

August 9, 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 Brief in Opposition to
Beyond Nuclear's Appeal of LBP-19-05**

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), Exelon Generation Company, LLC (“Exelon”) submits this brief in opposition to the appeal by Beyond Nuclear Inc. (“Beyond Nuclear”)¹ of the Atomic Safety and Licensing Board’s (the “Board”) June 20, 2019 Memorandum and Order LBP-19-05.² In LBP-19-05, the Board properly denied Beyond Nuclear’s petition to intervene and request for hearing in this subsequent license renewal proceeding for the Peach Bottom Atomic Power Station, Units 2 and 3, because Beyond Nuclear failed to proffer any admissible contention. On appeal, Beyond Nuclear challenges the Board’s ruling on Contention 2, which alleged that Exelon’s Environmental Report was deficient by failing to address the risk of design-basis accidents. The Commission should deny Beyond Nuclear’s Appeal because Beyond Nuclear fails to identify any error or abuse of discretion in the Board’s ruling. The Board correctly found that the Environmental Report incorporated by reference generic findings on the impacts of accidents, and that Beyond Nuclear had provided no basis to challenge those findings.

¹ Beyond Nuclear’s Notice of Appeal of LBP-19-05 (July 15, 2019) (NRC ADAMS Accession No. ML19196A371); Beyond Nuclear’s Brief on Appeal of LBP-19-05 (July 15, 2019) (NRC ADAMS Accession No. ML1916A372) (hereinafter “BN Brief”).

² *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-05, __ N.R.C. __, slip op. (June 20, 2019) (“LBP-19-05”).

II. STANDARD OF REVIEW

The Commission gives substantial deference to Board rulings regarding the admissibility of contentions,³ and the Commission will not sustain an appeal of such decisions in the absence of a clear error of law or an abuse of discretion.⁴ As such, “[p]ointing out the errors in the Board’s decision is a basic requirement for an appeal,”⁵ and “a mere recitation of an appellant’s prior positions in a proceeding or a statement of his or her general disagreement with a decision’s results ‘is no substitute for a brief that identifies and explains the errors of a Licensing Board in the order below.’”⁶

“The purpose of an appeal to the Commission is to point out errors made in the Board’s decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.”⁷ However, the Commission is free to affirm a board decision on any ground finding support in the record, whether previously relied on or not.⁸

³ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 N.R.C. 111, 121 (2006); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 260 (2006).

⁴ *See, e.g., Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 N.R.C. 214, 220 (2011); *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. 377, 379-80 (2012); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 N.R.C. 301, 307 (2012).

⁵ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 N.R.C. 499, 503 (2007).

⁶ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 N.R.C. 192, 198 (1993).

⁷ *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 458 (2006).

⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 N.R.C. 160, 166 (2005). A decision may be defended on any ground advanced below. *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 N.R.C. 1591, 1597 n.3 (1984); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 N.R.C. 135, 141 (1986), *rev’d in part on other grounds*, CLI-87-12, 26 N.R.C. 383 (1987); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 N.R.C. 775, 789 (1979); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-691, 16 N.R.C. 897, 908 n.8 (1982) (citing *Black Fox*, ALAB-573, 10 N.R.C. at 789).

III. STATEMENT OF THE CASE

This proceeding involves Exelon’s application dated July 10, 2018, requesting the subsequent (i.e. second) license renewal (“SLR”) of the renewed facility operating licenses for the Peach Bottom Atomic Power Station, Units 2 and 3 (“Peach Bottom”). The application includes an environmental report⁹ that analyzes applicable issues that have been determined to require further analysis (termed “Category 2” issues) by the NRC’s Generic Environmental Impact Statement on license renewal.¹⁰ With respect to those issues that are designated as “Category 1” issues in the GEIS¹¹ (which include design-basis accidents), the ER identifies the issues and findings that apply to Peach Bottom, addresses whether new and significant information exists, and, in the absence of any identification of new and significant information, incorporates the GEIS conclusions by reference.¹²

Beyond Nuclear petitioned for leave to intervene in this proceeding, requesting a hearing on two contentions.¹³ Contention 2, at issue in this appeal, alleged that Exelon’s ER violates the National Environmental Policy Act (“NEPA”) and 10 C.F.R. § 51.53(c)(2) by failing to address the risk of design-basis accidents posed by operating aging reactor equipment. The gravamen of this contention was that because 10 C.F.R. § 51.53(c)(3) applies only to applicants seeking an

⁹ Applicant’s Environmental Report – Operating License Renewal Stage – Subsequent License Renewal, Peach Bottom Atomic Power Station, Units 2 and 3 (July 2018) (NRC ADAMS Accession No. ML18201A219) (“ER”).

¹⁰ NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants,” Rev. 1 (June 2013), available at ADAMS Accession Nos. ML13106A241, ML13106A242, and ML13106A244 (“GEIS”).

