

May 17, 2019

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

EXELON GENERATION COMPANY, LLC

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

Docket No. 50-277-SLR  
50-278-SLR

NRC STAFF ANSWER TO BEYOND NUCLEAR INC.'S  
AMENDED HEARING REQUEST AND PETITION TO INTERVENE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1) and the Atomic Safety and Licensing Board (Board) scheduling order,<sup>1</sup> the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby files its answer to the amended hearing request and petition to intervene (Amended Petition) filed by Beyond Nuclear, Inc. (Beyond Nuclear or Petitioner)<sup>2</sup> concerning the subsequent license renewal application (SLRA) submitted by Exelon Generation Company, LLC (Exelon or Applicant) for Peach Bottom Atomic Power Station, Units 2 and 3 (Peach Bottom). Specifically,

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<sup>1</sup> *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), Notice and Order (Scheduling Briefing on Beyond Nuclear's Motion to Amend Its Petition and the Board's Issuance of Order on Standing and Contention Admissibility) (May 3, 2019) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML19123A197).

<sup>2</sup> Beyond Nuclear, Inc.'s Amended Hearing Request and Petition to Intervene (May 1, 2019) (ML19121A453) (Amended Petition). Although the word "motion" is absent from the caption of its filing, Beyond Nuclear moves for leave, under 10 C.F.R. § 2.309(c), "to amend the basis statements of its contentions." See Amended Petition at 1, 6, 9.

Petitioner “seeks to amend the basis statements for [previously proffered] Contentions 1 and 2 to include reference to” a revised version of a Pacific Northwest National Laboratory (PNNL) report prepared for the NRC (Final Report)<sup>3</sup> and claims it has good cause to file its request after the hearing request deadline.<sup>4</sup>

As discussed further below, the Board should deny the Amended Petition. Petitioner does not demonstrate good cause under 10 C.F.R. § 2.309(c)(1) and neither addresses nor otherwise meets the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements. Petitioner seeks to add, but not replace, previous references to a draft of the report (Draft Report)<sup>5</sup> and Petitioner fails to include a markup portraying what references would be added, thus depriving the Board and parties of a meaningful opportunity to scrutinize its request.<sup>6</sup> Moreover, Petitioner seeks (1) to raise issues about preparation of Staff research reports that have no nexus to the SLRA or the scope of this proceeding, (2) to raise claims that lack adequate support, and (3) to admit issues that do not raise a genuine dispute on a material issue of law and fact. Therefore, the Amended Petition should be denied.

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<sup>3</sup> Amended Petition at 6 (citing PNNL-27120, Revision 1, “Criteria and Planning Guidance for Ex-Plant Harvesting to Support Subsequent License Renewal,” March 2019 (ML19081A006) (Final Report).

<sup>4</sup> Amended Petition at 8-9.

<sup>5</sup> PNNL-27120, “Criteria and Planning Guidance for Ex-Plant Harvesting to Support Subsequent License Renewal,” December 2017 (Draft Report).

<sup>6</sup> It is not clear whether Petitioner (1) solely wants to add references to the Final Report in its initial intervention and which citations would be added, see Amended Petition at 6, (2) wants to add the three statements from Section III of its pleading, see Amended Petition at 6-8, or (3) plans to submit another document that shows changes to its contention bases at a later date. Submission of another document would be untimely inasmuch as its later submission would deprive the parties of the ability to comprehend the nature of Petitioner’s request. Petitioner must structure its participation in a meaningful way that places the Board and parties on notice regarding the claims it raises. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978).

## BACKGROUND

### I. Procedural History

This proceeding concerns the application submitted by Exelon on July 10, 2018 for the renewal of Renewed Facility Operating License Nos. DPR-44 and DPR-56 to permit an additional 20 years of operation at Peach Bottom Units 2 and 3.<sup>7</sup> Pursuant to an extension granted by the Commission,<sup>8</sup> on November 19, 2018, Petitioner timely filed a request for hearing and petition to intervene (Petition), which included a declaration and report by its expert, David Lochbaum.<sup>9</sup> Staff and Exelon filed answers to the Petition on December 14, 2018.<sup>10</sup> Staff argued, inter alia, that Contention 1 was inadmissible to the extent it constitutes a general plea for the nuclear industry to perform harvesting (or removal) and noted that Mr. Lochbaum cited a draft PNNL document.<sup>11</sup> The Board, established to preside over the contested hearing,<sup>12</sup> heard oral argument on standing and contention admissibility on March 27, 2019.<sup>13</sup> By letter, dated

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<sup>7</sup> See Letter from Michael Gallagher (Exelon) to NRC Document Control Desk (July 10, 2018) (ML18193A697); Subsequent License Renewal Application, Peach Bottom Atomic Power Station Units 2 and 3, (July 2018) (ML18193A773) (SLRA); Exelon Generation Company, LLC: Peach Bottom Atomic Power Station, Units 2 and 3, 83 Fed. Reg. 45,285 (Sept. 6, 2018) (notice of opportunity for hearing).

<sup>8</sup> *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station Units 2 and 3), “Order of the Secretary” (Nov. 1, 2018) (ML18305B372).

