

August 19, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

| | | |
|------------------------------------|---|----------------------------|
| In the Matter of |) | |
| Exelon Generation Company, LLC |) | |
| Peach Bottom Atomic Power Station, |) | Docket Nos. 50-277/278 SLR |
| Units 2 & 3 |) | |

BEYOND NUCLEAR, INC.’S REPLY BRIEF ON APPEAL OF LBP-19-05

I. INTRODUCTION

Beyond Nuclear, Inc. (“Beyond Nuclear”) hereby replies to two arguments made by Exelon Generation Co. L.L.C. (“Exelon”) and the U.S. Nuclear Regulatory Commission (“NRC”) Staff in opposition to Beyond Nuclear’s Brief on Appeal of LBP-19-05 (July 15, 2019) (“Appeal Br.”). Exelon’s Brief in Opposition to Beyond Nuclear’s Appeal of LBP-19-05 (Aug. 9, 2019) (“Exelon Br.”); NRC Staff Brief in Opposition to Beyond Nuclear Appeal of LBP-19-5 (Aug. 9, 2019) (“NRC Staff Br.”). The arguments are factually erroneous and without legal merit, and therefore should be rejected.¹

II. ARGUMENT

Exelon and the NRC Staff contend that Beyond Nuclear should be barred from challenging the ASLB’s reliance on 10 C.F.R. § 51.53(a) to reject Contention 2 because Beyond Nuclear “argued for the first time on appeal that the [Environmental Report] improperly incorporated Category 1 findings by reference.” Exelon Br. at 8. *See also* NRC Br. at 12. They also urge the Commission to disregard Beyond Nuclear’s citation to applicable case law, regulations, and guidance setting forth the NRC’s requirements for

¹ By not replying to other incorrect arguments, Beyond Nuclear does not concede them.

incorporation by reference under the National Environmental Policy Act (“NEPA”), on the ground that Beyond Nuclear did not cite them previously before the ASLB. *Id.* See also Appeal Brief at 6 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 and 4), LBP-16-08, 83 N.R.C. 417, 432 (2016), *aff’d on other grounds*, CLI-16-18, 84 N.R.C. 167 (2016) (“LBP-16-08”); 10 C.F.R. Part 51, Subpart A, App. A § 1(b)) (adopting “[t]he techniques of tiering and incorporation by reference described respectively in 40 CFR 1502.21 of [the Council on Environmental Quality’s (“CEQ’s) NEPA regulations”]; and NUREG-1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants (Oct. 1999) (“NUREG-1555”)). Exelon and the Staff are correct that the NRC prohibits parties from raising new issues on appeal; but they are wrong on the law and the facts.

i. Exelon and the Staff are wrong on the law.

Exelon and the Staff cite no legal authority, nor is Beyond Nuclear aware of any, that prohibits a party from citing additional authorities in support of an argument made below. The Staff’s assertion that Beyond Nuclear had an “ironclad obligation” to cite 10 C.F.R. § 51.53(a), LBP-16-08 and 10 C.F.R. Part 51, Subpart A, App. A § 1(b)) in its hearing request (NRC Staff Br. at 12 (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 N.R.C. 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1401 (1983)) is simply absurd. The “publicly available documents” on which Beyond Nuclear had an “ironclad obligation” to base Contention 2 made no mention of 10 C.F.R. § 51.53(a). Instead, the Environmental Report cited 10 C.F.R. § 51.53(c)(3) forty-five times. Mention of 10 C.F.R. § 51.53(a) did not appear in any public document until Exelon’s and the Staff’s responses to Exelon’s Hearing Request. Exelon Response

at 31, NRC Staff Response at 57. Even then, their brief *post hoc* rationalizations failed to explain how 10 C.F.R. § 51.53(a) could be deemed to carve out a wholesale exception to 10 C.F.R. § 51.53(c)(2)’s requirement to discuss the environmental impacts of operating Peach Bottom Units 2 and 3 in a subsequent license renewal term, simply by referring summarily to “Category 1” findings. Beyond Nuclear’s level of legal briefing at that level was at least equivalent to the level of briefing provided by Exelon and the Staff.

ii. Beyond Nuclear has consistently raised the claim on appeal.