¹¹ Findings on Category 1 issues are codified in 10 C.F.R. Part 51, App. B, Table B-1 (“Table B-1”). Issues are designated as Category 1 issues if analysis in the GEIS has shown that: (1) the environmental impacts associated with the issue have been determined to apply to all plants or plants with a specified characteristic, (2) a single significance level (i.e. small, moderate, or large) has been assigned to the impacts, and (3) mitigation of adverse impacts associated with the issue have been considered and additional plant specific mitigation has been determined not likely to be sufficiently beneficial to warrant implementation. *Id.*, n.2.

¹² *See generally* ER at 4-2, 4-4. *See also* ER at 4-69 (incorporating by reference the GEIS conclusions on design basis accidents).

¹³ Beyond Nuclear Inc.’s Hearing Request and Petition to Intervene (Nov. 19, 2018) (NRC ADAMS Accession No. ML18323A750) (“BN Hearing Request”).

initial renewed license, it does not exempt Exelon from considering the Category 1 issue of design basis accidents.¹⁴ Contention 2 incorporated by reference a 48-page report prepared by David Lochbaum in support of Contention 1,¹⁵ and asserted that Exelon was violating NEPA by not reviewing the existing body of literature regarding reactor aging phenomena, including the relevant studies listed in the four and a half pages of references in Mr. Lochbaum's report, the Expanded Materials Degradation Assessment ("EMDA")¹⁶ and SECY-14-0016, Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal (Jan. 31, 2014).¹⁷ Beyond Nuclear also asserted that the ER should address the significance of the declining amount of external operating experience available to Exelon.¹⁸

Both Exelon and the NRC Staff answered opposing Beyond Nuclear's hearing request for failure to plead an admissible contention.¹⁹ With respect to Contention 2, both Exelon and the NRC Staff responded that the Contention impermissibly challenged the NRC's rules, including the generic findings on Category 1 issues codified in Table B-1.²⁰ Both Exelon and the NRC Staff also responded that the NRC rules at 10 C.F.R. § 51.53(a) permit an applicant to incorporate into its ER information from NRC Staff prepared generic environmental impact statements,²¹ that Exelon had done so,²² and that Beyond Nuclear provided no basis for any

¹⁴ BN Hearing Request at 7, 11.

¹⁵ *Id.* at 8.

¹⁶ NUREG/CR-7153, Expanded Material Degradation Analysis (Oct. 2014).

¹⁷ BN Hearing Request at 7-8.

¹⁸ *Id.* at 8.

¹⁹ Exelon's Answer Opposing Beyond Nuclear Inc.'s Hearing Request and Petition to Intervene (Dec. 14, 2018) ("Exelon Answer") (NRC ADAMS Accession No. ML18348B049); NRC Staff Answer to Beyond Nuclear Inc.'s Hearing Request and Petition to Intervene (Dec. 14, 2018) (NRC ADAMS Accession No. ML18355B014) ("NRC Staff Answer").

²⁰ Exelon Answer at 29-36; NRC Staff Answer at 29-37.

²¹ Exelon Answer at 31; NRC Staff Answer at 56-7, 58.

²² Exelon Answer at 29-30; NRC Staff Answer at 60 n.249.

claim that impacts of design basis accidents would be significantly different during the renewal term.²³ As the NRC Staff observed: “The Lochbaum Report contains no discussion of environmental consequences of SLR. Petitioner’s brief reference to studies listed in the Lochbaum Report, and the incorporation by reference of that report, fails to disclose new and significant information concerning the environmental impacts of design-basis accidents or the risk of such accidents.”²⁴ Similarly, Exelon observed:

[E]ven if accident risk were not resolved generically . . . , Contention 2 would still be inadmissible, because Beyond Nuclear has provided no information indicating that the NRC Staff’s previous identification of research topics or the vague and speculative concern regarding the sufficiency of future operating experience would result in any significant increase in the consequences of design basis accidents (or the probability-weighted consequences of severe accidents). Beyond Nuclear provides no basis to dispute the assessment in the 2013 GEIS that additional experience has contributed to improved plant performance (e.g., as measured by trends in plant-specific performance indicators), a reduction in operating events, and lessons learned that improve the safety of all of the operating nuclear power plants. NUREG-1437, Rev. 1, Vol. 3, App. E at E-3. As the GEIS states, “the performance and safety record of nuclear power plants operating in the United States continues to improve. This is also confirmed by analysis which indicates that, in many cases, improved plant performance and design features have resulted in reductions in initiating event frequency, core damage frequency, and containment failure frequency.” *Id.* Beyond Nuclear also provides no information disputing the observation in the ER that estimated core damage frequencies from internal events have followed a decreasing trend at both Peach Bottom units. ER at 4-70.

* * *

Here, Beyond Nuclear has not made any showing that accident risk has or will increase as Peach Bottom continues to operate. It has not pointed to any data suggesting any increase in accident risk or consequences. Therefore, in addition to rejecting Contention 2 as an impermissible challenge to the NRC rules generically assessing accident risk, the Board should also rule that Beyond Nuclear has failed to demonstrate any genuine material dispute with the assessment of accident risk in the GEIS, which the ER has incorporated by reference. In sum, even if a challenge to this assessment were permissible . . . , Contention 2 would be inadmissible for lack of basis, failure to demonstrate an

²³ Exelon Answer at 38-40; NRC Staff Answer at 58-59.

