

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the matter of:

VIRGINIA ELECTRIC AND POWER COMPANY
and OLD DOMINION ELECTRIC COOPERATIVE

(North Anna Power Station, Units 1 and 2)

Docket Nos. 50-338-SLR-2 and
50-339-SLR-2

August 30, 2024

**APPLICANTS' ANSWER AND BRIEF IN OPPOSITION TO THE APPEAL OF
LBP-24-07 FILED BY BEYOND NUCLEAR AND THE SIERRA CLUB**

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), Virginia Electric and Power Company, on behalf of itself and Old Dominion Electric Cooperative (collectively, “Applicants”) submits this Brief in Opposition to the Appeal of LBP-24-07 (“Appeal”), filed by Beyond Nuclear and the Sierra Club (“Petitioners”).¹ In LBP-24-07,² the Atomic Safety and Licensing Board (“ASLB” or “Board”) denied Petitioners’ March 28, 2024 (as corrected on April 8, 2024, and amended on April 11, 2024) hearing request and petition to intervene in this proceeding (“Petition”).³ As explained more fully below, the Commission should affirm LBP-23-07 in its entirety because Petitioners identify no reason to disturb the Board’s well-reasoned decision.

II. BACKGROUND & LEGAL STANDARDS

A. The SLRA & Procedural History

1. The SLRA & Procedural History Through February 2022

The background on Applicants’ subsequent license renewal (“SLR”) application and the procedural history through the Commission’s two decisions (CLI-22-2 and CLI-22-3) in February 2022 is provided in Applicant’s Answer to the Hearing Request and Petition to Intervene and Motion for Leave to Amend Contention 3 Filed by Beyond Nuclear and Sierra Club (“Answer”), which Applicants incorporate into this brief by reference.⁴

¹ Notice of Appeal and Brief on Appeal of LBP-24-07 (August 5, 2024) (Package No. ML24218A285) (Notice of Appeal (ML24218A286); Brief (ML24218A287)) (“Appeal”). References and citations to the Appeal are to the Brief.

² *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), LBP-24-07, 100 NRC __ (July 10, 2024) (slip op.) (ML24192A320).

³ [Corrected] Hearing Request and Petitioner to Intervene by Beyond Nuclear and the Sierra Club (Apr. 8, 2024) (ML24099A146) (“Petition”).

⁴ Applicant’s Answer to the Hearing Request and Petition to Intervene and Motion for Leave to Amend Contention 3 Filed by Beyond Nuclear and Sierra Club at 7–10 (May 6, 2024) (ML24127A220) (“Answer”).

2. Procedural History After February 2022

Applicants Supplement Their ER: Consistent with the option provided by the Commission in CLI-22-3, Applicants filed a supplemental Environmental Report on September 28, 2022.⁵ The NRC then issued a draft Site-Specific Environmental Impact Statement in December 2023 (“2023 DSEIS”).⁶ The 2023 DSEIS “(1) addresses, on a site-specific basis, the issues that were previously treated as generic ‘Category 1’ issues in the 2021 DSEIS, and (2) updates and revises the evaluation of site-specific ‘Category 2’ issues in the 2021 DSEIS.”⁷ The 2023 DSEIS also analyzed the new and revised environmental issues identified by the NRC staff during its update of the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (“GEIS”).⁸

New Hearing Opportunity Notice & Petitioners’ Hearing Request: After publication of the 2023 DSEIS, the NRC published a new hearing opportunity notice in the *Federal Register*.⁹ Petitioners filed their Petition on March 28, 2024, to which they filed a corrected version on April 8, 2024. Petitioners proposed three contentions. Contention 1 alleged the 2023 DSEIS failed to address the environmental significance of the 2011 Mineral earthquake.¹⁰ Contention 2 alleged the 2023 DSEIS did not contain a complete or adequately rigorous evaluation of accident

⁵ Letter from J. Holloway, Virginia Electric and Power Co. to NRC, Virginia Electric and Power Company, North Anna Power Station (NAPS) Units 1 and 2, Subsequent License Renewal Application for Facility Operating Licenses NPF-4 and NPF-7, Appendix E Environmental Report Supplement 1 (Sept. 28, 2022) (ML22272A041) (“Supp. ER”).

