

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

EXELON GENERATION COMPANY, LLC

(Peach Bottom Atomic Power Station, Units 2 and 3)

Docket Nos. 50-277-SLR
50-278-SLR

NRC STAFF ANSWER TO
BEYOND NUCLEAR MOTION FOR LEAVE TO REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby answers the Beyond Nuclear, Inc. (Beyond Nuclear) motion for leave to reply¹ to the Staff and Exelon Generation Company, LLC (Exelon) briefs² filed in opposition to Beyond Nuclear's appeal of the Atomic Safety and Licensing Board (Board) decision in LBP-19-5.³

As discussed below, the Commission should deny the motion and reject the reply brief, which Beyond Nuclear filed the same day,⁴ because a reply brief is not authorized under the

¹ Beyond Nuclear's Motion for Leave to Reply in Part to Oppositions to Beyond Nuclear's Brief on Appeal of LBP-19-05 (Aug. 19, 2019) (Motion). Beyond Nuclear claims a reply is necessary to correct factual and legal errors made by Exelon or the Staff that it could not have anticipated. Motion at 1–3.

² NRC Staff Brief in Opposition to Beyond Nuclear Appeal of LBP-19-5 (Aug. 9, 2019) (Staff Appeal Brief); Exelon's Brief in Opposition to Beyond Nuclear's Appeal (Aug. 9, 2019) (Exelon Appeal Brief).

³ *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC __ (Jun. 20, 2019) (slip op.).

⁴ Beyond Nuclear, Inc.'s Reply Brief on Appeal of LBP-19-05 (Aug. 19, 2019) (Reply Brief).

Commission's regulations and Beyond Nuclear does not identify an issue of fairness or necessity⁵ that would warrant the additional briefing requested.

BACKGROUND

In LBP-19-5, the Board denied Beyond Nuclear's request for a hearing in this proceeding concerning the subsequent license renewal application submitted by Exelon for Peach Bottom Atomic Power Station Units 2 and 3 (Peach Bottom). The Board found that Beyond Nuclear failed to file an admissible contention as required by 10 C.F.R. § 2.309(f)(1)(iv)–(vi).⁶ Beyond Nuclear appealed the Board's decision with respect to Contention 2,⁷ in which it claimed that Exelon violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321–4370h, and NRC implementing regulations because Exelon's Environmental Report did not address the environmental impacts of operating Peach Bottom with aging equipment during the subsequent license renewal period.⁸ The Staff and Exelon filed briefs in opposition to the appeal.⁹

Beyond Nuclear now moves for leave to reply to the Staff's and Exelon's appeal briefs, simultaneously filing a Reply Brief. Beyond Nuclear claims that Exelon and the Staff mischaracterize the record and law in asserting that Beyond Nuclear raised a matter for the first time on appeal and in addressing 10 C.F.R. § 51.53(a) versus 10 C.F.R. § 51.53(c)(3).¹⁰

⁵ See *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 & 2), CLI-14-3, 79 NRC 31, 35 & n.24 (2014) (stating that filings not otherwise authorized by Commission rules will be permitted only where necessity or fairness dictates) (citations omitted).

⁶ LBP-19-5, slip op. at 1, 24; see also Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene (Nov. 19, 2018) (Petition).

⁷ Beyond Nuclear does not contest the Board's holding that Contention 1 is also inadmissible. Appeal at 1 n.1.

⁸ Beyond Nuclear's Notice of Appeal of LBP-19-05 (Jul. 15, 2019); Beyond Nuclear's Brief on Appeal of LBP-19-05 (Jul. 15, 2019) (Appeal); LBP-19-5, slip op. at 16–24.

⁹ Staff Appeal Brief; Exelon Appeal Brief.

¹⁰ Motion at 1–3.

Beyond Nuclear states that it could not have anticipated these arguments and that a reply is needed to correct the record and inform the Commission.¹¹ Because the grounds for the Beyond Nuclear Motion are stated in both the Motion and Reply Brief,¹² the Staff addresses both documents below.