²⁴ NRC Staff Answer at 58.

issue material to the findings that the NRC must make, and failure to demonstrate a genuine dispute with the application on a material issue, as required by 10 C.F.R. §§ 2.309(f)(1)(ii), (iv), and (iv).²⁵

Beyond Nuclear's reply²⁶ remained essentially devoted to the argument that 10 C.F.R. § 51.53(c)(3) does not apply to a subsequent license renewal application. Beyond Nuclear did not dispute that such findings could be referenced. As Beyond Nuclear admitted on reply, "the NRC may still refer to the environmental findings of the 2013 Revised GEIS in a subsequent license renewal review, but NEPA prohibits the NRC from *codifying* those findings for purposes of a subsequent license renewal review."²⁷ However, Beyond Nuclear asserted that the ER did not address accident risk at all.

Exelon and the Staff also argue that Beyond Nuclear has not provided sufficient basis to show a material dispute with Exelon. These arguments are incorrect. Beyond Nuclear has shown that the Environmental Report does not discuss the risk of accidents due to aging of equipment at Peach Bottom *at all*, and that Exelon has no lawful excuse for failing to do so. Beyond Nuclear has also identified particular issues that should be addressed in that discussion. By itself, however, the very failure of Exelon to provide *any* discussion of environmental impacts due to aging reactor equipment constitutes a lawful and adequate basis for Contention 2.²⁸

The Board held oral argument on Beyond Nuclear's hearing request addressing the admissibility of both proposed contentions. Thereafter, in LBP-19-05, the Board denied Beyond Nuclear's hearing request because Beyond Nuclear had not proffered an admissible contention.²⁹ With respect to Contention 2, the Board found it unnecessary to determine the applicability of 10 C.F.R. § 51.53(c)(3) to subsequent license renewal applications or whether Contention 2

²⁵ Exelon Answer at 38-40 (footnotes omitted).

²⁶ Beyond Nuclear Inc.'s Reply to Exelon and NRC Staff's Oppositions to Hearing Request and Petition to Intervene (Dec. 21, 2018) (NRC ADAMS Accession No. ML18355B014) ("BN Reply").

²⁷ *Id.* at 28-29 (emphasis in original).

²⁸ *Id.* at 31-32 (emphasis added). During oral argument, Beyond Nuclear characterized its claim as a contention of omission. Transcript of Oral Argument ("Tr.") at 189 (Mar. 27, 2019) (Curran).

²⁹ LBP-19-05, slip op. at 1.

represented an impermissible challenge to Table B-1.³⁰ Instead, the Board concluded that 10 C.F.R. § 51.53(a) permits an ER to incorporate GEIS analyses,³¹ Exelon’s ER incorporated the conclusions from the GEIS on design basis accidents,³² Beyond Nuclear offered no explanation why Section 51.53(a) would not permit Exelon to utilize the GEIS in its application,³³ and Mr. Lochbaum’s report provided no support for Beyond Nuclear’s position that the GEIS analysis was deficient or could not be applied.³⁴ The Board therefore found no support for the allegation that Exelon failed to address accident risks.³⁵ The Board also found no basis for Beyond Nuclear’s allegation that the ER violates NEPA by failing to take into account the body of literature concerning aging, including the EMDA, literature referenced in Mr. Lochbaum’s report, and issues raised in SECY-14-0016.³⁶ In particular, the Board found that Beyond Nuclear did not identify the specific documents in Mr. Lochbaum’s report that should have been reviewed and evaluated, let alone any evidence that NEPA mandates such review.³⁷ The Board also agreed that “Beyond Nuclear has provided no information indicating that . . . the vague and speculative concern regarding the sufficiency of future operating experience would result in any significant increase in the consequences of design-basis accidents (or the probability-weighted consequences of severe accidents).”³⁸

Beyond Nuclear now appeals the Board’s ruling on Contention 2. Beyond Nuclear

³⁰ *Id.* at 18-19.

³¹ *Id.* at 19.

³² *Id.* at 19-20.

³³ *Id.* at 20.

³⁴ *Id.* at 21 and n.98.

³⁵ *Id.* at 19-20.

³⁶ *Id.* at 21-22.

³⁷ *Id.* at 22.

³⁸ *Id.* at 23 (quoting Exelon Answer at 38).

makes two claims on appeal: (1) that the Board erred in finding that the ER incorporated the GEIS by reference, and (2) that the Board erred in finding that Beyond Nuclear failed to support its position that the GEIS is insufficient to satisfy NEPA or NRC implementing regulations.³⁹ As discussed below, these claims on appeal have no merit.⁴⁰

IV. ARGUMENT

A. BEYOND NUCLEAR IMPROPERLY PRESENTS NEW ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL

Beyond Nuclear improperly argues for the first time on appeal that the ER improperly incorporated Category 1 findings by reference.⁴¹ Beyond Nuclear argues that the manner in which these findings were incorporated by reference does not meet the requirements of: (1) *Florida Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 and 4), LBP-16-8, 83 N.R.C. 417, 422 (2016) (“LBP-16-8”), *aff’d on other grounds*, CLI-16-18, 84 N.R.C. 167 (2016); (2) 10 C.F.R. Part 51, Subpart A, App. A § 1(b); (3) the Council on Environmental Quality (“CEQ”) rule at 40 C.F.R. § 1502.21, and (4) NUREG-1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants (Oct. 1999) (“NUREG-1555”).⁴² No part of this argument was raised before the Board. There is not a single reference to LBP-16-8 or any of

³⁹ BN Brief at 6, 11.

