associated with the Commission's action on SECY-14-0016 do not support such an interpretation. Although the Staff, in its paper, discussed its activities relative to the environmental impacts of license renewal, the Staff dismissed the need to amend Part 51 in a single sentence, stating that it "does not recommend updating the environmental regulatory framework under 10 [C.F.R.] Part 51 . . . because environmental issues can be adequately addressed by the existing GEIS and through future GEIS revisions."[50] At the same time, the options laid out for Commission

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46 Id. (citation omitted).

47 Id. at 576.

48 See Mortg. Bankers, 575 U.S. at __, 135 S. Ct. at 1206.

49 See Majority at 20; FPL Surreply at 12–14; NRC Staff Response to FPL Surreply at 10–11, 13.

50 "Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal," Commission Paper SECY-14-0016 (Jan. 31, 2014) at 5, encl. 1 (ADAMS Accession No. ML14050A306) [hereinafter SECY-14-0016]. A common-sense view of how we got to this point is that the word "initial" in 51.53(c)(3) has simply been overlooked when

action in the Staff's paper, as well as the Staff's recommended option, all pertained to safety concerns.[51] And the voting record for SECY-14-0016 reflects that the Commission was responding to the safety aspects of subsequent license renewal and whether changes should be made to 10 C.F.R. Part 54, rather than any potential changes to the environmental regulations in Part 51.[52]

Second, even were we to assume that the Staff Requirements Memorandum for SECY-14-0016 implies a Commission determination that no change to Part 51 was necessary because the rules and the GEIS already applied to subsequent license renewal, neither the Commission's nor the Staff's interpretation is sufficient to amend section 51.53(c)(3).[53] FPL and

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Part 51 has been reviewed the past several years while the requirements for subsequent license renewal were being considered. If not this, then how else could the Staff tell the Commissioners in this SECY paper that updating Part 51 is not recommended? But just because "initial' has been overlooked, this does not give the Board authority to change its meaning to what the Staff wants today.

[51] SECY-14-0016, at 1–2, 5–9.

[52] See Commission Voting Record, "SECY-14-0016—Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal" (Aug. 29, 2014) (ADAMS Accession No. ML14245A118). Rather than approving anything, the Commission disapproved the Staff's recommendation to initiate a rulemaking pertaining to Part 54. Staff Requirements—SECY-14-0016—Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal (Aug. 29, 2014) (Adams Accession No. ML14241A578) [hereinafter SRM-SECY-14-0016].

Also, it seems strange that these distinctly amorphous circumstances are the best evidence of Commission intent FPL and the Staff (and the majority) can point to in the context of what is apparently the last instance in which the Commission dealt with the rule provisions in question. Given its obvious significance, if the Commission had been fully aware of this section 51.53(c)(3) issue, surely some definitive indication of the Commission's "intent" would have been expressed. Perhaps the first opportunity the Commission may actually have to directly express its "intent" on this subject may be in response to this Board's referred ruling on this issue. See 10 C.F.R. § 2.323(f)(1).

[53] See, e.g., Christensen, 529 U.S. at 588 (declining to defer to an agency interpretation that conflicted with an unambiguous regulation because to do so "would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation"). The same rationale applies to FPL's reference to the July 2018 status report the agency sent to the U.S. Senate Committee on Environment and Public Works, which FPL claims demonstrates "that the Commission views the current Part 51 regulatory framework," including the GEIS, "as

the Staff argue that we should accept their interpretation of section 51.53(c)(3) because to do otherwise would lead to an "absurd result." But it is far more absurd to read out of the regulation a word that has been retained over the course of several years and that was the product of a rulemaking involving broad public participation, including public meetings and workshops, at the time it was adopted.[54] Nor do we have the authority to do so.

Although the Commission has not issued a formal statement directly addressing the issue before us, such an interpretive rule would also put the agency at risk. As the Court has cautioned, "when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions," the agency may be challenged under the "arbitrary and capricious standard."[55] Under the APA, an agency must "provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests [in the written regulation] that must be taken into account. It would be arbitrary and capricious to ignore such matters.'"[56]

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applicable to [subsequent license renewal applications]." FPL Surreply at 14–15. Even assuming the status report is an expression of that intent, the report to Congress would not be enough to overcome the plain language of section 51.53(c)(3). See Christensen, 529 U.S. at 588.

[54] See 1996 Final Rule, 61 Fed. Reg. at 28,469 (describing several public meetings and workshops over a rulemaking history spanning almost ten years). The majority describes a hypothetical that "would result in the wasteful expenditure of private and governmental resources." Majority at 25. This brings to mind TVA v. Hill, in which use of a federally funded multi-million-dollar dam project was halted to protect a small fish. Although not operating the dam similarly could have been described as a "wasteful expenditure," the Court declined to use such an excuse to go beyond the plain meaning of the Endangered Species Act. 437 U.S. 153, 187 (1978). Congress thereafter passed legislation to exempt the dam from the Endangered Species Act so that the dam could operate. See Pub. L. No. 96-69, 93 Stat. 437, 449–50 (1979). The legislature fixed the problem it created, rather than the Court.