<sup>9</sup> Beyond Nuclear, Inc.’s Hearing Request and Petition to Intervene (Nov. 19, 2018) (ML18323A749) (Petition).

<sup>10</sup> NRC Staff Answer to Beyond Nuclear, Inc.’s Hearing Request and Petition to Intervene (Dec. 14, 2018) (ML18348B262) (Staff Answer); Exelon’s Answer Opposing Beyond Nuclear Inc.’s Hearing Request and Petition to Intervene (Dec. 14, 2018) (ML18348B049).

<sup>11</sup> See, e.g., Staff Answer at 41 & n.177.

<sup>12</sup> Establishment of Atomic Safety and Licensing Board: Exelon Generation Company, LLC, 83 Fed. Reg. 64,902 (Dec. 18, 2018).

<sup>13</sup> See *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station Units 2 and 3), “Order (Scheduling Oral Argument)” (Feb. 28, 2019) (ML19059A404).

April 2, 2019, Staff counsel notified the Board and parties that the Final Report, dated March 2019, was publicly available.<sup>14</sup>

On May 1, 2019, Petitioner filed the instant petition seeking to amend the basis statements for Contentions 1 and 2 “to include reference to [the Final Report] to establish support for” its contentions.<sup>15</sup> Petitioner cites instances where its expert relied on the Draft Report to support his position that harvesting of components, particularly electrical cables, from shutdown reactors is “a reasonable and potentially necessary means of obtaining external operating experience.”<sup>16</sup> Petitioner claims the Final Report “makes significant changes” to text that “qualitatively characterizes the state of understanding of material degradation, the safety significance of missing information,” and the necessity for harvesting.<sup>17</sup> Beyond Nuclear argues that it has good cause to amend Contentions 1 and 2 because (1) the Final Report was not previously available, (2) the Final Report is materially different from information previously available, and (3) the Amended Petition was submitted within 30 days of the date that the report was posted on ADAMS.<sup>18</sup>

## II. The Pacific Northwest National Laboratory (PNNL) Report

The Final Report was prepared for the NRC under a contract with the U.S. Department of Energy.<sup>19</sup> The project, entitled “Strategic Approach for Obtaining Material and Component

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<sup>14</sup> See Letter from Kayla Gamin, NRC, to the Board (April 2, 2019) (ML19092A425) (Staff Letter).

<sup>15</sup> Amended Petition at 6-7.

<sup>16</sup> *Id.* at 3-4 (citing Lochbaum Report at 17-18, 21-22, 35, 37, 34-41).

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 8-9.

<sup>19</sup> See Final Report at cover page. PNNL is one of the Department of Energy National Laboratories.

Aging Information,” asked PNNL to engage in a literature review of domestic and international sources of technical information, evaluate the reactor material that is projected to be available for potential harvesting, and develop a preliminary strategic approach to sampling representative materials based on interviews with NRC and external stakeholders.<sup>20</sup>

The Statement of Work additionally specifies that a summary of PNNL’s findings is to be provided to the NRC as either a draft NUREG/CR or draft technical letter report (TLR) and subsequently published after the NRC provides comments.<sup>21</sup> Staff comments on the Draft Report were incorporated before the issuance of the Final Report, clarifying descriptions of knowledge about aging effects and the need for harvesting. The revisions apparent in the Final Report do not alter the facts stated in the Draft Report, and discussions of technical issues and the focus of the report—harvesting priorities—did not materially change.<sup>22</sup> The revisions reflect, in part, developments since the inception of the research project in September 2015,<sup>23</sup> including

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<sup>20</sup> Interagency Agreement No. NRC-HQ-60-15-T-0023 at 1, 3 & Attachment 1, Statement of Work at 1, 8 (ML19129A329) (Statement of Work) (listing Pradeep Ramuhalli as one of the PNNL Principal Investigators).

<sup>21</sup> See Statement of Work at 13-14. The contract noted the agency retained the discretion to determine whether the report would be published as TLR rather than a NUREG/CR. *Id.* at 14.

<sup>22</sup> Compare, e.g., Draft Report at 30 (identifying five criteria to prioritize materials for harvesting), with Final Report at 24 (identifying the same five criteria). See Section II.A, *infra*, for further discussion.

<sup>23</sup> See Interagency Agreement No. NRC-HQ-60-15-T-0023 (ML19129A329) at 1.

the “Generic Aging Lessons Learned for [SLR]” Report, NUREG-2191 (“GALL-SLR”), issued in July 2017.<sup>24</sup>

PNNL inadvertently released the Draft Report on its website,<sup>25</sup> but later removed it.<sup>26</sup>

The publication was premature because PNNL had not then completed working with the NRC Staff to finalize the report. While the Draft Report was publicly available on PNNL’s website, Beyond Nuclear accessed and downloaded the Draft Report,<sup>27</sup> and later referenced the Draft Report in its November 2018 Petition.<sup>28</sup> Staff counsel acknowledged the existence of the Draft Report in its answer to the Petition<sup>29</sup> and stated at oral argument that Staff’s review of that report was “nearing completion.”<sup>30</sup> On April 2, 2019, Staff counsel informed the Board and parties that the PNNL report had been finalized and was publicly available.<sup>31</sup>