From the beginning of this proceeding, starting with the language of Contention 2, Beyond Nuclear has pursued the claim it now raises on appeal. Beyond Nuclear has consistently and repeatedly argued that NEPA and NRC implementing regulation 10 C.F.R. § 51.53(c)(2) require Exelon’s Environmental Report to address the environmental impacts of operating Peach Bottom Units 2 and 3 with aging equipment; and that the single regulation that would excuse Beyond Nuclear from discussing those impacts, 10 C.F.R. § 51.53(c)(3), does not apply. Beyond Nuclear also agreed, in the proceeding before the ASLB, that Exelon was entitled to incorporate the License Renewal GEIS into its Environmental Report, but argued that Exelon must do more than just cite to the Category 1 findings. While acknowledging that incorporation by reference of other relevant environmental studies is a common and accepted practice, Beyond Nuclear argued that enough information must be provided to show that the environmental impacts of operating Peach Bottom Units 2 and 3 with aging equipment up to 80 years had been adequately addressed.²

² It bears noting that the Environmental Report’s *entire* discussion of the environmental impacts of design-basis accidents is to cross-reference the phrase “Category 1,” without

Beyond Nuclear has consistently taken this position throughout the proceeding before the ASLB, as follows:

- Contention 2 itself asserts that:

Exelon violated [NEPA] and NRC implementing regulation 10 C.F.R. § 51.53(c)(2) by *failing to address the accident risk posed by operating aging reactor equipment* during a second license renewal term. Exelon incorrectly claims that the risk of operating Peach Bottom with aging equipment is a “Category 1” issue and therefore exempt from consideration under 10 C.F.R. § 51.53(c)(3) and Table B-1 of 10 C.F.R. Part 50 (sic), Appendix A.

Beyond Nuclear’s Hearing Request and Petition to Intervene at 6-7 (Nov. 19, 2018) (“Hearing Request”) (emphasis added).

- Contention 2 also criticizes the Environmental Report for failing to discuss the existing body of literature and a high-level NRC Staff memorandum raising concerns about safety and environmental risks of operating nuclear reactors with aging equipment, including specific studies of safety and environmental risks of operating Peach Bottom with aging equipment. *Id.* at 7-9 (citing NUREG/CR-7153, Expanded Materials Degradation Assessment (EMDA), a five-volume

making the slightest attempt to describe or cite the specific environmental conclusions of the License Renewal GEIS. As stated at page 4-69 of the Environmental Report:

The 2013 GEIs defines postulated accidents to include the following Category 1 issues:

- Issue 65 – Design-basis accidents.

No new and significant information was identified regarding impacts from the design-basis accidents. Therefore, the conclusions in the 2013 GEIS are considered appropriate for the PBAPS SLR, are incorporated herein by reference, and need no further analysis.

report prepared by the NRC and the U.S. Department of Energy (“DOE”) (ORNL/TM-2013/532, Oct. 2014); and SECY-14-0016, Memorandum from Mark A. Satorius, NRC Executive Director of Operations, to NRC Commissioners, re: Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal (Jan. 31, 2014) (NRC ADAMS Accession No. ML14050A306)). Thus, the contention gives examples of the types of information that must be addressed in the Environmental Report.³

- In replying to Exelon’s and the NRC Staff’s oppositions to Contention 2, Beyond Nuclear argued that it had “shown that the Environmental Report does not discuss the risk of accidents due to aging of equipment at Peach Bottom *at all*, and that Exelon has no lawful excuse for failing to do so.” Beyond Nuclear’s Reply to Exelon’s and NRC Staff’s Oppositions to Hearing Request and Petition to Intervene at 32 (Dec. 21, 2018) (“Beyond Nuclear Reply”) (emphasis in original). As Beyond Nuclear pointed out, “the very failure of Exelon to provide any discussion of environmental impacts due to aging reactor equipment constitutes a lawful and adequate basis for Contention 2.” *Id.*
- Beyond Nuclear did not object to Exelon’s claimed right to incorporate the License Renewal GEIS by reference. *See* Tr. 189 (Lewis) (asserting that even if

³ Beyond Nuclear respectfully submits that Contention 2 is an admissible contention of omission because it asserts that (a) 10 C.F.R. § 51.53(c)(3) is inapplicable and Exelon gives no information other than an oblique reference to “Category 1” to describe the environmental impacts of design-basis accidents during a second license renewal term. While Beyond Nuclear has identified documents that should have been discussed in the Environmental Report, it is appropriate to remand the Environmental Report to Exelon for a discussion of the environmental impacts of design-basis accidents and then allow submission of hearing requests on the adequacy of that discussion, in which Exelon’s failure to address certain specific information could be raised.