⁴⁰ Beyond Nuclear states in a footnote that it continues to assert that 10 C.F.R. § 51.53(c)(3) does not apply, and that it seeks a remand to the Board for a ruling. BN Brief at 10 n.4. In addition, Beyond Nuclear requests a separate opportunity for briefing on this issue if the Commission decides to address the applicability of 10 C.F.R. § 51.53(c)(3) without a remand. *Id.* While the Board’s decision does not depend on this issue and should be affirmed for the reasons discussed in this brief, the rejection of Contention 2 may also be sustained on any ground advanced before the Board (*see supra* note 8) and thus as an impermissible challenge to the NRC rules as Exelon and the NRC Staff maintained (*see supra* note 20; Tr. 167-74). As Beyond Nuclear acknowledges, the parties have fully briefed the issue. Therefore, neither a remand nor further briefing is necessary. Further, as the Board noted, the applicability of 10 C.F.R. § 51.53(c)(3) was raised in the Turkey Point subsequent license renewal proceeding and is currently pending before the Commission. LBP-19-05, slip op. at 18 & n. 90 (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-19-3, 89 N.R.C. ___, ___, slip op. at 25 n.46) (Mar. 7, 2019)). If the Commission affirms the ruling in the Turkey Point proceeding, Beyond Nuclear’s appeal will be moot.

⁴¹ BN Brief at 6-7.

⁴² *Id.*

these other provisions in Beyond Nuclear's hearing request, reply, or in the transcript of oral argument.

"[A]bsent 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.'"⁴³ Before the Board, Beyond Nuclear made no claim that the ER's incorporation by reference of the GEIS findings on Category 1 issues was improper. As previously discussed, Exelon and the NRC Staff's Answers to Beyond Nuclear's hearing request both responded that the NRC rules at 10 C.F.R. § 51.53(a) permit an applicant to incorporate into its ER information from NRC Staff prepared generic environmental impact statements and identified the pages of the ER that incorporated by reference the findings on accidents.⁴⁴ Beyond Nuclear's Reply did not dispute these assertions. Instead, despite the identification in Exelon's Answer of the specific pages of the ER incorporating the GEIS findings on accidents, Beyond Nuclear merely asserted (incorrectly) that "Beyond Nuclear has shown that the Environmental Report does not discuss the risk of accidents due to aging of equipment at Peach Bottom *at all*. . . ." ⁴⁵

At oral argument, Beyond Nuclear continued to ignore the statements in the Application incorporating the GEIS findings, presenting no dispute with them.

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

⁴³ *USEC*, CLI-06-10, 63 N.R.C. at 458 (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).

⁴⁴ See *supra* notes 21-22.

⁴⁵ BN Reply at 32 (emphasis in original).

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.⁴⁶

Exelon responded:

Our environmental report with respect to each category 1 issue incorporates by reference the 2013 GEIS finding and identifies whether there's any new and significant information. It's correct. We have two responses to this contention. The first is that it's barred by the rules, particularly [Table] (b)(1) of Part 51 because these are codified findings. But if you were to decide that, in fact, that bar doesn't apply, we still have these finding from the GEIS incorporated into our ER as permitted by 51.53(a). At that point, the issue would be, okay, assuming that these issues aren't barred by the rule you've incorporated by reference the GEIS discussion, why is that inadequate? And that's not addressed at all by Beyond Nuclear.⁴⁷

Judge Gibson specifically asked Beyond Nuclear how it would respond to this argument:

"But let's go to his argument which is that, okay, even if they're not covered as on the 51.53 issue. Even if we have to go back to this GEIS, they are covered – they're adequately addressed in that GEIS and they incorporated it by reference. Now how do you respond to that, Ms. Curran?"⁴⁸ In response, Beyond Nuclear raised no objection to the manner in which the Category 1 findings were incorporated by reference, but instead simply reiterated vaguely, that "[w]e respond by raising specific criticisms of a lack of certain analyses in that environmental report. There are things that we think should be included in there in their discussion of environmental impacts which are not."⁴⁹

⁴⁶ Tr. 189 (Curran). Quotes from this transcript in this brief incorporate transcript corrections adopted by the Board. Order (Granting Joint Motion for Transcript Corrections) (Apr. 17, 2019).

⁴⁷ Tr. 189-90 (Lewis).

⁴⁸ Tr. 192.

⁴⁹ *Id.* (Curran). See also Tr. 179-80 (Curran) ("And 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."). As Exelon stated at oral argument and as the cited pages of the ER show, the sections of the ER incorporating Category 1 issues by reference identify that no new and significant information has been identified. Tr. 189; ER at 4-69, 4-70. See also BN Brief at 7-8 n.3.