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<sup>24</sup> See, e.g., Generic Aging Lessons Learned for Subsequent License Renewal, NUREG-2191, Vols. 1 and 2 (July 2017) (ML17187A031 and ML17187A204) (GALL-SLR) at xxviii-xxix (stating that SLR guidance on AMPs was modified after the issuance of SRM-SECY-14-0016 to incorporate lessons learned on technical issues); see also Staff Answer at 20-21 n. 1 and 2 (July 2017) (ML17187A031 and ML17187A204) (GALL-SLR) at xxviii-xxix (stating that SLR guidance on AMPs was modified after the issuance of SRM-SECY-14-0016 to incorporate lessons learned on technical issues); see also Staff Answer at 20-21 n. 83 (citing 2017 Briefing Transcript at 68-72 (Hiser) (noting confirmatory research being done by the NRC and refinements in the SLR guidance documents); 2017 Briefing Transcript at 73--76 (Thomas) (providing status of confirmatory research supporting SLR and progress on researching four technical areas resulting in enhanced aging management programs in license renewal guidance documents)).

<sup>25</sup> See Final Report at ii (stating PNNL report “was inadvertently released while still under development”).

<sup>26</sup> See Tr. at 118-19 (Curran) (ML19088A340).

<sup>27</sup> *Id.* at 118-19, 20 (Curran).

<sup>28</sup> Petition, Attachment 4 at 18, 35, 37, 40.

<sup>29</sup> Staff Answer at 41 n.177.

<sup>30</sup> Tr. at 116-17, 142-43 (Gamin).

<sup>31</sup> Staff Letter.

## DISCUSSION

### I. Legal Requirements for Contention Admissibility

#### A. Good Cause Requirements for New and Amended Contentions

New or amended contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing that the following three conditions are met:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

While the regulations do not specify the number of days within which a new or amended contention must be filed, the Commission generally considers a new or amended contention to be timely if filed within 30 days of the availability of the new information.<sup>32</sup> In the context of 10 C.F.R. § 2.309(c)(1), materiality generally relates to the degree or magnitude of the difference between previously available information and currently available information.<sup>33</sup> As such, the information must be more than a new interpretation or restatement of previously

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<sup>32</sup> See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 218 n.8 (2011).

<sup>33</sup> See Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,572 (Aug. 3, 2012) (noting that in the NEPA context “materially different” is equivalent to “differs significantly”); *Fla. Power & Light Co.* (Turkey Point Units 6 & 7), LBP-17-6, 86 NRC 37, 48 (2017), *aff’d*, CLI-17-12, 86 NRC 215 (2017) (noting that “materially” in the context of 10 C.F.R. § 2.309(c)(1)(ii) is synonymous with, for example, “significantly,” “considerably,” or “importantly”) (citing *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-1, 71 NRC 165, 185 (2010)).

available information.<sup>34</sup> Rather, a new or amended contention must be based upon *facts or information* that were previously unavailable.<sup>35</sup>

B. General Requirements for Contention Admissibility

In addition to meeting the requirements of 10 C.F.R. § 2.309(c)(1), new or amended contentions must also satisfy the six contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).<sup>36</sup> Contention admissibility rules are “strict by design” and failure to comply with any of the requirements set forth in the regulations is grounds for the dismissal of a contention.<sup>37</sup> The contention admissibility rules require “a clear statement as to the basis for the contentions

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<sup>34</sup> See *Progress Energy Fla., Inc.* (Levy Cty. Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 142 (2009) (“The fact that a party integrates, consolidates, restates, or collects previously available information into a new document, does not convert it into ‘previously unavailable’ information.”); *Entergy Nuclear Vermont Yankee, L.L.C. & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 344 (2011) (citing *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493-96 (2010) (“documents merely summarizing earlier documents or compiling preexisting, publicly available information into a single source do not render ‘new’ the summarized or compiled information.”)).

<sup>35</sup> See *Vermont Yankee*, CLI-11-2, 73 NRC at 344 (citing *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146 (2007)); *Prairie Island*, CLI-10-27, 72 NRC at 496.

<sup>36</sup> 10 C.F.R. § 2.309(f)(1) requires that each contention:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . ; and
- (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

<sup>37</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016) (citations omitted).

and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention.”<sup>38</sup> An issue is inadmissible if the petitioner “has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”<sup>39</sup> Any contention that falls outside the scope of the proceeding is inadmissible and must be rejected.<sup>40</sup> The regulations in 10 C.F.R. Part 54 limit the scope of a license renewal proceeding to those matters that must be considered for the license renewal application to be granted and that have not been addressed by rulemaking or on a generic basis.<sup>41</sup> Also, the adequacy and the manner of Staff’s safety review is not an

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<sup>38</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006) (citations omitted).

<sup>39</sup> *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (citations omitted).