⁶ See generally NUREG-1437, Supp. 7a, Second Renewal, “Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 7a, Second Renewal, Regarding Subsequent License Renewal for North Anna Power Station Units 1 and 2, Draft Report for Comment” (Dec. 2023) (ML23339A047) (“2023 DSEIS”).

⁷ *Id.* at iv.

⁸ See *id.*, App. G.

⁹ Virginia Electric and Power Company; North Anna Power Station, Units 1 and 2; Draft Environmental Impact Statement; Request for Comment; Public Comment Meetings; Opportunity to Request a Hearing and Petition for Leave to Intervene, 89 Fed. Reg. 960 (Jan. 8, 2023).

¹⁰ Petition at 9–12.

risks.¹¹ Contention 3 alleged the 2023 DSEIS failed to address the effects of climate change on accident risk.¹² Petitioners also submitted a declaration from Jeffrey Mitman in support of their Petition.¹³

Petitioners Move to Amend Contention 3: On April 11, 2024, Petitioners moved to amend Contention 3 to cite a newly issued report by the U.S. Government Accountability Office (“GAO”).¹⁴ The GAO’s report, entitled “Nuclear Power Plants: NRC Should Take Actions to Fully Consider the Potential Effects of Climate Change” (“GAO Report”), examined how climate change is expected to affect nuclear power plants by compiling already existing government data.¹⁵ Petitioners’ motion also asked to amend the basis statement for Contention 3 to include several “observations and conclusions” from the GAO Report that they believed supported Contention 3.¹⁶ The Board set a briefing schedule on Petitioners’ motion to amend that extended Applicants’ and the NRC staff’s time to answer.¹⁷

Applicants’ and NRC Staff’s Answers: Applicants filed their answer on May 6, 2024, and opposed the admission of all three contentions and also opposed the motion to amend Contention 3.¹⁸ Applicants argued that all three contentions were “exceedingly vague,” lacked adequate support, and failed to demonstrate a genuine dispute on a material issue of law or fact.¹⁹ Applicants also argued that the contentions were outside the scope of this proceeding because

¹¹ *Id.* at 13–15.

¹² *Id.* at 16–18.

¹³ *See id.*, Attach. 1 (“Mitman Decl.”).

¹⁴ Motion by Beyond Nuclear and the Sierra Club to Amend Their Contention 3 Regarding Failure to Consider Environmental Impacts of Climate Change (Apr. 11, 2024) (ML24102A199) (“Motion to Amend”).

¹⁵ Government Accountability Office, GAO-24-106326, Nuclear Power Plants: NRC Should Take Actions to Fully Consider the Potential Effects of Climate Change (Apr. 2024) (“GAO Report”).

¹⁶ Motion to Amend at 3.

¹⁷ Memorandum and Order (Initial Prehearing Order (amended)) (Apr. 15, 2024) (unpublished) (ML24107A696).

¹⁸ *See generally* Answer.

¹⁹ *See id.* at 14–42.

they all challenged various aspects of North Anna’s current licensing basis (“CLB”).²⁰ As to Petitioners’ motion to amend, Applicants argued it should be denied because Petitioners did not satisfy the criteria for late-filed contention amendments.²¹

The NRC staff also filed its Answer on May 6, 2024, and argued that the three contentions did not challenge new information in the 2023 DSEIS and failed to satisfy all contention admissibility criteria.²² Although the NRC staff did not directly oppose Petitioners’ motion to amend Contention 3, the NRC staff argued that even with the amendment, Petitioners failed to provide sufficient support for the contention.²³

The Board granted Petitioners’ motion to amend Contention 3 on May 7, 2024.²⁴ After requesting and receiving an extension of time to file their Reply,²⁵ Petitioners filed their Reply in further support of their Petition on May 20, 2024.²⁶

The Commission Approves the GEIS Update and Part 51 Rulemaking: On May 16, 2024, the Commission approved a final rule to update Part 51 to apply to both initial and one term of subsequent license renewal.²⁷ This final rule was supported by the Revision 2 of the

²⁰ *See id.*

²¹ *See id.* at 42–49.

²² NRC Staff Answer in Opposition to Petition for Leave to Intervene Filed by Beyond Nuclear Inc., and Sierra Club, Inc. (May 6, 2024) (ML24127A233) (“NRC Answer”).