In short, Beyond Nuclear raised no argument before the Board that the ER improperly incorporated by reference the Category 1 findings. To the extent it responded at all, its sole claim was that further analysis of literature on aging and declining operating experience was needed. Having failed to raise its new objections to the manner in which the GEIS findings were incorporated by reference, depriving the Board of any opportunity to consider such objections, Beyond Nuclear may not now raise these objections on appeal.

B. THERE IS NO MERIT TO BEYOND NUCLEAR’S NEW OBJECTIONS TO THE MANNER IN WHICH EXELON’S ER INCORPORATED CATEGORY 1 FINDINGS BY REFERENCE

Even if Beyond Nuclear’s untimely new arguments are considered (which they should not be), they fail to raise any genuine material dispute with the Application. Neither LBP-16-8 nor any of the other provisions to which Beyond Nuclear refers (10 C.F.R. Part 51, App. A § 1(b), 40 C.F.R. § 1502.21, and NUREG-1555) applies to an applicant’s environmental report. LBP-16-8 relates to the adequacy of an environmental assessment prepared by the NRC Staff to comply with NEPA.⁵⁰ 10 C.F.R. Part 51, App. A, provides the format for an environmental impact statement prepared by the NRC Staff. The CEQ rule at 40 C.F.R. § 1502.21 (which is not binding on the NRC⁵¹) addresses how agencies should incorporate material into an environmental impact statement by reference. NUREG-1555 provides guidance for the NRC Staff’s environmental review, and Beyond Nuclear concedes that it applies to environmental

⁵⁰ See LBP-16-8, 83 N.R.C. at 417, 420-21.

⁵¹ The Commission looks to CEQ regulations for guidance, but its longstanding policy is that, as an independent regulatory agency, the NRC “is not bound by those portions of CEQ’s NEPA regulations that have a substantive impact on the way in which the Commission performs its regulatory functions.” See *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 N.R.C. 427, 443-44 (2011).

impact statements prepared by the NRC.⁵² Beyond Nuclear asserts that the Atomic Safety and Licensing Board in LBP-16-8 applied NUREG-1555 to an environmental report, but that assertion is inaccurate. LBP-16-8 applied NUREG-1555 to an environmental assessment prepared by the NRC Staff.⁵³

As NEPA applies to the NRC Staff, not the applicant, any source of some legal duty regarding the ER must be found in the NRC regulations.⁵⁴ Beyond Nuclear does not identify any NRC regulation that prescribes the manner in which an ER may incorporate information by reference. 10 C.F.R. § 51.53(a), applicable to the ER in this proceeding, imposes no restrictions.

Moreover, even if the regulations to which Beyond Nuclear refers were applied to Exelon's ER, they would be satisfied. The CEQ rule at 40 C.F.R. § 1502.21, to which 10 C.F.R. Part 51, App. A § 1(b) refers, merely states that incorporated material shall be cited in the statement and its content briefly described. The ER cites the GEIS (ER at 1-2 and 4-4), and Table 4.0-1 quotes each of its findings on Category 1 issues and lists the ER sections that contain Peach Bottom information relevant to the issue.

Thus, Beyond Nuclear's new objection devolves to the claim that to properly incorporate information by reference, the ER must provide specific GEIS section references.⁵⁵ Beyond Nuclear bases this assertion on LBP-16-8, which in turn relied on NUREG-1555. The guidance

⁵² BN Brief at 7. The discussion of how to incorporate material by reference appears in Appendix A of NUREG-1555, at A-1, and merely summarizes the provision in 10 C.F.R. Part 51, App. A, relating to incorporating information by reference into an environmental impact statement.

⁵³ LBP-16-8, 83 N.R.C. at 432 n.98.

⁵⁴ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Unit 1 and 2), LBP-11-32, 74 N.R.C. 654, 666 (2011), *review declined*, CLI-12-13, 75 N.R.C. 681 (2012). *See also South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 N.R.C. 87, 106 (2009), *rev'd in part on other grounds*, CLI-10-1, 71 N.R.C. 1 (2010) ("Thus a contention asserting the inadequacy or insufficiency of the content of the ER cannot succeed as a challenge to an applicant's compliance with an Agency regulation so long as the ER reasonably addresses the topics that the Agency's regulations require.").

⁵⁵ BN Brief at 7-8.

in NUREG-1555, however, does not apply to license renewal proceedings. As Appendix A to NUREG-1555 states, “The table presented in this appendix is a guide to selection of ESRPs that are appropriate for use in reviews associated with each of these licensing actions except LR. LR is treated in a supplement to this document.”⁵⁶ Nowhere in the NUREG-1555 supplement applicable to license renewal⁵⁷ is there any guidance calling for specific section references. Further, NUREG-1555 does not establish any legal requirement (and again, does not apply to an environmental report).

Citing LBP-16-8, Beyond Nuclear also asserts that to incorporate another environmental study by reference, an environmental document must consider environmental changes that occurred after the incorporated study was prepared.⁵⁸ Putting aside the inapplicability of LBP-16-8 to an environmental report, here, Exelon’s ER clearly concluded that no new and significant information was identified regarding the impacts of design-basis accidents.⁵⁹ Beyond Nuclear complains that there is no discussion of the likely changes to the condition of equipment during the last twenty years of an 80-year operating license period,⁶⁰ but this complaint simply disputes the GEIS conclusion⁶¹ and the merits of Exelon’s conclusion that no new and significant

⁵⁶ NUREG-1555 at A.1.