<sup>40</sup> 10 C.F.R. § 2.309(f)(1)(iii); see *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-18, 76 NRC 127, 157 (2012); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

<sup>41</sup> *Oyster Creek*, CLI-06-24, 64 NRC at 117-18. See also 10 C.F.R. § 54.29; *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 at 8-10 (2001).

The standards in 10 C.F.R. Part 54 and the environmental regulations related to license renewal set forth in 10 C.F.R. Part 51 and Appendix B thereto establish the scope of issues that may be considered in a license renewal proceeding. See *generally* Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991); Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461 (May 8, 1995). As the Commission made clear in 2014, the existing regulatory framework and regulatory process for license renewals also apply to subsequent license renewals. See “Staff Requirements – SECY-14-0016 – Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal” (Aug. 29, 2014) (ML14241A578) (SRM-SECY-14-0016) (declining rulemaking, directing the staff to update license renewal guidance as needed to provide clarity, and to “address emerging technical issues and operating experience through alternative vehicles”).

admissible issue in a licensing proceeding.<sup>42</sup> Indeed, actions of the Staff are entitled to a presumption of regularity.<sup>43</sup> Further, under 10 C.F.R. § 2.335, no Commission rule or regulation concerning the licensing of production and utilization facilities is subject to attack in an adjudicatory proceeding absent a waiver petition granted by the Commission.<sup>44</sup> Finally, each contention must show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This requires the petitioner to challenge and identify either specific portions of, or alleged omissions from, the application, state both the applicant and petitioner's views,

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<sup>42</sup> *Prairie Island*, CLI-10-27, 72 NRC at 493 n.56 (citations omitted) (noting that adjudicatory challenges that focus on the Staff's review of the application rather than errors or omissions in the application are not permitted in NRC adjudications); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476-77, 481-82 (2008) (citations omitted) (stating that "[t]he NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications" and that it is the applicant, not the Staff, that has the burden of proof in litigation).

Further, boards are not generally empowered to correct or supervise the Staff's performance of its research activities. See 10 C.F.R. § 2.319. Boards "simply have no jurisdiction over nonadjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to the Board." *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004) (citations omitted). Staff non-adjudicatory functions include safety reviews, the approaches to conducting environmental reviews. See *id.* at 74 ("[L]icensing boards do not sit to correct NRC Staff misdeeds or to supervise or direct NRC Staff regulatory reviews.") (safety reviews); *Powertech USA, Inc.* (Dewey-Burdock in Situ Uranium Recovery Facility), CLI-19-01, 89 NRC \_\_\_, slip op. at 3 (April 29, 2019) (noting that, while a Licensing Board may identify a deficiency in the Staff's NEPA analysis, it "cannot direct Staff on a particular approach to rectify the deficiency") (ML19119A322) (approach to environmental reviews). By extension, licensing boards also do not have jurisdiction over the adequacy and manner of Staff's research activities.

<sup>43</sup> *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 606 (2009) (citing *U.S. Department of Energy* (High-Level Waste Repository), CLI-08-11, 67 NRC 379, 384 (2008); *National Archives & Records Administration v. Favish*, 541 U.S. 157, 174 (2004); *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)).

<sup>44</sup> 10 C.F.R. § 2.335(a)-(b); see also *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citations omitted).

explain any alleged deficiency, and show the issue would affect the outcome of the proceeding.<sup>45</sup>

## II. Analysis of the Amended Petition

Petitioner seeks to amend the basis statements for Contentions 1 and 2, describing differences between the Draft Report and the Final Report, its positions regarding both versions of the PNNL report, and the circumstances surrounding the release of the Final Report.<sup>46</sup> Petitioner claims that Staff “substantially weakened” conclusions and recommendations in the earlier version “without changing the underlying facts” by making “significant changes to language that qualitatively characterizes the state of understanding of material degradation, the safety significance of missing information, and whether harvesting is necessary or merely desirable.”<sup>47</sup> Petitioner notes (1) two revisions to the text concerning harvesting and benchmarking in the Summary section, (2) the replacement of terms like “technical gaps” and “knowledge gaps” with the phrases “technical issues” and “technical questions,” and (3) removal of two paragraphs of the report that describe the need or benefits of harvesting.<sup>48</sup>

Despite its continued reliance on the Draft report, Petitioner also states that it seeks to amend the basis statements for both of its contentions to add references to the Final Report to

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<sup>45</sup> Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process; Final Rule, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *see also Nuclear Mgmt. Co., LLC* (Palisades Nuclear Power Plant), LBP-06-10, 63 NRC 314, 341 (2006). In this context, an issue is material if the information would affect the outcome of the NRC staff’s review of the application. *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), LBP-15-20, 81 NRC 829, 850 (2015) (citation omitted) (noting that “there must be some significant link between the claimed deficiency and the agency’s ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment.”).

<sup>46</sup> Amended Petition at 6–8.

<sup>47</sup> *Id.* at 6, 4.