[55] Mortg. Bankers, 575 U.S. at __, 135 S. Ct. at 1209.

[56] Id. (quoting Fox Television, 556 U.S. at 515).

Sidestepping the rulemaking process denies the public an opportunity to comment on a not-insignificant change to the NRC's regulations. And, in this case, that change would add another hurdle for petitioners. In past license renewal adjudicatory proceedings, a petitioner raising a challenge to a Category 1 issue had to meet the requirements for a waiver petition in 10 C.F.R. § 2.335, in addition to the contention admissibility requirements in 10 C.F.R. § 2.309, because such a contention would have been a challenge to the rule.[57] In those proceedings, however, applicants were seeking the initial renewal of their licenses, and therefore section 51.53(c)(3) plainly applied. To expect this case's petitioners to have sought a waiver of a regulation that does not clearly apply to this subsequent license renewal proceeding would be unfair.[58]

While I agree that the agency's current intent is to streamline the subsequent license renewal process, the agency has not amended 51.53(c)(3) to keep up with the evolved policy. The agency's expressed intent at the time the regulation was proposed was clearly that it applies only to initial license renewal. Looking to current intent while trying to explain away the expressed original intent of the regulation is a bridge too far. The agency's intent today may not be the same as the agency's intent when the regulation was created, but that original intent is what ultimately matters for regulatory interpretation. As the Appeal Board explained in the Shoreham proceeding, "[a]lthough administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that

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[57] See Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 384, 386 (2012); Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 16 (2007); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 22–23 (2001).

[58] Cf. Limerick, CLI-13-7, 78 NRC at 203 (offering a belated opportunity to submit a waiver petition after resolving "an apparent ambiguity in [the] license renewal regulations").

regulation."[59] The majority's tortuous approach to determining the regulation's applicability wipes away the plain meaning and the original regulatory intent, and instead skips to the Staff's more recent guidance documents and to the inconsistency the agency created when it did not update section 51.53(c)(3) to match that new intent.

The agency's new position clearly conflicts with the plain language of the rule, and we may not fix the problem in this adjudication.[60] To do so would run afoul of the APA and set a troubling precedent that might encourage the agency to take short cuts to amending its regulations in future adjudicatory proceedings. The majority points out the inefficiency of admitted contentions then becoming inadmissible if the regulations are applied as written,[61] but this inefficiency was created by the agency that is responsible for ensuring that the regulations are up-to-date. An agency may not create a situation that is inconsistent with an existing regulation and then use that disparity as an excuse to make a de facto amendment without notice and comment. For example, if the agency can change the meaning of "initial," what is to

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59 Shoreham, ALAB-900, 28 NRC at 288.

60 See "Standard Review Plan for Review of Subsequent License Renewal Applications for Nuclear Power Plants," NUREG-2192 at 1.1-2 (July 2017) (ADAMS Accession No. ML17188A158) (providing that the Staff reviewer will check that the applicant has prepared its environmental report "in accordance with the guidelines in NUREG–1555, 'Standard Review Plans for Environmental Reviews for Nuclear Power Plants, Supplement 1: Operating License Renewal,'" which refers generally to license renewal applicants); accord "Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications," Reg. Guide 4.2 (supp. 1, rev. 1) (June 2013) (ADAMS Accession No. ML13067A354) (referring generally to "license renewal applications") [hereinafter Reg. Guide 4.2]. But see Reg. Guide 4.2 at 33 (guiding the applicant to show the relationships between plant operation and resource attributes, and "[i]f any adverse impacts are identified," guiding the applicant to describe "the mitigation measures that have been used to reduce the adverse impacts during the initial license period or that are expected to be used during the license renewal period and their expected effects") (emphasis added)).

61 Majority at 24–25.

stop it from changing the June 30, 1995, limitation in section 51.53(c)(3) without notice and comment?[62]

If the NRC truly wants section 51.53(c)(3) to apply to subsequent license renewals, it must amend its regulations via the rulemaking process. Until that is completed, a short-term solution might be for the NRC to allow FPL and similarly situated subsequent license renewal applicants the option to reference the information in the GEIS for Category 1 issues in their environmental reports (rather than generating that information anew), thus gaining the procedural efficiencies that the Staff and the Commission may desire for subsequent license renewal.[63] But until section 51.53(c)(3) is revised to include subsequent license renewal

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[62] The NRC might again be presented with a need to amend section 51.53(c)(3) when the time comes for a combined license holder to seek a renewed license. Although the agency amended the regulation in 2007 to include "combined licenses," section 51.53(c)(3) is limited to license holders as of "June 30, 1995," at which time no combined license had been issued, thereby precluding its use for those licensees. See Final Rule, Licenses, Certifications, and Approvals, 72 Fed. Reg. at 49,432, 49,513; Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-2, 75 NRC 63, 122 (2012) (authorizing issuance of the first combined licenses). The "June 30, 1995," restriction also appears in Part 51, Subpart A, Appendix B, but this appendix does not include combined licenses among the types of licenses that may be renewed using the GEIS-associated efficiencies in the rule.

