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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	)	
	)	

## I. INTRODUCTION

<sup>1</sup> 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 Admit Contention 3 and Beyond Nuclear's Motion to Reopen the Record for Purposes of Considering and Admitting a New

## II. JURISDICTION

Beyond Nuclear filed its Motion to Admit Contention 3 before both the Atomic Safety and Licensing Board (“ASLB”) and the Commission, due to an apparent conflict between the ASLB’s termination of the Peach Bottom proceeding in LBP-19-05 and the plain language of 10 C.F.R. § 2.318(a), which states that the ASLB retains jurisdiction until “the Commission renders a final decision.” Beyond Nuclear does not dispute Exelon’s citation to *Virginia Elec. and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 N.R.C. 692, 701 (2012) as establishing the Commission’s jurisdiction over this motion, and has corrected the caption of its pleadings accordingly. Nevertheless, the contradiction between the regulations and caselaw warrants comment and deserves clarification in the regulations.

Citing *Virginia Elec. and Power Co.*, Exelon asserts that “there is clear precedent that 10 C.F.R. § 2.318 does not extend the Board’s jurisdiction.” Exelon Response at 15 and n.76. But *Virginia Elec. and Power Co.* does not establish the clarity of Section 2.318; to the contrary, the Commission admitted that “the most common instance where the Board’s jurisdiction ends” is the one situation *not* addressed in the regulation. *Id.* Furthermore, while the Commission stated in CLI-12-14 that the set of three circumstances listed in 10 C.F.R. § 2.318(a) as conferring jurisdiction on the Commission (*i.e.*, “when the period within which the Commission may direct that the record be certified to it for final decision expires, when the Commission renders a final

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Contention Based on Draft Supplement 10 to 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”). This Reply addresses Exelon’s and the NRC Staff’s arguments against the admissibility of Beyond Nuclear’s new contention under 10 C.F.R. § 2.309(f) and whether Beyond Nuclear had good cause for late-filing under 10 C.F.R. § 2.309(c). Exelon’s and the Staff’s arguments opposing Beyond Nuclear’s motion to reopen the record of this proceeding are addressed separately in Beyond Nuclear, Inc.’s Reply to Oppositions to Motion to Reopen the Record, filed concurrently with this pleading.

decision, or when the presiding officer withdraws from the case upon considering himself or herself disqualified, whichever is earliest”) is not “exhaustive,” *id.*, the plain language of the regulation gives no such indication. Instead, by the use of commas and the word “or,” it appears to give a comprehensive list. Where the plain language of a regulation is comprehensive, it should not be necessary to resort to case law to find hidden exceptions.

### **III. CONTENTION 3 IS ADMISSIBLE.**

Exelon argues that Contention 3 is inadmissible because it “impermissibly challenges the Category 1 findings on design-basis accidents and the NRC rules requiring the NRC Staff to rely on those findings.” Exelon Response at 22. *See also* NRC Staff Response at 27-28. This argument misconstrues Contention 3, which asserts that the Category 1 findings in Table B-1 *do not apply to subsequent license renewal decisions*. Thus, Beyond Nuclear is not challenging Table B-1 *pe se*, but rather its applicability to the licensing action of subsequent renewal. Beyond Nuclear contends that by their plain terms, other regulations govern the environmental analyses prepared by the Staff for subsequent license renewal. Accordingly, no waiver petition or rulemaking petition is required.<sup>2</sup>

In support of Contention 3, Beyond Nuclear demonstrated that none of the contemporaneous rulemaking or NEPA documents relating to the 1996 License Renewal GEIS and the 2013 Revised License Renewal GEIS refer to subsequent license renewal. Motion to

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<sup>2</sup> In support of its argument that Category 1 findings are binding in this proceeding, Exelon partially quotes, and characterizes as an “admission,” a statement by Beyond Nuclear that “the NRC may still refer to the environmental findings of the 2013 GEIS in a subsequent license renewal review.” Exelon Response at 23 (citing Beyond Nuclear’s Reply to Exelon’s and NRC Staff’s Oppositions to Hearing Request and Petition to Intervene at 28-29 (Dec. 21, 2018)) (“Beyond Nuclear Reply.”) But Exelon strangely omits the rest of the sentence, in which Beyond Nuclear asserts that “NEPA prohibits the NRC from *codifying* those findings for purposes of subsequent license renewal.” Beyond Nuclear Reply at 29 (emphasis in original). Thus, the purported admission was never made.

Admit Contention 3 at 10-12. In fact, the term “license renewal” was not understood to mean anything other than renewal of the original operating license, and therefore the NRC had “no reason to state that the Category 1 exception applied only to initial license renewals.” *Id.* at 11. Exelon counters that the Regulatory Analysis for the 2013 Final Rule “indicates that the 2013 amendments *are* intended to apply to second license renewal applications.” Exelon Response at 24 (emphasis in original). But the language of the Regulatory Analysis simply does not support that characterization. Instead, it merely states that:

Some plants will become eligible for a second 20-year license extension after FY 2013. While the NRC understands that the possibility exists for license holders to submit a second license renewal application, no letters of intent have been received as of the issuance date of this document. The NRC estimates receiving 3 applications per year from FY 2015 through FY 2022.