<sup>48</sup> *Id.* at 4-6.

support the following three propositions.<sup>49</sup> First, Petitioner asserts that the Draft Report continues to provide reliable information and expert opinion, was not labeled “draft,” and relies on the same underlying facts.<sup>50</sup> Second, Petitioner asserts that differences in the conclusions and recommendations between the Draft Report and the Final Report “raise questions about whether the Staff “watered down [statements in the Draft Report] . . . without a technical basis, in response to industry pressure.”<sup>51</sup> Third, Petitioner claims that differences between the Draft Report and Final Report support Contention 2 by “underscoring” NEPA’s requirement to take a “hard look” at the environmental impacts of extending Peach Bottom’s operating license.<sup>52</sup>

A. The Amended Petition Does Not Meet Good Cause Requirements and Should Be Denied

Petitioner asserts that its request to amend the basis statements for Contentions 1 and 2 is supported by the publication of the Final Report on April 2, 2019, stating that the Draft Report “disappeared from the public record, and in that sense was not ‘publicly available’” when Beyond Nuclear filed its contentions, but now “the existence of [the Draft Report] has been confirmed,” and the Final Report has “changed conclusions and recommendations.”<sup>53</sup> Staff does not contest Petitioner’s claims that the Final Report was not publicly available before April 2, 2019, and that its Amended Petition was filed within 30 days of the public release of the document. However, Petitioner’s admission that no new factual information is present in the

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<sup>49</sup> *Id.* at 6, 9.

<sup>50</sup> Amended Petition at 7.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

Final Report is fatal to its claim of good cause. And, because Petitioner has not specifically identified how it seeks to amend its contentions, any later amendments would be untimely.

Petitioner admits that “the factual information evaluated in [the Final Report] has not changed,” but asserts that “the characterization of the significance of those facts and actions needed to address those facts has materially changed.”<sup>54</sup> However, the factual information in the two reports is the essence of the reports. As a licensing board recently stated, the legal standard in applying 10 C.F.R. § 2.309(c)(1) is “whether the factual information underpinning [a new document] was previously available.”<sup>55</sup> Changes in how those facts are framed and qualitatively characterized is insufficient to show material difference.<sup>56</sup>

Furthermore, Petitioner’s complaints that conclusions and recommendations of the Draft Report are “substantially weakened” in the Final Report are not persuasive. Petitioner identifies minor changes in descriptions of materials degradation knowledge and the role of harvesting that do not alter the report’s factual or technical basis or its conclusions. First, the terms “will require” and “will likely require” were replaced with “may be achieved by” and “can provide confirmation of”<sup>57</sup> to avoid creating the incorrect perception that the Final Report conveys regulatory decisions. Thus, these changes do not constitute material differences, but are merely recharacterizations. Second, although Petitioner points to instances where the Draft

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<sup>54</sup> Amended Petition at 8.

<sup>55</sup> *Holtec Int’l* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, slip op. at 65, 89 NRC \_\_\_ (May 7, 2019) (concluding that the information upon which petitioners based their amended contentions was previously available because “[t]he legal standard is not whether Holtec’s RAI responses differ from the arguments it raised in its Answer to the Petition, but whether the factual information underpinning Holtec’s RAI responses was previously available.”).

<sup>56</sup> See *Levy Cty.*, LBP-09-10, 70 NRC at 142.

<sup>57</sup> Amended Petition at 4-5.

Report uses the word “gap” or “gaps” and the Final Report does not,<sup>58</sup> Petitioner does not explain why minor differences in wording such as changing “gap” to “issue” are material.

Finally, Petitioner claims that the Final Report “eliminates entire paragraphs” by pointing to the failure of the Final Report to include an Abstract section and a paragraph from page 2 of the Draft Report.<sup>59</sup> However, the essence of the Abstract section is included in the Summary section of the Final Report at pages ii-iii and in other sections of the report. For instance, the capability of long-lived passive components to meet their functional requirements during extended operation,<sup>60</sup> the challenges of understanding materials degradation mechanisms,<sup>61</sup> and the need for a “strategic and systematic approach to sampling”<sup>62</sup> are all discussed in the Final Report.

Similarly, the discussions of recent plant shutdowns and the resultant opportunities for harvesting in the paragraph on page 2 of the Draft Report are echoed by similar language in the Final Report.<sup>63</sup> A statement describing harvesting as “essential to provide reasonable assurance that the materials/components will continue to perform their safety function

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<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.*

<sup>60</sup> Final Report at ii, 2.

<sup>61</sup> *Id.* at 2–4.

<sup>62</sup> *Id.* at ii, 1, 2.

<sup>63</sup> *Compare* Draft Report at 2 (“Over the past several years, a number [of] NPPs . . . have either permanently ceased operation or have indicated that they will shut down in the next few years. These shutdown plants provide an opportunity to extract materials that have real-world aging and provide an avenue for benchmarking laboratory-scale studies on materials aging.”) *with* Final Report at 1 (“While many plants are continuing to operate and some have begun applying for continued operation through the SLR period, other plants in recent years have shut down or decided to cease operations in the near future. As these plants enter decommissioning, there are expected to be several opportunities for accessing and harvesting service-aged materials for use in materials degradation research activities.”).

throughout the plant licensing period”<sup>64</sup> was removed from the Final Report because the report was not intended to make regulatory decisions about requirements such as reasonable assurance.<sup>65</sup> These are matters within the NRC’s purview, not PNNL’s.

