

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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In the Matter of)	
Exelon Generation Company, LLC)	Docket Nos. 50-277/278 SLR
Peach Bottom Atomic Power Station,)	October 21, 2019
Units 2 & 3)	
)	

**BEYOND NUCLEAR, INC.’S REPLY TO OPPOSITIONS TO MOTION TO
REOPEN THE RECORD OF PROCEEDING FOR SUBSEQUENT LICENSE
RENEWAL OF PEACH BOTTOM OPERATING LICENSE**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.326, Beyond Nuclear, Inc. (“Beyond Nuclear”) hereby replies to oppositions by Exelon Generation Company, LLC (“Exelon”) and the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) Staff to Beyond Nuclear’s Motion to Reopen the Record for Purposes of Considering and Admitting a New Contention Based on Draft Supplement 10 to the Generic Environmental Impact Statement for Subsequent License Renewal of Peach Bottom Operating License and Request for Consideration of Some Elements of the Motion Out of Time (Sept. 23, 2019) (“Motion to Reopen”). Exelon’s Answer Opposing Beyond Nuclear’s Motion for Leave to File a New Contention and Motion to Reopen the Record (Oct. 3, 2019) (“Exelon Response”); NRC Staff Answer to Beyond Nuclear Inc.’s: Motion for Leave to File New Contention Based on Draft Supplement to Generic Environmental Impact Statement; and Motion to Reopen the Record and for Consideration of Arguments Out of Time (Oct. 2, 2019) (“NRC Staff Response”).¹

¹ Beyond Nuclear notes that both Exelon’s and the NRC Staff’s responses address two separate pleadings by Beyond Nuclear: Beyond Nuclear’s Motion to Reopen the Record and Beyond Nuclear’s Motion for Leave to File a New Contention Based on Draft Supplement 10 to Generic Environmental Impact Statement for Subsequent License Renewal of Peach Bottom Operating

II. ARGUMENT

Beyond Nuclear hereby replies to the following arguments by Exelon and the NRC Staff:

1. Counsel for Beyond Nuclear concededly erred in failing to file a motion to reopen the record at the same time as its Motion to Admit Contention 3. Nevertheless, Beyond Nuclear respectfully submits that the standard should be one of objective reasonableness, not whether a practitioner is sufficiently steeped in the peculiarities of NRC practice. As discussed in the attached Reply to Oppositions to Motion for to Admit Contention 3, the NRC's regulations on the subject of the Atomic Safety and Licensing Board's jurisdiction (and thus whether a record remains open) are confusing at best.

In any event, and most importantly, the *only aspect* in which Beyond Nuclear submitted any relevant information out of time was a set of two standing declarations. All other information necessary to a determination of whether 10 C.F.R. § 2.326 is satisfied was submitted in Beyond Nuclear's Motion to Admit Contention 3. It is notable that neither Exelon nor the NRC Staff has objected to the adequacy or reliability of those declarations, which indeed are virtually identical to the declarations filed by Beyond Nuclear in support of its initial hearing request.

2. In its Motion to Reopen, Beyond Nuclear argued that under applicable judicial precedents, a contention contesting an Environmental Impact Statement ("EIS"),

License (Sept. 3, 2019; corrected Sept. 5, 2019) ("Motion to Admit Contention 3"). This Reply addresses Exelon's and the NRC Staff's arguments that Beyond Nuclear has failed to satisfy the NRC's standard for reopening the record. Exelon's and the Staff's arguments opposing Beyond Nuclear's motion to admit Contention 3 are addressed separately in Beyond Nuclear, Inc.'s Reply to Oppositions to Motion for Leave to File a New Contention Based on Draft Supplement 10 to Generic Environmental Impact Statement for Subsequent License Renewal of Peach Bottom Operating License ("Reply to Oppositions to Motion to Admit Contention 3"), filed concurrently with this pleading.

submitted after the record has closed, must be admitted if it meets the requirements of application of 10 C.F.R. § 2.309(c); if the petition demonstrates that the contention raises new issues (rather than new arguments or evidence); and if the petitioner demonstrates standing. Motion to Reopen at 9-11 (citing *Union of Concerned Scientists v. NRC*, 735 F.2d 1445-44 (D.C. Cir. 1984) (“*UCS I*”); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) (“*UCS II*”). Beyond Nuclear also asserted that its Motion to Admit Contention 3 met these requirements, and therefore Contention 3 should be admitted.

The NRC Staff does not contest the applicability of *UCS I* and *UCS II*, but it argues that in order to fall under *UCS II*, an issue must be “*defined as material in NRC regulations.*” NRC Staff Response at 24. Contention 3 meets that test. Environmental impacts of design basis accidents are, indeed, defined as potentially significant – and therefore material – by virtue of their very inclusion in Table B-1. The “Category 1” determination of insignificance relates to the time frame of the first twenty-year renewal term after the original operating license term – not to any and all time frames. Therefore, the issue raised by Contention 3 is material under *UCS I* and *UCS II*. And, accordingly, the NRC may not raise additional barriers to the admission of the issue for a hearing, such as requiring a demonstration by affidavits that it is “exceptionally grave.” NRC Staff Response at 24.