⁵⁷ NUREG-1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, Supplement 1: Operating License Renewal (June 2013) (NRC ADAMS Accession No. ML13106A246).

⁵⁸ BN Brief at 6.

⁵⁹ ER at 4-69.

⁶⁰ BN Brief at 8.

⁶¹ As the GEIS explains, “Due to the requirements for nuclear plants to maintain their licensing basis and implement aging management programs during the license renewal term, the environmental impacts during a license renewal term should not differ significantly from those calculated for the design-basis accident assessments conducted as part of the initial plant licensing process.” Exelon’s Answer at 35 n.32 (quoting GEIS at S-17). *See also* Tr. 195-96 (quoting GEIS at E-5 to E-6 (“Since the licensee is required to maintain the plant within acceptable design and performance criteria, including during any license renewal term, these impacts are not expected to change.”)).

information exists.⁶² Beyond Nuclear poses some rhetorical questions about how this conclusion was reached,⁶³ but provides no support for any claim that additional discussion in the ER is required.⁶⁴ Further, LBP-16-8 found the environmental assessment at issue in that proceeding deficient because, as factually determined after a hearing, it relied on referenced impact evaluations that predated the proposed action under review and did not consider significant changes in relevant data that had been subsequently documented.⁶⁵ Nothing in LBP-16-8 decision indicates that an environmental report in a license renewal proceeding must elaborate on the *absence* of new and significant information.

Finally, citing LBP-16-8, Beyond Nuclear asserts that to incorporate another environmental study by reference, an environmental document must consider the environmental effects “of the specific license at issue.”⁶⁶ LBP-16-8 found the environmental assessment at issue in that proceeding deficient because it failed to consider the environmental effects of the “specific license *action* at issue”⁶⁷ – not the specific license as Beyond Nuclear inaccurately asserts.⁶⁸ Obviously, the GEIS considers the effects of license renewal. Based on its mischaracterization of LBP-16-8, Beyond Nuclear then complains that the ER does not contain any analysis of design basis accidents at Peach Bottom, or how the GEIS applied to Peach Bottom.⁶⁹ This complaint is tantamount to an assertion that conclusions from a generic

⁶² As discussed later, Beyond Nuclear failed to provide any basis to challenge the conclusion that the impacts of design-basis accidents remain small.

⁶³ BN Brief at 9.

⁶⁴ Beyond Nuclear alleges that the ER contains no hint of how Exelon reached its conclusion. *Id.* Section 5 of the ER describes Exelon’s process for assessing whether new and significant information exists.

⁶⁵ LBP-16-8, 83 N.R.C. at 435-38, 440.

⁶⁶ BN Brief at 6.

⁶⁷ LBP-16-8, 83 N.R.C. at 432.

⁶⁸ LBP-16-8 faulted the reliance on prior environmental review documents because they were “evaluating a different proposed action.” *Id.* at 435.

⁶⁹ BN Brief at 9.

environmental impact statement (here, one making findings applicable to all plants) cannot be incorporated by reference, and as such represents an impermissible challenge to 10 C.F.R. § 51.53(a),⁷⁰ which explicitly allows an ER to incorporate information from a generic environmental impact statement.

C. BEYOND NUCLEAR FAILED TO DEMONSTRATE ANY GENUINE MATERIAL DISPUTE WITH THE FINDINGS ON DESIGN BASIS ACCIDENTS AND THUS FAILED TO PROFFER AN ADMISSIBLE CONTENTION

The Board correctly rejected Beyond Nuclear's Contention 2 for failing to establish a genuine material dispute with the application and thus failing to proffer an admissible contention. On appeal, Beyond Nuclear focuses solely on its prior claim that the ER is deficient for a failure to address literature⁷¹ and seeks, improperly for the first time on appeal, to limit this claim to five specific studies plus SECY-14-0016. Before the Board, Beyond Nuclear failed to demonstrate how addressing any of this literature would materially change the impacts of design basis accidents addressed in the GEIS and incorporated by reference into the ER, and on appeal, Beyond Nuclear provides no grounds to overturn the Board's determination.

In its Petition to Intervene, Beyond Nuclear alleged that Exelon failed to review and evaluate "the significant body of studies raising concerns about how much is still unknown about

⁷⁰ Beyond Nuclear states that Exelon clearly did not rely on Section 51.53(a) to incorporate the GEIS findings and characterizes this as a post-hoc rationalization. *Id.* at 9. An applicant does not have to cite Section 51.53(a) in order to incorporate information by reference, and the ER explicitly does so. ER at 4-69 ("No new and significant information was identified regarding impacts from design-basis accidents. Therefore, the conclusions in the 2013 GEIS are considered appropriate for the PBAPS SLR, are incorporated herein by reference, and do not need further analysis.").