Not only was the factual information in the Final Report publicly available before the publication of the Final Report, but so too was information supporting other descriptive statements that Petitioner considers to be “conclusions.” Petitioner states that the Final Report “characterizes the current state of knowledge as sufficient and describes harvesting as beneficial but not necessarily essential.”<sup>66</sup> Information supporting these statements, however, did not originate with the Final Report and is far from new. The discussion of research needs and the context apparent in the Final Report reflects publicly available Commission direction and Staff positions related to SLR over at least the last five years. This publicly available information addresses the agency’s readiness to consider SLR applications and the agency’s knowledge concerning the four technical issues noted in both the Draft and Final Reports, including revisions to the aging management programs in GALL-SLR.<sup>67</sup> Thus, the Final Report does not contain information that is materially different from that previously available.

Finally, Petitioner’s claim that the existence of the Draft Report needs to be “confirmed” and was not available at the time it filed its contentions is both incorrect and unrelated to the

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<sup>64</sup> Draft Report at 2, quoted in Amended Petition at 6.

<sup>65</sup> The inclusion of a similar phrase in the background section of the Statement of Work described the regulatory context for the NRC research to gain more information on aging issues, but did not assign PNNL the task of making regulatory judgments. Statement of Work at 2.

<sup>66</sup> Amended Petition at 9.

<sup>67</sup> See, e.g., SRM-SECY-14-0016 at 1; [Commission] Briefing on the Status of Subsequent License Renewal Preparations (Apr. 26, 2017) (ML17118A300) (2017 Briefing Transcript), Tr. at 72 (Hiser); see generally GALL-SLR and “Standard Review Plan for Review of Subsequent License Renewal Applications for Nuclear Power Plants,” NUREG-2192 (July 2017) (ML17188A158) (SRP-SLR).

good cause requirements of 10 C.F.R. § 2.309(c)(1).<sup>68</sup> In fact, the existence of the report has not been disputed,<sup>69</sup> and Petitioner had full access to the Draft Report when preparing its previously submitted contentions.<sup>70</sup>

As the movant, Petitioner has the burden to meet the good cause requirements of 10 C.F.R. § 2.309(c)(1). Petitioner fails to meet this burden because the Amended Petition does not identify information that is materially different from information previously available and is based on information that was previously available. For these reasons, the Amended Petition should be denied.

Furthermore, even if Petitioner had shown it met the above-cited good cause requirements, Petitioner's request to amend its basis statements fails due to vagueness. It is not clear whether Petitioner wishes to amend its petition solely to add references to the Final Report, to include the statements at pages 6–8 of its Amended Petition, or whether Petitioner plans to submit a new document in the future that reflects the changes it envisions.

**B. The Amended Petition Does Not Meet the Contention Admissibility Requirements and Should be Denied**

In addition to meeting the good cause requirements of 10 C.F.R. § 2.309(c)(1), Petitioner must also meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) as

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<sup>68</sup> Amended Petition at 8.

<sup>69</sup> Staff acknowledged the report's existence in its pleadings and at oral argument. Staff Answer at 41 n.177; Tr. at 116–117, 142–143.

<sup>70</sup> Petitioner posted the Draft Report on its website, cited it in a July 2018 white paper, and referenced it in its original Petition. See Beyond Nuclear, [http://www.beyondnuclear.org/storage/aging/slr/autopsy\\_PNNL-27120\\_harvesting\\_Dec2017.pdf](http://www.beyondnuclear.org/storage/aging/slr/autopsy_PNNL-27120_harvesting_Dec2017.pdf) (last visited May 13, 2019); Paul Gunter, "A Beyond Nuclear Decommissioning White Paper: Nuclear power reactors need an autopsy during decommissioning to verify and validate safety of the license extension process" (July 2018), [http://www.beyondnuclear.org/storage/aging/slr/Autopsy\\_Revised2-07122018\\_whitepaper-fnl.pdf](http://www.beyondnuclear.org/storage/aging/slr/Autopsy_Revised2-07122018_whitepaper-fnl.pdf); and Petition, Attachment 4 at 18, 35, 37, 40.

required by 10 C.F.R. § 2.309(c)(4). Beyond Nuclear, however, did not address the legal requirements for contention admissibility, which also govern the admission of a contention's basis.<sup>71</sup> Nonetheless, the matters in the Amended Petition are inadmissible because Petitioner (1) raises issues outside the scope of this proceeding, (2) fails to offer sufficient factual or expert support, and (3) does not raise a genuine dispute with the application.

1. The Amended Petition Raises Issues Outside the Scope of this Proceeding

Petitioner's request to amend the basis statements of Contentions 1 and 2 seeks to raise issues outside the scope of this proceeding and is thus inadmissible under 10 C.F.R.