10 C.F.R. § 51.53(c)(3) does not apply, “we still have these findings from the GEIS incorporated into our ER as permitted by 51.53(a).”) But Beyond Nuclear insisted that Exelon must do more than make a summary reference to the Category 1 findings. Tr. 189 (Curran) (“[Exelon has] done nothing and they have to do something...”)⁴ As Beyond Nuclear’s counsel explained, “[I]t would be fine to go back and cross reference the old GEIS and say, we still think that we did

⁴ Exelon selectively quotes a statement by Beyond Nuclear’s counsel during the oral argument and misconstrues it to suggest that Beyond Nuclear has presented “no dispute” with Exelon about the adequacy of the Environmental Report to incorporate the License Renewal GEIS by reference. Exelon Br. at 9 (quoting tr. 189 (Curran)). In fact, Beyond Nuclear asserted that if Exelon had sought to incorporate the License Renewal GEIS *without* relying on 10 C.F.R. § 51.53(c)(3), and had “done nothing” to address the environmental impacts of design basis accidents during a subsequent license renewal term, then Beyond Nuclear could raise an admissible contention of omission by simply challenging Exelon’s failure to describe those impacts in any way. The entirety of the relevant portion of the statement by Beyond Nuclear’s counsel is as follows:

[Mr. Lewis, counsel for Exelon] was saying that we would’ve needed to say a lot more in a contention about what was required. We have to justify it. And I don’t think so because accidents are treated by Exelon as a Category 1 issue, and they really just don’t discuss them because they assume they’re covered by 51.53(c)(3).

And all we have to say is that don’t apply, and you need to address all these issues that you thought were exempted under that regulation. So – and then if they do and if what they say is nothing is – we rely on the GEIS. That analysis is good enough for us. We haven’t changed anything. Then of course, we would comment on that or raise new contentions about it and probably challenge that. But if they’ve done nothing and they have to do something, then all we have to do is say, you haven’t addressed this issue. And that’s an admissible contention of . . . omission.

Tr. 188-89 (Curran).

some good work here and we'd like to rely on it. But I think NEPA requires the NRC to brush it up and make sure that it's really up to date.”).

- Beyond Nuclear also consistently attacked the applicability of the *only* regulation in the NRC code that would allow a license renewal applicant to incorporate another environmental study by reference, without addressing the sufficiency of that study to evaluate the environmental impacts of the proposed action at issue: 10 C.F.R. 51.53(c)(3). Under this unique regulation, holders of reactor operating licenses issued before June 30, 1995 who “seek “an initial renewed license” need do no more than mention the Category 1 findings in Table B-1 and state that they are aware of no new or significant information. These initial license renewal applicants can avail themselves of Section 51.53(c)(3)’s exemption from the requirement to discuss the environmental impacts of the proposed action because the Category 1 findings are binding as a matter of law. Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses 61 Fed. Reg. 28,467, 28,464 (June 5, 1996).⁵ As conceded in the rulemaking notice, this practice of codifying environmental findings for initial license applications

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- ⁵ As explained in the preamble to the Final Rule:

The amendment *codifies certain environmental impacts associated with license renewal* that were analyzed in NUREG-1437, “Generic Environmental Impact Statement for License Renewal at Nuclear Plants” (xxxx 1996). Accordingly, absent new and significant information, the analyses for certain impacts codified by this rulemaking *need only be incorporated by reference in an applicant’s environmental report for license renewal* and in the Commission’s (including NRC staff, adjudicatory officers, and the Commission itself) draft and final SEIS and other environmental documents developed for the proceeding.

Id. (emphasis added).

“deviates from current NEPA review practice.” *Id.* As Beyond Nuclear has maintained throughout the proceeding, because Exelon is not an initial license renewal applicant, it has no legal right to claim the exception in 10 C.F.R. § 51.53(c)(3). *See* Hearing Request at 6-7, 9-11, 11-14; Beyond Nuclear’s Reply at 18-32, Oral Argument Tr. 162-66, 175-77, 188-190, 210.⁶

Accordingly, contrary to the argument by Exelon and the NRC Staff, Beyond Nuclear did not raise any new issue on appeal regarding the lawfulness of Exelon’s incorporation of Category 1 environmental findings into its Environmental Report. The only new information provided by Beyond Nuclear consisted of providing additional citations to support its position, which is permissible.

B. Exelon and the Staff Erroneously Confuse the Differing Standards for Incorporation by Reference in 10 C.F.R. §§ 51.53(c)(3) and 51.53(a).