⁷¹ BN Brief at 11 ("[T]he Environmental Report is deficient for failing to address a body of literature concerning aging reactor phenomena that might occur beyond the first sixty years of operation."). As Beyond Nuclear abandons on appeal its claim that Exelon failed to address the significance of declining operating experience, its arguments on that point are waived. *Int'l Uranium Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 N.R.C. 247, 253 (2001); see *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 N.R.C. 245, 257 n.70 (2010).

the effects of aging on reactor safety equipment.”⁷² In support, Beyond Nuclear referred to studies listed in Sections 4 and 10 of Mr. Lochbaum’s report,⁷³ of which Section 10 of the report listed approximately 50 references. Other than alluding vaguely to the references in Mr. Lochbaum’s report, Contention 2 mentioned only the EMDA Report⁷⁴ and SECY-14-016.⁷⁵

As the Board held, Beyond Nuclear did not identify the specific documents referenced in Mr. Lochbaum’s report that Exelon allegedly should have “review[ed] and evaluate[d]” or any evidence that a review of these documents was required.⁷⁶ Clearly, this vague reference to a long list of documents, without any explanation of their materiality to the impacts of design basis accidents, failed to demonstrate any material issue in dispute. As is well established, it is not the Board’s responsibility to “search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves.”⁷⁷

On appeal, Beyond Nuclear attempts to cure this omission by specifying five technical studies cited in Mr. Lochbaum’s report that it now says should be considered. However, this attempt to cure this defect in Contention 2 on appeal is impermissible.⁷⁸

With the respect to the two studies specifically identified by Beyond Nuclear in its Petition to Intervene (the EMDA and SECY-14-0016), the Board agreed with the NRC Staff and Exelon that Beyond Nuclear failed to provide a basis showing a genuine dispute with the

⁷² BN Hearing Request at 7.

⁷³ *Id.* at 7.

⁷⁴ *See id.* at 7, 12-13.

⁷⁵ *See id.* at 12-13.

⁷⁶ LBP-19-05, slip op. at 22.

⁷⁷ *USEC*, CLI-06-10, 63 N.R.C. at 457.

⁷⁸ *Id.* at 458 (“The purpose of an appeal to the Commission is to point out errors made in the Board’s decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.”).

Application,⁷⁹ and correctly concluded that Contention 2 did not meet the requirements in either 10 C.F.R. § 2.309(f)(1)(iv) or 10 C.F.R. 2.309(f)(1)(vi).⁸⁰ As explained in the NRC Staff Answer cited with agreement by the Board,⁸¹ Beyond Nuclear provided no arguable basis to conclude that the effects of aging will not be managed such that the impacts of design basis accidents would be other than SMALL.⁸² As the NRC Staff observed, while the 2014 EMDA described research needs for degradation beyond 60 years of operation, Beyond Nuclear did not address publicly available information indicating that NRC guidance documents have since been revised to address this information.⁸³ As the Staff further explained,

The [Generic Aging Lessons Learned for Subsequent License Renewal (GALL-SLR)] Report and the SLR-SRP incorporate revisions “to reflect aging differences for increased operating time from 60-80 years” as well as revisions “to consider new operating experience and provide information identified as missing since the release of GALL Report Rev 2 [ML103490041].” Moreover, the GALL-SLR Report specifically states that Staff “used the results of the [2014] EMDA report to identify gaps in current technical knowledge or issues not being addressed by planned industry or DOE research, and to identify aging management programs that will require modification for SLR.”⁸⁴

Beyond Nuclear never addressed Exelon’s use of the aging management program and the GALL-SLR refinements.⁸⁵

⁷⁹ LBP-19-05, slip op. at 22 & n.105 (citing with agreement Exelon Answer at 58 and NRC Staff Answer at 58-59).

⁸⁰ *Id.* at 22 & n.107.

⁸¹ *See supra* note 79.

⁸² NRC Staff Answer at 59.

⁸³ *Id.*

⁸⁴ *Id.* at 59-60 (internal citations omitted).

⁸⁵ Beyond Nuclear’s brief states that the EMDA’s “catalog of poorly understood aging remains unresolved” (BN Brief at 14), but the citation to the EMDA report provides no support for this assertion. Nor did Beyond Nuclear provide any other support for assertion. As the Board ruled with regard to Contention 1, Beyond Nuclear did not identify any specific deficiencies in the aging management programs described in Exelon’s application. LBP-19-05, slip op. at 15. *See also* Exelon Answer at 24-27 (discussing the results of research subsequent to the EMDA and SECY-14-0016). Use of an aging management program consistent with the GALL Report constitutes reasonable assurance that the targeted aging effect will be adequately managed during the renewal period. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 467 (2008). *See also Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 N.R.C. 1, 36 (2010); *Seabrook*, CLI-12-5, 75 N.R.C. at 315.