§ 2.309(f)(1)(iii). The Commission's Notice of Opportunity for Hearing, which confined the scope of the proceeding solely to disputes concerning the Peach Bottom SLRA, establishes the permissible scope of the hearing.<sup>72</sup>

At bottom, Petitioner seeks to amend the basis statements for Contentions 1 and 2 based on minor revisions to a report that addresses generic research issues.<sup>73</sup> Petitioner's concerns regarding changes in descriptions of purported technical knowledge gaps concerning aging mechanisms and the need for harvesting relate to generic research activities that are not plant-specific. To establish support for Contention 1, Petitioner cites language that is inconsistent with its views on "gaps" and the need for "harvesting" as part of its effort to impose

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<sup>71</sup> See Amended Petition at 6-9.

<sup>72</sup> Exelon Generation Company, LLC: Peach Bottom Atomic Power Station, Units 2 and 3, 83 Fed. Reg. 45,285 (Sept. 6, 2018).

<sup>73</sup> Granting Petitioner's Amended Petition based only on minor revisions to a research document on generic issues effectively permits Petitioner to rehash issues already raised in the Petition. NRC and its contractors publish dozens of research reports each year, often containing generic research of broad applicability. For example, NUREG-series documents published in the first few months of 2019 can be found at <https://www.nrc.gov/reading-rm/doc-collections/nuregs/pubs/2019/>. To allow litigants to amend contentions every time such a generic research report is revised would risk vitiating the good cause requirements of 10 C.F.R. § 2.309(c).

a harvesting requirement on SLR applicants. But Petitioner does not demonstrate that the information it seeks to relates to issues specific to Peach Bottom rather than generic concerns applicable to other nuclear plants.<sup>74</sup> Such generalized grievances about NRC policies are outside the scope of a licensing proceeding and are inadmissible.<sup>75</sup> Rather, as Staff has previously argued, they are matters for rulemaking and cannot be heard in this proceeding absent the grant of a waiver petition.<sup>76</sup>

Further, Petitioner's unfounded suspicion that differences between the Draft Report and the Final Report are the result of "industry pressure"<sup>77</sup> is outside the scope of this adjudicatory proceeding and inadmissible. Contentions must rest on the license application, not on the adequacy of the Staff's performance of its safety reviews,<sup>78</sup> and, *a fortiori*, not on Staff's revisions to research reports that are not relied on in either the application, NRC application review guidance, or Staff review documents (i.e., safety evaluation reports or EISs). The Final Report was sponsored by the NRC Office of Nuclear Regulatory Research (RES). Staff's work associated with this report included providing technical and editorial feedback to PNNL. This falls squarely within Staff's non-adjudicatory functions.<sup>79</sup> Absent any mention of Peach Bottom's SLRA and absent any connection to matters that must be considered for granting the license

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<sup>74</sup> See Amended Petition at 4-8.

<sup>75</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003) (citations omitted) ("Petitioners may not seek an adjudicatory hearing 'to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies'").

<sup>76</sup> Staff Answer at 31-32 (citing 10 C.F.R. § 2.335(a) and Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41,872, 41,874 (Aug. 5, 1998)).

<sup>77</sup> See Amended Petition at 7.

<sup>78</sup> *Prairie Island*, CLI-10-27, 72 NRC at 493 n.56 (2010); *Oyster Creek*, CLI-08-23, 68 NRC at 476-77, 481-82.

<sup>79</sup> See *supra* note 42.

renewal, Petitioner's speculative claim concerning staff activities is outside the scope of this proceeding.

Finally, while NEPA requires the NRC to take a "hard look" at environmental impacts as a general principle, contentions raising environmental issues in a license renewal proceeding are limited to plant-specific impacts caused by license renewal.<sup>80</sup> Petitioner's discussion of NEPA on pages 7–8 of the Amended Petition states generic propositions and does not identify any potential plant-specific environmental impacts stemming from the Peach Bottom SLRA. It is therefore outside the scope of this proceeding.<sup>81</sup> Thus, Petitioner does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii) and the Amended Petition should be denied.

## 2. The Amended Petition Lacks Sufficient Basis and Support

Petitioner's unsubstantiated claims of "industry pressure" in the development of the Final Report and Petitioner's vague references to NEPA are inadmissible under 10 C.F.R. § 2.309(f)(1)(v) because they lack sufficient support.<sup>82</sup>

Petitioner alleges that the differences between the Draft Report and the Final Report "raise questions" about whether the December 2017 draft was "watered down . . . without a technical basis, in response to industry pressure."<sup>83</sup> This claim is baseless and speculative. Beyond Nuclear provides no evidence other than its own bare assertion to support this claim. In fact, the revisions made to the Draft Report were part of Staff's routine review of contractor work products before publication. Indeed, the Statement of Work for this contract specifically notes

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<sup>80</sup> *Turkey Point*, CLI-01-17, 54 NRC at 11-12.

<sup>81</sup> *Millstone*, CLI-03-14, 58 NRC at 218.

<sup>82</sup> Amended Petition at 7–8.