*Id.* at 25. Thus, subsequent license renewal applications remained a mere “possibility” in 2013.

Equally importantly, Exelon does not explain how this obscure reference to the “possibility” of “second” license renewal in a reference document to the 2013 Final License Renewal Rule could be seen to introduce the concept of subsequent license renewal to a series of rulemaking notices and draft and final GEISs that made no mention of subsequent license renewal at all. *See* Motion to Admit Contention 3 at 10-11.

The only reference to multiple license renewals that Exelon can point to is the NRC’s explanation of the fact that the Atomic Energy Act imposes no limit on the number of times a license may be renewed. Exelon Response at 25 (citing 1996 GEIS at 1-2.) The NRC’s regulatory scheme for license renewal under its Part 54 safety regulations, however, is “analytically separate” from the Part 51 environmental regulations at issue here. *Florida Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 and 4), CLI-01-17, 54 NRC 3, 13 (2001). As explained in *Florida Power & Light*:

The Commission's [Atomic Energy Act] review under Part 54 does not compromise or limit NEPA. The AEA and NEPA contemplate *separate* NRC reviews of proposed licensing actions. *See Limerick Ecology Action v. NRC*, 869 F.3d 719, 729-31 (3d Cir. 1989).

54 NRC at 13 (emphasis added). Thus, statements about the temporal scope of the NRC's Atomic Energy Act-based safety regulations have no bearing on the temporal scope of the 1996 License Renewal GEIS, the 2013 Revised License Renewal GEIS, or their related rulemakings.

Finally, Exelon commits legal error in faulting Beyond Nuclear for failing to "explain why the assessment of incremental environmental impacts for an additional 20-year period of extended operation would be any different in a first or second license renewal period." Exelon Response at 25. As the proponent of the Draft GEIS Supp. 10, the NRC Staff bears the burden of justifying the current sufficiency of the findings of the 2013 Revised GEIS to support the proposed action of renewing Exelon's license for a full 80 years. Any environmental impact listed in Table B-1 – including environmental impacts of design basis accidents – must be addressed unless they are lawfully excluded from consideration as "Category 1" impacts. The burden of discussing these impacts may not be shifted to Beyond Nuclear. Beyond Nuclear's only burden is to establish the inapplicability of Category 1, and to point out the NRC's failure to address the environmental impacts of design basis accidents.

In any event, Contention 3 does, in fact, identify NRC documents identifying age-related issues that should have been addressed in Draft GEIS Supp. 10: the Expanded Materials Degradation Assessment ("EMDA"), NUREG/CR-7153, ORNL/TM-2013/532 (Oct. 2014) ("EMDA Report"); 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). Again, the NRC bears a burden of showing it

has considered this information in concluding that no further analysis is required beyond the 2013 Revised License Renewal GEIS. Moreover, the vague statement in a subsequent NRC briefing that the NRC Staff has “made progress” in its research on these issues does not, by any stretch of the imagination, amount to a resolution. *See* Exelon Response at 29 and n. 158 (citing Briefing on Status of Subsequent Licensing Renewal Preparations, tr. at 73 (Brian Thomas, Office of Nuclear Regulatory Research) (Apr.26, 2017) (ADAMS Accession No. ML17118A300); NRC Staff Response at 29-30. Finally, contrary to Exelon’s and the Staff’s suggestion, statements by the NRC Staff that the Atomic Energy Act-based framework for license renewal cannot, as a matter of law, be equated with a finding that the environmental impacts of unaddressed design basis accidents are insignificant. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989) (citing *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 81 (1st Cir. 1978)) (holding that NEPA’s requirements are independent of other statutes and must be complied with “unless specifically excluded by statute or existing law makes compliance impossible.”).

**B. Contention 3 Meets the Timeliness Requirements for Late-Filed Contentions.**

Exelon and the Staff argue that Contention 3 is not timely because it is not materially different from Contention 2, which the ASLB rejected in LBP-19-05. Exelon Response at 18-19, NRC Staff Response at 33-34. Beyond Nuclear described two significant differences between the Environmental Report and Draft GEIS Supp. 10 in its Motion to Admit Contention 3. *Id.* at 15. First, while the Environmental Report contained no discussion at all of the environmental impacts of design basis accidents, Draft GEIS Supp. 10 does contain a paragraph summarizing those impacts. *Id.* at E-2. *See also* Motion to Admit Contention 3 at 9. Beyond Nuclear has satisfied the NRC’s admissibility standards by addressing this different language. Second, the

NEPA implementing regulations for Environmental Reports and supplements to the License Renewal GEIS are separate, and they also use different language. *See* Motion to Admit Contention 3 at 8-12. Therefore, Beyond Nuclear has appropriately and adequately addressed these differences in Contention 3.

#### **IV. CONCLUSION**

For the foregoing reasons, the Commission should admit Contention 3.

Respectfully submitted,

\_\_\_\_\_/signed electronically by/  
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I certify that on October 21, 2019, I posted copies of the foregoing 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 on the NRC's Electronic Information Exchange System.

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