DISCUSSION

Beyond Nuclear seeks Commission permission to submit a filing that is not contemplated by the Commission's regulations. The regulations in 10 C.F.R. Part 2 do not authorize an appellant to reply to briefs filed under 10 C.F.R. § 2.311(b).¹³ The Commission "permits filings not otherwise authorized by [its] rules only where necessity or fairness dictates."¹⁴

The Commission should deny this motion because additional briefing is not required as a matter of fairness or necessity¹⁵ and would not assist the Commission in reaching a decision. As discussed below, Beyond Nuclear mistakenly asserts that factual and legal errors need to be corrected and that it could not have anticipated the arguments raised in opposition to its appeal.¹⁶ The record does not support Beyond Nuclear's assertion that its claim that Exelon failed to properly execute incorporation by reference under 10 C.F.R. § 51.53(a) was raised below.¹⁷ Beyond Nuclear also (1) mistakenly asserts that Staff and Exelon argued that Beyond

¹¹ See *id.* at 1–3.

¹² Motion at 1–3; Reply at 2–3.

¹³ *Sequoyah*, CLI-14-3, 79 NRC at 34 (citations omitted); 10 C.F.R. § 2.311.

¹⁴ *Sequoyah*, CLI-14-3, 79 NRC at 35 & n.24 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 807 (2011) (citing, in turn, *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008)).

¹⁵ See *Sequoyah*, CLI-14-3, 79 NRC at 35 & n.24 (citations omitted).

¹⁶ See *id.* at 1–2; Reply Brief at 2–8.

¹⁷ See Motion at 1; Reply Brief at 3–8.

Nuclear cannot rely on additional authorities to support positions taken below and (2) mistakenly concludes that the Staff and Exelon confused the legal standards of 10 C.F.R. § 51.53(a) and 10 C.F.R. § 51.53(c)(3).¹⁸ Fundamentally, Beyond Nuclear seeks an opportunity to raise an issue it did not identify below and to reargue its position on 10 C.F.R. § 51.53. Thus, the Commission should deny the Motion.

I. Beyond Nuclear Does Not Show A Factual Error

Beyond Nuclear concedes that new issues cannot be raised on appeal, but is mistaken when it claims that the record needs to be corrected to reflect that it previously argued that Exelon had not taken the proper steps to incorporate the GEIS.¹⁹

The record below shows Beyond Nuclear did not dispute Exelon's claim that it incorporated the GEIS and Table B-1 by reference.²⁰ Absent from Beyond Nuclear's Motion and Reply Brief are citations to its intervention petition and its reply to the Exelon and Staff intervention petition answers, showing that it argued that Exelon had not taken sufficient actions to incorporate the GEIS (or Table B-1 findings in 10 C.F.R. Part 51, Subpart A, Appendix B) under 10 C.F.R. § 51.53(a). Rather, Beyond Nuclear focuses on claims that 10 C.F.R. § 51.53(c)(3) does not apply to subsequent license renewal and does not "exempt" Exelon from addressing 10 C.F.R. § 51.53(c)(2) requirements.²¹

Now Beyond Nuclear states that it "agreed...that Exelon was entitled to incorporate by reference the License Renewal GEIS into its Environmental Report," and did not object to Exelon's right to do so.²² It asserts, however, that its counsel's statement (at oral argument)

¹⁸ Motion at 2–3; Reply Brief at 8–11.

¹⁹ See Motion at 1; Reply Brief at 3–8.

²⁰ As noted in the Staff Appeal Brief at 12, Beyond Nuclear did not respond to the arguments concerning the availability of § 51.53(a). See *also* LBP-19-5, slip op. at 20 n.98.

²¹ See Reply Brief at 3–8.

²² *Id.* at 3, 5-7.

that Exelon has “done nothing and they have to do something” was sufficient to put the Board and other litigants on notice.²³ Vague assertions that Exelon needed to do more did not satisfy Beyond Nuclear’s obligation to meaningfully structure its participation so that the Board and litigants could meaningfully respond.²⁴ Nor do these conclusory statements provide an adequate foundation for raising Beyond Nuclear’s newly-minted incorporation by reference complaint on appeal. In addition, this statement, when read in context, clearly refers to 10 C.F.R. § 51.53(c)(3).²⁵

Beyond Nuclear, itself, reveals that its focus was on the adequacy of the GEIS for license renewal rather than the adequacy of Exelon’s steps to incorporate the GEIS by quoting a statement made by its counsel statement at oral argument that:²⁶

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.