²³ *Id.* at 40.

²⁴ Memorandum and Order (Granting Joint Intervenor’s Motion to Amend Contention 3) (May 7, 2024) (ML24128A209).

²⁵ Unopposed Emergency Motion By Beyond Nuclear And The Sierra Club For Extension Of Time To Reply To Oppositions To Their Hearing Request And Petition To Intervene And Request For Postponement Of Oral Argument (May 13, 2024) (ML24134A194); Memorandum and Order (Granting Motion for Extension of Time and Postponing Oral Argument) (May 14, 2024) (ML24135A262).

²⁶ Reply By Beyond Nuclear and Sierra Club To Oppositions To Their Hearing Request and Petition To Intervene (May 20, 2024) (ML24141A287).

²⁷ Mem. from C. Safford, Secretary, to R. Furstenau, Acting Executive Director for Operations, SECY-24-0017 – Final Rule: Renewing Nuclear Power Plant Operating Licenses-Environmental Review (RIN 3150-AK32; NRC-2018-0296) (May 16, 2024) (ML24137A164).

GEIS.²⁸ After the Commission’s approval of the final rule, the Board ordered to parties to address the effect of the final rule and updated GEIS, if any, on this proceeding.²⁹ Petitioners,³⁰ Applicants,³¹ and the NRC staff,³² all agreed that the final rule and revised GEIS had no impact on this proceeding.

3. Oral Argument and the Board’s Decision

The Board held oral arguments on June 3, 2024.³³ During oral arguments, the Board asked all parties about the effect of the Part 51 final rule on this proceeding. All parties agreed that the final rule had no impact on the proceeding.³⁴ On July 10, 2024, the Board issued its decision denying Petitioners’ hearing request and terminating the proceeding.³⁵

The Board Unanimously Found Contention 1 to be Inadmissible: The Board analyzed Contention 1 as both a contention of omission and a contention of adequacy. As a contention of omission, the Board found it to be inadmissible because the 2023 DSEIS discussed the 2011 Mineral earthquake and “the extensive regulatory review that followed it.”³⁶ The Board also found Contention 1 to be inadmissible because it was “vague and unparticularized,” and Petitioners failed to “cite to any requirement that the [2023 DSEIS] include the information they

²⁸ See *id.*; see also NUREG-1437, Rev. 2, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (Aug. 2024) (Vol. 1, ML24086A526) (“2024 GEIS”).

²⁹ Memorandum and Order (Request to Address Contention Admissibility and Impacts of Final Rule Applying Generic Environmental Impact Statement to Subsequent License Renewal Period) (May 21, 2024) (ML24142A259).

³⁰ Beyond Nuclear’s And The Sierra Club’s Table Of Authorities In Response To Board Order Of May 21, 2024 (May 29, 2024) (ML24150A190).

³¹ Applicants’ Tables of Legal and Factual Authorities in Response to the Board’s May 21, 2024 Memorandum and Order (May 29, 2024) (ML24150A328).

³² NRC Staff Response To The Atomic Safety And Licensing Board’s Memorandum And Order Of May 21, 2024 (May 29, 2024) (ML24150A384).

³³ Transcript of North Anna Power Station, Units 1 and 2, Hearing, June 3, 2024 (June 5, 2024) (ML24157A311) (“Tr.”).

³⁴ *Id.* at 21–50.

³⁵ See *N. Anna*, LBP-24-07, 100 NRC __.

³⁶ *Id.* at __ (slip op. at 14).

seek.”³⁷ As a contention of adequacy, the Board found it to be inadmissible because “it raise[d] safety instead of environmental issues.”³⁸ The Board also noted that the prior licensing board rejected a “nearly identical contention” in 2021, and Petitioners offered “no new evidence or support” for the contention in this proceeding.³⁹

