

August 29, 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

Exelon’s Answer Opposing Beyond Nuclear’s Motion to File a Reply Brief

Pursuant to 10 C.F.R. § 2.323(c), Exelon Generation Company, LLC (“Exelon”) submits this Answer opposing Beyond Nuclear, Inc.’s Motion for Leave to Reply in Part to Oppositions to Beyond Nuclear’s Brief on Appeal of LBP-19-05 (August 19, 2019) (“Motion”). Beyond Nuclear’s Motion and the accompanying Reply Brief¹ should be rejected because 10 C.F.R. § 2.311 does not provide for the filing of reply briefs, Beyond Nuclear provides no grounds for any exception, and in a number of instances seeks to use the Reply Brief to continue to raise issues improperly presented for the first time on appeal. Beyond Nuclear has had a full and fair opportunity to present its arguments in its initial brief, and deserves no further opportunity, particularly one seeking to recast its claims and present arguments never pressed before the Atomic Safety and Licensing Board (“Board”).²

The Commission permits filings not otherwise authorized by its rules only where “necessity or fairness dictates.”³ Beyond Nuclear was aware of Exelon’s and the NRC Staff’s

¹ Beyond Nuclear, Inc.’s Reply Brief on Appeal of LBP-19-05 (Aug. 19, 2019) (“BN Reply Brief” or “Reply Brief”).

² Because Beyond Nuclear is improperly attempting to recast its claims, its Reply Brief is over twice as long as would be allowed in connection with reviews of final decisions. *See* 10 C.F.R. § 2.341(b)(3).

³ *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-03, 79 N.R.C. 31, 35 (2014).

position that Exelon’s Environmental Report (“ER”) incorporated the GEIS findings on design-basis accidents by reference as permitted by 10 C.F.R. § 51.53(a)⁴ (contrary to Beyond Nuclear’s contention that the impacts of design-basis accidents were not addressed “*at all*”); and, as it is represented by experienced counsel, Beyond Nuclear cannot claim surprise at Exelon’s and the NRC Staff’s argument that it is barred from now challenging the manner in which those findings were incorporated by reference for the first time on appeal.⁵ Under these circumstances, neither fairness nor necessity dictates that Beyond Nuclear’s Reply Brief should be permitted.⁶

Beyond Nuclear’s Motion and Reply Brief are predicated on Beyond Nuclear’s assertion that it could not have anticipated Exelon’s and the NRC Staff’s argument that Beyond Nuclear is barred from making for the first time on appeal arguments not made before the Board, including raising legal arguments challenging the manner in which GEIS findings were incorporated into the ER.⁷ Beyond Nuclear attempts to suggest that it has merely cited additional legal authority in support of an argument made below.⁸ But before the Board, Beyond Nuclear presented no

⁴ In opposing Beyond Nuclear’s Contention 2, both Exelon’s and the NRC Staff’s answers responded that 10 C.F.R. § 51.53(a) permits an applicant to incorporate into its ER information from NRC Staff prepared generic environmental impact statements, that Exelon had done so, and that Beyond Nuclear provided no basis for any claim that impacts of design-basis accidents would be significantly different during the renewal term. Exelon’s Answer Opposing Beyond Nuclear Inc.’s Hearing Request and Petition to Intervene (Dec. 14, 2018) (“Exelon Answer”) at 29-31, 38-40; NRC Staff Answer to Beyond Nuclear Inc.’s Hearing Request and Petition to Intervene (Dec. 14, 2018) (“NRC Staff Answer”) at 56-60.

⁵ The NRC case law is clear and explicit that “absent extreme circumstances, [the Commission] will not consider on appeal ‘either new arguments or new evidence supporting the contentions,’ which the Board never had the opportunity to consider.” *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 458 (2006) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 N.R.C. 125, 140 (2004)). See also *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-03, 71 N.R.C. 49, 51 n.7 (2010) (“We do not consider arguments or new facts raised for the first time on appeal unless their proponent can demonstrate that the information was previously unavailable.”). See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 N.R.C. 124, 132-33 & n.38 (2007), *aff’d*, *New Jersey Dep’t of Env’tl. Prot. v. NRC*, 561 F.3d 132, 137 n.5 (3d Cir. 2009).