²³ *Id.* at 6-7.

²⁴ See *Pennsylvania Power & Light Co.* (Susquehanna Steam Elec. Station, Units 1 & 2), ALAB-693, 16 NRC 952, 957 (1982) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978)).

²⁵ At oral argument, Counsel for Beyond Nuclear stated:

[A]ccidents 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 doesn’t apply, and you need to address all those 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 admission—of omission.

Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 & 3), Official Transcript of Proceedings, at 188–189 (Curran) (Mar. 27, 2019) (Transcript) (emphases added).

²⁶ *Id.* at 179–80 (Curran).

Beyond Nuclear does not explain how a claim that NEPA requires the NRC to “brush up” the GEIS for subsequent license renewal equates to a claim that Exelon did not take proper steps to incorporate the GEIS under 10 C.F.R. § 51.53(a).

Beyond Nuclear also contends that the applicability of 10 C.F.R. § 51.53(c)(3) to subsequent license renewal is “an issue of first impression that should be fully briefed in order to allow the Commission to make a well-informed decision.”²⁷ But Beyond Nuclear states in its Reply Brief that it has “consistently and repeatedly argued” “[f]rom the beginning of this proceeding” that “10 C.F.R. § 51.53(c)(3) does not apply” to Exelon’s Environmental Report.²⁸ The Board was able to resolve contention admissibility without addressing those arguments.²⁹ Additional briefing on that point would be cumulative and unnecessary. Beyond Nuclear’s attempt to obtain an additional opportunity to address the issue reveals shortcomings in its Appeal rather than the need to respond to Exelon or Staff arguments.

II. Beyond Nuclear Fails to Show That A Reply Brief is Needed to Correct Legal Errors

Beyond Nuclear asserts that the Staff (and Exelon)³⁰ argued that “an appellant may not cite any...cases or regulations that were not previously identified below” and that the Staff and Exelon “confuse the legal requirements in 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. § 51.53(a) for incorporation by reference.”³¹ Beyond Nuclear claims that the Reply Brief is needed because of these legal “errors,” but it mischaracterizes the positions taken by the Staff.

²⁷ Motion at 2–3.

²⁸ Reply Brief at 3.

²⁹ LBP-19-5, slip op. at 17–20.

³⁰ The Staff focuses its answer here on Beyond Nuclear’s arguments regarding Staff positions taken by the Staff, but notes that the same reasoning should be applied to positions taken by Exelon before the Board.

Contrary to Beyond Nuclear's assertions, the Staff did not argue that an appellant may not cite new legal cases or regulations that were not previously identified below,³² nor did the Staff argue that Beyond Nuclear had an ironclad obligation to cite a particular regulation.³³ The Staff merely noted that Beyond Nuclear could have included the claim that Exelon inadequately executed incorporation by reference in its original intervention petition and in response to Exelon and Staff answers to the petition.³⁴ Its failure to raise the issue below waived the matter on appeal.³⁵ Beyond Nuclear elected to forego a written response to Staff's arguments concerning Exelon's ability to incorporate the GEIS and Table B-1 impact determinations pursuant to 10 C.F.R. § 51.53(a) until it filed the instant Motion. It must accept the consequences of that decision. Read correctly, there was no assertion in the Staff's appeal brief that Beyond Nuclear could not rely on additional authorities to support arguments previously raised and no legal error in these arguments.

Beyond Nuclear also states that Exelon and the Staff conflate 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. § 51.53(a).³⁶ This alleged legal error is more akin to a difference of opinion regarding the availability of incorporation by reference for a subsequent license renewal applicant.³⁷ The Staff's brief does not claim that 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. § 51.53(a) are the same, but notes that Exelon can incorporate the GEIS and Table B-1 findings in accordance with 10 C.F.R. § 51.53(a).³⁸ Thus, Beyond Nuclear appears to recast opposing

³² See Motion at 2; Reply Brief at 2.

³³ See Reply Brief at 2 (citing Staff Appeal Brief at 12).

³⁴ Staff Appeal Brief at 12–13.

³⁵ *Id.*

³⁶ Motion at 2.