<sup>83</sup> *Id.* at 7.

that Staff will provide comments to the contractor on all reports prior to their final publication.<sup>84</sup> Absent strong and concrete evidence to the contrary, the Staff is entitled to the presumption that it has discharged its duties honestly and properly.<sup>85</sup> Without meaningful support for its claim, Petitioner does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v).<sup>86</sup>

Additionally, the proposed amended basis statements, according to Petitioner, support Contention 2 by underscoring the “hard look” requirement of NEPA.<sup>87</sup> However, Petitioner provides no explanation or factual support that connects this “hard look” requirement to the Peach Bottom SLRA which is the subject of this proceeding.<sup>88</sup> Petitioner does not identify any plant-specific environmental impacts related to the Final Report, nor does the Amended Petition contain any reference to the ER or SLRA.<sup>89</sup> In the absence of any evidence connecting NEPA’s requirements to Peach Bottom’s ER or the Final Report, Petitioner fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v).

### 3. The Amended Petition Fails to Raise a Genuine Dispute with the Application

Petitioner’s proposed amendments to the basis statements of Contentions 1 and 2 fail to raise a genuine dispute with the application and are thus inadmissible under 10 C.F.R. § 2.309(f)(1)(vi). Petitioner asserts that the Draft Report contains reliable recommendations and

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<sup>84</sup> See Statement of Work at 13-15 (listing as deliverables “NRC to provide comments to contractor” on Reports 1.1, 1.2, 1.3, 1.4, 1.5.1, 1.6, 2, 3.1, 3.2, and 4).

<sup>85</sup> *High-Level Waste Repository*, CLI-09-14, 69 NRC at 606.

<sup>86</sup> *Fansteel*, CLI-03-13, 58 NRC at 203.

<sup>87</sup> Amended Petition at 7–8.

<sup>88</sup> See *Turkey Point*, CLI-01-17, 54 NRC at 11-12.

<sup>89</sup> See Amended Petition at 1–2 (“Background”).

that the Final Report makes no significant changes to the facts relied upon for the report.<sup>90</sup> But the Amended Petition does not point to any specific connection between the Final Report and the Peach Bottom SLRA and does not articulate which portion of the Peach Bottom SLRA is deficient. Petitioner neither identifies any AMP that needs to be modified in support of Contention 1 nor specifies any information that is missing from the Peach Bottom ER in support of Contention 2. Further, the report was not submitted with Peach Bottom's SLRA or relied upon by the Applicant, nor does it contain information specific to Peach Bottom.<sup>91</sup> Therefore, Petitioner fails to show that any of the recharacterized statements in the Final Report will affect the outcome of Staff's review of Peach Bottom's SLRA. In fact, Petitioner admits that the Final Report "does not make any significant changes to the facts relied on by the authors" of the Draft Report.<sup>92</sup> Because Petitioner fails to identify any deficiency in the Peach Bottom SLRA and does not show how the availability of the Final Report will affect the staff's safety review, Petitioner fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).<sup>93</sup>

Lastly, as noted above, although Petitioner claims that the proposed amended basis statements support Contention 2 by underscoring the "hard look" requirement of NEPA,<sup>94</sup> Petitioner neither identifies specific information that is missing from the Peach Bottom ER nor explains which portion of the Peach Bottom ER is deficient due to the differences between the Draft Report and the Final Report. Indeed, there is no discussion in the Amended Petition of

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<sup>90</sup> See *Id.* at 7.

<sup>91</sup> The report contains one brief reference to Peach Bottom, as part of a list of all the subsequent license renewal applications that have been submitted to NRC. Final Report at 1.

<sup>92</sup> Amended Petition at 7.

<sup>93</sup> See *Palisades*, LBP-15-20, 81 NRC at 850.

<sup>94</sup> Amended Petition at 7–8.

any deficiency in the ER. In addition, Petitioner admits that the facts supporting the Draft Report and the Final Report are the same.<sup>95</sup> Given that there has been no change to substantive facts, Staff's environmental review will necessarily be unaffected by the revisions made to the Draft Report. With no noted deficiency in the ER and no possible impact on the outcome of Staff's environmental review as a result of the updates in the Final Report, Petitioner fails to satisfy the 10 C.F.R. § 2.309(f)(1)(vi) requirement to raise a genuine dispute with the applicant on a material issue of law or fact and, thus, the Amended Petition should be denied.<sup>96</sup>

It is Petitioner's burden to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Petitioner fails to meet this burden because the proposed amendments to the basis statements of Contentions 1 and 2 raise issues that are beyond the scope of this proceeding, lack sufficient support, and do not raise a genuine dispute on a material issue of law or fact. For these reasons Petitioner's Amended Petition should be denied.

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<sup>95</sup> *Id.* at 7.

<sup>96</sup> See *Palisades*, LBP-06-10, 63 NRC at 341; *Palisades*, LBP-15-20, 81 NRC at 850.

CONCLUSION

For the reasons set forth above, the NRC Staff submits that Petitioner has not shown good cause for its filing and has not proffered at least one admissible amended contention. Accordingly, the Amended Petition should be denied.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated this 17<sup>th</sup> day of May 2019

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

EXELON GENERATION COMPANY, LLC

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

Docket No. 50-277-SLR  
50-278-SLR

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 INC.'S AMENDED HEARING REQUEST AND PETITION TO INTERVENE," dated May 17, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 17<sup>th</sup> day of May, 2019.

**/Signed (electronically) by/**

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Dated this 17<sup>th</sup> day of May 2019