⁶ *Sequoyah*, CLI-14-03, 79 N.R.C. at 35.

⁷ Motion at 2; BN Reply Brief at 1-2.

⁸ BN Reply Brief at 2.

argument that the manner in which the ER incorporated by reference the GEIS⁹ findings was improper or failed to meet any applicable standard for incorporation by reference. Instead, Beyond Nuclear stuck stubbornly to its untenable claim that the ER did not address the risk of accidents at all.¹⁰ In short, Beyond Nuclear's claim, that the manner in which these findings were incorporated by reference into Exelon's ER violates LBP-16-8,¹¹ Appendix A to 10 C.F.R. Part 51, 40 C.F.R. § 1502.21, and NUREG-1555, is an entirely new argument raised on appeal and therefore improper. Moreover, raising new authorities as a new basis for a contention for the first time on appeal is impermissible in any event.¹²

Beyond Nuclear also argues that it could not have anticipated Exelon and the NRC Staff would ignore or mischaracterize the record made by Beyond Nuclear before the Board¹³ but fails to identify any such instance. There is one footnote in the Reply Brief asserting that Exelon

⁹ NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Rev. 1 (June 2013) ("GEIS").

¹⁰ Beyond Nuclear Inc.'s Reply to Exelon and NRC Staff's Oppositions to Hearing Request and Petition to Intervene (Dec. 21, 2018) at 31-32; *see also* Tr. 189. In its Reply Brief, Beyond Nuclear points to its counsel's statement during oral argument that "it would be fine to go back and cross reference the old GEIS and say, we still think that we did 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." BN Reply Brief at 6, quoting Tr. 179-80. Beyond Nuclear's counsel musing about what she thinks the NRC should do says nothing about how an applicant should incorporate by reference information into its environmental report, and Beyond Nuclear did not provide any citation or support. Further, Exelon's ER states that no new and significant information regarding the impacts of design-basis accidents has been identified, and therefore the GEIS conclusions remain appropriate and do not need further analysis. ER at 4-69. "[I]t is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position and contentions." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1977). Before the Board, Beyond Nuclear provided no meaningful indication that the manner in which the GEIS findings were referenced was inadequate.

¹¹ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-16-08, 83 N.R.C. 417 (2016), *aff'd*, CLI-16-18, 84 N.R.C. 167 (2016).

¹² *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 N.R.C. 681, 699 & n.20 (1985) (summary dismissal of a CEQ argument is justified when pressed for the first time on appeal). Moreover, Beyond Nuclear's new authorities are a late and improper attempt to remedy an otherwise deficient contention. *See American Centrifuge Plant*, CLI-06-10, 63 N.R.C. at 458.

¹³ Motion at 1.

selectively quoted a statement by Beyond Nuclear counsel during oral argument,¹⁴ but there is nothing selective about the quotation. To show that Beyond Nuclear at oral argument continued to ignore the statements in the Application incorporating the GEIS findings, presenting no dispute with them, Exelon's Brief quoted Beyond Nuclear's counsel statement that:

And all we have to say is that doesn'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.¹⁵

Beyond Nuclear appears to view this quote as selective because it did not include Beyond Nuclear's counsel's prior statement that:

[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).¹⁶

This additional statement simply reinforces Beyond Nuclear's failure to acknowledge the ER's incorporation of the GEIS findings, asserting instead "that they really just don't discuss them." Exelon's brief referenced repeated statements by Beyond Nuclear alleging incorrectly that the

¹⁴ BN Reply Brief at 6 n.4.

¹⁵ Exelon's Brief in Opposition to Beyond Nuclear's Appeal of LBP-19-05 (Aug. 9, 2019) ("Exelon Brief") at 9-10, quoting Tr. 189. Remarkably, after accusing Exelon and the NRC Staff as having mischaracterized the record, Beyond Nuclear attempts to recast its statement as asserting 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." BN Reply Brief at 6 n.4. Exelon respectfully submits that Beyond Nuclear's statement that "they've done nothing" meant that Exelon had not addressed design-basis accidents at all, as Beyond Nuclear persistently and incorrectly maintained.

¹⁶ BN Reply Brief at 6 n.4.

ER did not discuss design-basis accidents at all.¹⁷ At no point did Beyond Nuclear say that the incorporation of the GEIS findings was insufficient under 10 C.F.R. § 51.53(a).