³⁷ Staff Appeal Brief at 13–17; Exelon Appeal Brief at 11–15.

³⁸ Staff Appeal Brief at 15–17; Exelon Appeal Brief at 11–15.

views as errors to seek another opportunity to dispute the Board's conclusion that Exelon may incorporate the GEIS by reference under 10 C.F.R. § 51.53(a), a conclusion the Staff and Exelon support.

Beyond Nuclear had the burden to show in its appeal brief why the Board erred in reaching its conclusions. No additional briefing is needed to correct what basically amounts to legal dispute on a matter of "first impression"³⁹ concerning subsequent license renewal. Because Beyond Nuclear has not identified any legal or factual error that needs to be corrected in the record, additional briefing is not required as a matter of fairness or necessity and would not assist the Commission in reaching a decision.

III. Beyond Nuclear Could Have Anticipated Arguments Made by Exelon and the Staff

Beyond Nuclear argues that its motion should be granted because it "could not have anticipated that Exelon and the Staff would "mischaracterize the record" and "make legal error[s]" regarding the ability of an appellant to cite additional authorities on appeal and the legal requirements in 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. § 51.53(a) for incorporation by reference.⁴⁰ However, Beyond Nuclear's long experience in NRC adjudications belies its claim that it could not have anticipated that other participants in the proceeding would dispute its views about the record below or legal standards.⁴¹ It is not surprising that opposing litigants would challenge the appeal based, in part, on the basic litigation principle that any grounds for appeal need the requisite foundation in the record below. Intervention petitioners often confront objections that arguments made in support of contentions raise a new issue. Beyond Nuclear

³⁹ See Motion at 2.

⁴⁰ *Id.* at 1, 2. We understand Beyond Nuclear's citation to 10 C.F.R. § 51.54(a) to refer to 10 C.F.R. § 51.53(a). See Motion at 2; Reply at 10.

⁴¹ See *Sequoyah*, CLI-14-3, 79 NRC at 35 & n.24 (denying motion to reply because an "experienced litigant" could reasonably have anticipated arguments contained in Staff brief).

addressed such an objection during oral argument and promptly conceded that another claim was not raised by its intervention filings.⁴²

Beyond Nuclear was aware from the outset of this proceeding that the Staff (and Exelon) did not share its views on 10 C.F.R. Part 51, Beyond Nuclear's interpretation of agency guidance, or the admissibility of the proffered contentions.⁴³ Any failure of Beyond Nuclear to anticipate opposing legal arguments or conflicting views of the record is entirely of its own making. Beyond Nuclear could have examined the application and included a complaint that Exelon did not accomplish incorporation by reference in its initial petition or in its reply to answers to its intervention petition. Had it done so, Beyond Nuclear not only would have been able to address the opposing arguments, but also would have allowed the Board to consider all the litigants' views on this issue before ruling on the admissibility of Contention 2.⁴⁴ Because Beyond Nuclear saved this complaint for its appeal, even though the application, the case cited, and 10 C.F.R. § 51.53(a) were all publicly available before it filed its intervention petition, it cannot now credibly claim that the Staff's arguments necessitate what Beyond Nuclear itself calls the "unusual step" of a reply at this stage of the proceeding.⁴⁵

⁴² Transcript at 188.

⁴³ See, e.g., Staff Answer at 44–61; Exelon Answer at 29–40.

⁴⁴ The Staff, however, does not concede that raising a new matter for the first time at oral argument would have rendered the issue timely inasmuch as it was not included in Beyond Nuclear's original intervention petition.

⁴⁵ Motion at 1.

CONCLUSION

For the reasons set forth above, the Commission should deny the Motion.

Respectfully submitted,

/Signed (electronically) by/

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

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Dated at Rockville, Maryland
this 29th day of August 2019

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NUCLEAR REGULATORY COMMISSION

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EXELON GENERATION COMPANY, LLC

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing “NRC STAFF ANSWER TO BEYOND NUCLEAR MOTION FOR LEAVE TO REPLY” dated August 29, 2019, have been filed through the Electronic Information Exchange, the NRC’s E-Filing System, in the captioned proceeding, this 29th day of August 2019.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 29th day of August 2019