[63] Applicants for subsequent license renewal still retain the efficiencies accorded under Part 54, as contemplated in the original rulemaking and reaffirmed by the Commission in SECY-14-0016. See, e.g., 1991 Proposed Rule at 47,017 ("The [P]art 54 rule could be applied to multiple renewals of an operating license for various increments."); SRM-SECY-14-0016 (disapproving the Staff's recommendation to initiate a rulemaking to amend Part 54 for power reactor subsequent license renewal). I recognize that in the long run, the outcome is not in question: section 51.53(c)(3) will end up applying to any renewal, either because the Commission upholds the majority's decision or because the agency changes the regulation via the notice-and-comment process. The real issue is what road the Commission takes to get there. And given the short-term solution proposed above, no immediacy exists here that might counsel in favor of taking action outside the rulemaking process and risking an APA violation. In the interim, the Staff has the option of incorporating information from the GEIS in the supplemental environmental impact statement. But given that there is some question as to whether the GEIS contemplates the temporal scope of subsequent license renewal, see supra Dissent notes 32–33 and accompanying text, the Staff should ensure that its environmental review of subsequent license renewal applications is sufficiently forward-looking. Cf. New York v. NRC, 681 F.3d 471, 478–79, 483 (D.C. Cir. 2012) ("[A] generic analysis must be forward looking and have enough breadth to support the Commission's conclusions."), and petition for review denied, 824 F.3d 1012 (D.C. Cir. 2016).

applicants, petitioners must be allowed to challenge the substantive viability of any GEIS analyses incorporated by reference, without having to request a section 2.335 waiver, provided that they meet the standards for intervention in section 2.309. Requiring petitioners to meet only the contention admissibility standards would not shift the burden, as FPL would have it,[64] but instead maintains the status quo, given that contentions challenging environmental report Category 1 issues in subsequent license renewal proceedings do not challenge the regulations as currently written.[65]

III. Standing and Contention Admissibility

I concur with the majority's rulings on standing for SACE and the Joint Petitioners and on the admission of limited portions of contentions related to the discussion of the cooling tower alternative, the effects on the American crocodile, the source of surface water ammonia, and the impacts of ammonia discharges.[66] I concur with the majority not to admit all other contentions, or portions of contentions, whose inadmissibility was based on reasons that did not include the need for a section 2.335 waiver.

I also concur with allowing Monroe County to join as an interested government participant regarding SACE's two admitted contentions. And finally, I concur in the majority's determination to refer its ruling on the section 51.53(c)(3) matter to the Commission pursuant to 10 C.F.R. § 2.323(f)(1).

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[64] See Tr. at 65–66.

[65] By the same token, if any admitted contentions challenging Category 1 issues were outstanding if and when a rulemaking change to section 51.53(c)(3) becomes effective (thus precluding Category 1 items from being subject to adjudicatory consideration in a subsequent license renewal proceeding), the sponsors of those contentions should be afforded a reasonable opportunity, in accordance with section 2.335(b), to submit a rule waiver petition regarding the subject matter of those contentions.

[66] Regarding the admission of ammonia-related issues, although section 51.53(c)(3)(ii)(E) is referenced, the Joint Petitioners also noted that if section 51.53(c)(3) does not apply to subsequent license renewal applications, section 51.53(c)(1) and (c)(2) (along with section 51.45) apply in the alternative. Joint Pet'rs Pet. at 16 n.71.

Relative to the contentions the majority has judged inadmissible due to, at least in part, the need for a section 2.335 waiver to challenge a Category 1 issue, I abstain from endorsing that result due to my conviction that section 51.53(c)(3), as written, cannot apply to subsequent license renewal applications.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250-SLR
	)	50-251-SLR
(Turkey Point Nuclear Generating Units 3 & 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting the Hearing Requests of SACE and Joint Petitioners, Denying the Hearing Request of Albert Gomez, Granting Monroe County's Request to Participate as an Interested Governmental Participant, and Referring a Ruling to the Commission) (LBP-19-3)** have been served upon the following persons by Electronic Information Exchange and by electronic mail as indicated by an asterisk (*).

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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of March, 2019