Finally, Beyond Nuclear argues that it could not have anticipated that Exelon and the NRC Staff would confuse the legal requirements of 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. § 51.53(a) for incorporation by reference of other environmental studies into an environmental report.¹⁸ Beyond Nuclear argues that 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, and overlook the fundamental difference between these provisions.¹⁹ This is yet another new argument improperly raised for the first time on appeal.²⁰ Beyond Nuclear made no argument before the Board that 10 C.F.R. § 51.53(a) only applies to incorporation by reference of “other environmental studies”²¹ or requires a greater level of discussion when incorporating studies by reference than 10 C.F.R. § 51.53(c)(3).

Further, that argument is inconsistent with the plain language of Section 51.53(a) permitting incorporation by reference of *any* information in a previously-prepared environmental impact statement, including NRC staff-prepared final generic environmental impact statements. Moreover, contrary to Beyond Nuclear’s assertion that 10 C.F.R. § 51.53(c)(3) codified Table B-1 findings “such that they be incorporated by reference into an Environmental Report merely by

¹⁷ See Exelon Brief at 6, 9.

¹⁸ Motion at 2.

¹⁹ BN Reply Brief at 8, 9.

²⁰ See *supra* note 5.

²¹ See Motion at 2. Beyond Nuclear appears to be suggesting that Section 51.53(a) allows an ER to incorporate any environmental studies other than the GEIS. Any such argument is inconsistent with the plain language of Section 51.53(a) permitting incorporation by reference of *any* information in a previously-prepared environmental impact statement, including NRC staff-prepared final generic environmental impact statements. Further, it would be remarkable to interpret Section 51.53(a) as allowing incorporation by reference of any environmental studies other than the only generic environmental impact statement specifically prepared to address license renewal.

mentioning the words ‘Category 1,’”²² 10 C.F.R. § 51.53(c)(3) contains no provision requiring an environmental report to incorporate Category 1 findings by reference or detailing how this should be done. Instead, it provides that an environmental report is not required to contain analyses of the environmental impacts of Category 1 issues.²³ The only rule providing for the incorporation by reference of information from a generic environmental impact statement is Section 51.53(a).

Beyond Nuclear’s Reply Brief argues (without any citation or support) that “[t]o comply with 10 C.F.R. § 51.54(a)’s [sic] 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.”²⁴ This is much the same as the new argument that Beyond Nuclear presented in its initial Brief challenging the manner in which the GEIS conclusions were referenced, again improperly presented for the first time on appeal.

Beyond Nuclear also includes in its Reply Brief a criticism of the discussion of design-basis accidents in the GEIS.²⁵ This criticism too was never raised before the Board and therefore is improperly raised now. Because Exelon’s ER incorporated the GEIS findings on design-basis accidents, it was Beyond Nuclear’s burden under 10 C.F.R. § 2.309 to demonstrate that any alleged error or omission in the ER is material. Beyond Nuclear never alleged or provided any support showing that consideration of the body of literature to which it referred in Contention 2

²² BN Reply Brief at 9.

²³ 10 C.F.R. § 51.53(c)(3)(i).

²⁴ BN Reply Brief at 10.

²⁵ BN Reply Brief at 9-11.

would materially alter the assessment of design-basis accidents in the GEIS, making such impacts anything other than small.

In sum, Beyond Nuclear cannot now attempt to cure on appeal its failure to dispute Exelon's ability to incorporate by reference GEIS findings in the ER, object to the manner in which those findings were referenced, or demonstrate any genuine material dispute with the referenced findings. Because Beyond Nuclear cannot legitimately claim surprise at any of the arguments in Exelon and the NRC Staff's answers, and instead is seeking in its Reply Brief to rehabilitate its hearing request through new arguments never presented to the Board, Beyond Nuclear's Motion should be denied and its Reply Brief should be rejected.

For all the foregoing reasons, the Commission should deny Beyond Nuclear's Motion.

Respectfully submitted,

/signed electronically by Anne R. Leidich/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Exelon's Answer Opposing Beyond Nuclear's Motion to File a Reply Brief has been served through the E-Filing system on the participants in the above-captioned proceeding this 29th day of August, 2019.

/signed electronically by Anne R. Leidich/
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