Similarly, as stated in Exelon's Answer cited with agreement by the Board,⁸⁶ Beyond Nuclear failed to specifically show how the information in the two reports at issue would support concluding that the consequences of a design-basis accident have increased and thereby change the conclusions in the ER.⁸⁷ As Exelon observed, Beyond Nuclear provided no basis to dispute the assessment in the GEIS that additional experience has contributed to improved plant performance (e.g., as measured by trends in plant-specific performance indicators), a reduction in operating events, and lessons learned that improve the safety of all of the operating nuclear power plants.⁸⁸ Beyond Nuclear also provided no information disputing the observation in the ER that estimated core damage frequencies from internal events have followed a decreasing trend at both Peach Bottom units.⁸⁹

If there are alleged errors or omission in the environmental analysis, it is the petitioner's burden to show their significance and materiality.⁹⁰ "NEPA is, after all, governed by a 'rule of reason,' which frees the agency from pursuing unnecessary or fruitless inquiries."⁹¹ Here, Beyond Nuclear made no showing that accident risk has or will increase as Peach Bottom continues to operate. It did not point to any data, identify any specific reference or provide any expert opinion indicating any expected increase in accident risk or consequences. Mr. Lochbaum's report contained no discussion of the environmental consequences of subsequent license renewal, let alone any discussion of accident risk or consequences. Thus, as the Board correctly concluded, Beyond Nuclear failed to raise a material issue and failed to show a genuine

⁸⁶ See *supra* note 79.

⁸⁷ Exelon Answer at 38.

⁸⁸ *Id.* (citing GEIS, Vol. 3, App. E at E-3).

⁸⁹ *Id.* at 38-39 (citing ER at 4-70).

⁹⁰ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 N.R.C. 801, 811 (2005).

⁹¹ *Private Fuel Storage*, CLI-04-22, 60 N.R.C. at 139.

dispute with the application on a material issue of law or fact.⁹²

On appeal, Beyond Nuclear fails to identify any error of law or abuse of discretion in this decision and instead asserts that CLI-11-11 and the CEQ rule at 40 C.F.R. §1502.22 provide a legal basis for its claims.⁹³ This assertion is irrelevant to the Board's finding. It was Beyond Nuclear's burden to show that any alleged error or omission in the environmental analysis is material – e.g., that some specific aging management issue could result in the consequences of design-basis accidents being greater than small.⁹⁴ Beyond Nuclear's asserted "legal basis" does nothing to meet its burden to demonstrate materiality. The GEIS finding on design basis accidents, incorporated by reference in the ER, is based on the NRC's determination that because the licensee is required to maintain the plant within acceptable design and performance criteria, including during any license renewal term, the impacts of design basis accidents are not expected to change.⁹⁵ Beyond Nuclear never addressed or disputed this conclusion. Beyond Nuclear referred to knowledge gaps identified in 2014, but never explained why the subsequently developed GALL-SLR programs would no longer be sufficient to maintain plants within acceptable design and performance criteria.⁹⁶ Nor did Beyond Nuclear provide any expert opinion or reference explaining why the generic findings on the environmental impacts of accidents suffer from any material lack of information or uncertainty that might necessitate

⁹² LBP-19-05, slip op. at 22 & n.107.

⁹³ BN Brief at 15-16.

⁹⁴ It is Beyond Nuclear's burden to show the significance and materiality of its contentions. *Early Site Permit for Clinton ESP Site*, CLI-05-29, 62 N.R.C. at 801.

⁹⁵ See *supra* note 61.

⁹⁶ It should be noted that the environmental impacts of design basis accidents are analyzed by determining the dose to the maximally exposed individual, and not by looking at probabilities. Tr. 212 (Lewis). See, e.g., NUREG-1437, Rev. 0, Generic Environmental Impact Statement for License Renewal of Nuclear Plants at 5-11 to 5-12 (May 1996). Beyond Nuclear failed to provide any link between any specific study and the consequences of a design-basis accident.

further discussion pursuant to 40 C.F.R. §1502.22, even if that rule applies.

Moreover, Beyond Nuclear cannot rely on 40 C.F.R. § 1502.22 as a “legal basis” for its contention. As explained previously, the CEQ regulations, including 40 C.F.R. § 1502.22, are neither binding on the NRC,⁹⁷ nor applicable to an environmental report. CLI-11-11 is also inapplicable. In CLI-11-11, the Commission recognized an admissible contention where an omitted study contradicted conclusions reached by an Applicant.⁹⁸ Here Beyond Nuclear has failed to demonstrate how the omitted studies could change the impacts listed in the ER or contradicted the conclusion that the impacts of design-basis accidents are small.

In sum, the Board correctly found that Beyond Nuclear’s reference to a body of literature failed to establish any genuine material dispute with the Application, and Beyond Nuclear fails to demonstrate any error or abuse of discretion in this ruling.

V. CONCLUSION

For all the foregoing reasons, the Board should deny Beyond Nuclear’s appeal and affirm LBP-19-05.

Respectfully submitted,

/signed electronically by Anne Leidich/

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⁹⁷ See *Diablo Canyon*, CLI-11-11, 74 N.R.C. at 443-44.

⁹⁸ *Id.* at 443.

**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	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Exelon's Brief in Opposition to Beyond Nuclear's Appeal of LBP-19-05 has been served through the E-Filing system on the participants in the above-captioned proceeding this 9th day of August, 2019.

/signed electronically by Anne Leidich/
Anne R. Leidich