3. The NRC Staff argues, nevertheless, that Contention 3 does not raise a “material issue” because NRC regulations allow the NRC Staff to rely on “Category 1” findings in the Draft Generic Environmental Impact Statement (“GEIS”) Supp. 10 for Peach Bottom. NRC Staff Response at 24. But Contention 3 asserts that the Category 1 findings in Table

B-1 of Appendix A to 10 C.F.R. Part 51 *do not apply* to subsequent license renewal, and that the environmental impacts of design basis accidents must therefore be considered in Supp. 10. Thus, Beyond Nuclear and the Staff have a genuine and material dispute over the question of what regulations govern the Draft GEIS Supp. 10. The Staff's disagreement with Beyond Nuclear may not serve as a bar to the admission of the issue.

4. Exelon disputes the continuing viability of *UCS I* and *UCS II*, arguing that both the NRC Commissions and the Third Circuit of the U.S. Court of Appeals have “expressly found the NRC’s approach to reopening consistent with the AEA’s hearing requirements.” Exelon Response at 17 (citing *Virginia Elec. and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 N.R.C. 692, 700 (2012); *New Jersey Environmental Federation v. NRC*, 645 F.3d 220, 232-33 (3rd Cir. 2011)). But neither of these decisions applied an elevated reopening standard to deny admission of a contention raising a concededly material issue in a major environmental review document. In *Virginia Elec. and Power Co.*, the Commission did not apply the reopening standard to a contention, but simply held that it should be applied. Consistent with *UCS I* and *UCS II*, the Commission found that the reopening standard “by no means prohibits hearings on significant new safety or environmental issues.” Also consistent with those decisions, the Commission warned that *UCS I* and *UCS II* do not confer hearing rights on “*anything* new revealed in [NRC safety and NEPA review documents]. Thus, *Virginia Elec. and Power Co.* does not dictate the application of an elevated standard of gravity to Contention 3.
5. Similarly, *New Jersey Environmental Federation* did not concern a concededly material issue in a major environmental review document. There, the Intervenor submitted a safety contention and motion to reopen the record based on an NRC Staff technical report and a

newspaper article that were issued after the record of the proceeding had closed. 645 F.3d at 226-27. While the Intervenor argued that the contention raised a new “issue,” the court refused to hold that “the motion to reopen standard may never be applied in situations where a petitioner seeks to add previously unlitigated material,” because it would render the regulation for reopening the record “meaningless.” *Id.* at 233. The court found it appropriate, in those circumstances, to apply the reopening standard, *i.e.*, the heightened standard of a “significant safety concern.” *Id.* at 232-33. Here, in contrast, Beyond Nuclear has challenged the NRC’s failure to address, in any meaningful way, the environmental impacts of design basis accidents in the Draft GEIS Supp. 10. Not only are the environmental impacts of design basis accidents established in NRC regulations as potentially significant, but the Draft GEIS Supp. 10 is a key review document in the Peach Bottom subsequent license renewal proceeding.

6. Finally, Beyond Nuclear seeks to make clear that it does not dispute the applicability of 10 C.F.R. § 2.326 where the record has closed. Nevertheless, we contend that the standards of Section 2.326 must be applied in a manner that is consistent with the NRC’s entire regulatory scheme for the litigation of environmental issues. In particular, NRC regulations contemplate that petitioners must initially base their contentions on the contents of the Environmental Report, but subsequently allow petitioners to amend or replace those contentions if the content of the EIS that replaces that Environmental Report should change. *See* 10 C.F.R. § 2.309(f)(2). Under that regulatory scheme, it would not be rational or fair to interpret the requirements of Section 2.326 to impose a higher standard on the admission of contentions regarding an EIS than an Environmental Report, simply based on the timing of the issuance of the EIS in relation to the opened or

closed state of the record. In this proceeding, Beyond Nuclear has satisfied the requirements of 10 C.F.R. § 2.326 as appropriately applied to the material issue raised by Contention 3 under *UCS I* and *UCS II*.

III. CONCLUSION

For the foregoing reasons, the ASLB or the Commission should reopen the record of this proceeding and admit Contention 3.

Respectfully submitted,

/signed electronically by/
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CERTIFICATE OF SERVICE

I certify that on October 21, 2019, I posted copies of the foregoing BEYOND NUCLEAR, INC.'S REPLY TO OPPOSITIONS TO MOTION TO REOPEN THE RECORD OF PROCEEDING FOR SUBSEQUENT LICENSE RENEWAL OF PEACH BOTTOM OPERATING LICENSE on the NRC's Electronic Information Exchange System.

/signed electronically by/
Diane Curran