Exelon and the NRC Staff erroneously conflate and confuse the standards for incorporation by reference in 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. § 51.53(a), as if they were the same. For instance, Exelon accuses Beyond Nuclear of continuously “ignor[ing]” the statements in the Application [*i.e.*, the Environmental Report] incorporating the GEIS findings.” Exelon Br. at 9. And the NRC Staff accuses Beyond Nuclear of seeking to “flyspeck” the Environmental Report by failing to read through the License Renewal GEIS Rev. 1 to find “Appendix E,” which contains “the discussion of accident risks.” NRC Staff Br. at 16.

⁶ Beyond Nuclear notes that the ASLB instructed the parties not to address issues related to 10 C.F.R. § 51.53(c)(3) that already had been decided by a different ASLB panel in *Florida Power & Light Co.* (Turkey Point Units 3 and 4), LBP-19-03, 89 N.R.C. ____ (March 7, 2019). *See* Notice and Order (Providing Instructions for Oral Argument) at 2 (Mar. 12, 2019). Therefore, Beyond Nuclear’s comments on the applicability of 10 C.F.R. § 51.53(c)(3) to Exelon’s Environmental Report were necessarily limited.

In making these arguments, Exelon and the Staff overlook the fundamental difference between 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. § 51.53(a). Section 51.53(c)(3) codifies the Table B-1 findings, such that they may be incorporated by reference into an Environmental Report merely by mentioning the words “Category 1.” No further description of environmental impacts is required, because as a matter of law the NRC has determined – for the purposes of initial license renewal – that the 1996 License Renewal GEIS, as revised in 2013, provides sufficient support. If 10 C.F.R. § 51.53(c)(3) did apply to Exelon’s Environmental Report, then Exelon’s brief reference to design-basis accidents as a “Category 1 issue would be sufficient for purposes of incorporating those findings by reference under that regulation.

In contrast, 10 C.F.R. § 51.53(a) makes no assumptions about the adequacy of the environmental analysis that a license applicant seeks to incorporate into an environmental report. The applicant must give reviewers enough information to (a) show that the applicant has reviewed the incorporated analysis and determined it is sufficient, and (b) allow an independent review. With respect to the License Renewal GEIS, for example, the Environmental Report is completely inadequate, because it amounts to shorthand. It would be reasonable, for example, to expect Exelon to cite the specific discussion in Appendix E, citing the volume and page number of the License Renewal GEIS, Rev. 1. It would also be reasonable to expect Exelon to include in the Environmental Report the relevant information in Appendix E about the environmental impacts of design-basis accidents:

- The “focus of” Rev. 1 of the License Renewal GEIS, is “severe accidents,” because the NRC considers the environmental impacts of design-basis accidents to be “SMALL.” *Id.* at E-1.
- NRC has made no update to the analysis of design-basis accidents found in the 1996 License Renewal GEIS. *Id.*
- Rev. 1 of the License Renewal GEIS contains only the following two-sentence explanation of why the analysis was not updated:

As stated in Section 5.3.2, the environmental impact from design-basis accidents was assessed in the individual plant-specific EISs at the time of the initial license application review. Since the licensee is required to maintain the plant within acceptable design and performance criteria, including any license renewal term, these impacts are not expected to change.”

Id. at E-5 – E-6.

- The above short squibs regarding design-basis accident impacts constitutes *the totality* of the environmental analysis of design-basis accident impacts in the 2013 revised License Renewal GEIS.

To comply with 10 C.F.R. § 51.54(a)’s requirements for incorporation by reference, Exelon must summarize this analysis (which would consist of copying what is already just a summary), provide citations to it, and give some explanation of how and why the analysis addresses the environmental impacts of design basis accidents at Peach Bottom Units 2 and 3 if the reactors are permitted to operate for a full 80 years. Contention 2 is admissible because Exelon’s Environmental Report lacks anything remotely approaching

such information, and because it is not entitled to protection from a legal challenge under 10 C.F.R. § 51.53(c)(3).⁷

III. CONCLUSION

For the foregoing reasons, the Commission should reverse LBP-19-05 and remand it to the ASLB to address the applicability of 10 C.F.R. § 51.53(c)(3) to Exelon's Environmental Report.

Respectfully submitted,

_____/signed electronically by/
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⁷ Beyond Nuclear notes that the ASLB declined to address the applicability of 10 C.F.R. § 51.53(c)(3) to Exelon's Environmental Report.

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CERTIFICATE OF SERVICE

I certify that on August 19, 2019, I posted copies of the foregoing Beyond Nuclear, Inc.'s Reply Brief on Appeal of LBP-19-05 on the NRC's Electronic Information Exchange System.

/signed electronically by/
Diane Curran