The Board Unanimously Found Contention 2 to be Inadmissible: The Board found Contention 2 to be inadmissible for multiple, independent reasons. First, Petitioners failed to state the issue “with particularity,” and improperly relied on the wholesale incorporation of Mr. Mitman’s expert declaration.⁴⁰ As the Board observed, not only does the Commission prohibit such “wholesale incorporation of documents” but Petitioners failed to explain how the incorporated declaration satisfied the contention admissibility criteria.⁴¹ Second, the Board found that the “statements” pulled from the declaration and listed in the Petition as the “statement of contention” did not show a genuine dispute existed with the 2023 DSEIS on a material issue of law or fact.⁴² The Board observed that the expert declaration “fail[ed] to articulate any reason why the [2023 DSEIS] falls short of any legal or regulatory obligations.”⁴³

A Majority of the Board Found Contention 3 to be Inadmissible: The Board found Contention 3 to be inadmissible because it is “out of scope, based on speculation, and lacks the requisite specificity” for an admissible contention.⁴⁴ As to scope, the Board found that Petitioners failed to identify the *new* information in the 2023 DSEIS the contention sought to

³⁷ *Id.*

³⁸ *Id.* at __ (slip op. at 15).

³⁹ *Id.*

⁴⁰ *Id.* at __ (slip op. at 16).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at __ (slip op. at 17).

⁴⁴ *Id.* at __ (slip op. at 21).

challenge.⁴⁵ As to speculation, the Board found that Petitioners failed to show that expected climate change effects would be sufficient to actually affect accident risk at North Anna, and Petitioners failed to engage with climate change projections in the 2023 DSEIS.⁴⁶ As to the lack of specificity, the Board found that the contention impermissibly relied on the wholesale incorporation of Mr. Mitman’s expert declaration.⁴⁷ Judge Gibson filed a dissenting opinion on the Board’s rejection of Contention 3.⁴⁸

B. Legal & Regulatory Standards

1. Hearing Requests & Contention Admissibility

Pursuant to 10 C.F.R. § 2.309(a)(1), a hearing request may be granted only if the presiding officer determines that the petitioner has established standing and has proposed at least one admissible contention that meets all of the requirements of 10 C.F.R. § 2.309(f)(1).

Thereunder, to be admissible, a proposed contention must: (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 is within the **scope** of the proceeding; (iv) demonstrate that the issue raised is **material** to the findings the NRC must make to support the action involved in the proceeding; (v) provide a concise statement of the alleged **facts or expert opinions**, referring to the specific sources and documents that support the petitioner’s position and on which the petitioner intends to rely; and (vi) provide sufficient information to show that a **genuine dispute** exists with the applicant on a material issue of law or fact.

⁴⁵ *Id.* at __ (slip op. at 21–22).

⁴⁶ *Id.* at __ (slip op. at 22–23).

⁴⁷ *Id.* at __ (slip op. at 23–25).

⁴⁸ *Id.* (J. Gibson, concurring in part, and dissenting in part) (“Gibson Dissent”).

Failure to satisfy any one of these six admissibility criteria requires that a proposed contention be rejected.⁴⁹ These criteria are “strict by design.”⁵⁰ The rules were “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’”⁵¹ The petitioner alone bears the affirmative burden to satisfy these criteria.⁵²

2. Standard of Review on Appeal

NRC regulations at 10 C.F.R. § 2.311(c) permit petitioners to appeal orders denying hearing requests and petitions to intervene, as of right, on the sole question of “whether the request and/or petition should have been granted.”⁵³ The Commission generally defers to Board decisions on contention admissibility, but will reverse a Board’s ruling “if there has been an error of law or an abuse of discretion.”⁵⁴ The Commission has reversed Board decisions admitting speculative contentions because “entertain[ing] contentions grounded on little more than guesswork would waste the scarce adjudicatory resources of all involved.”⁵⁵

⁴⁹ See Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004); see also *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁵⁰ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

⁵¹ *Id.* (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

⁵² See *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 325, 329 (2015) (“The proponent of a contention is responsible for formulating the contention and providing the necessary support to satisfy the contention admissibility requirements” and “it is Petitioners’ responsibility, not the Board’s, to formulate contentions and to provide ‘the necessary information to satisfy the basis requirement’ for admission”) (citation omitted).

⁵³ 10 C.F.R. § 2.311(c).

⁵⁴ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-7, 75 NRC 379, 386 (2012) (citing *Progress Energy Fla., Inc.* (Levy Cty. Nuclear Power Plant, Units 1 & 2), CLI-10-2, 71 NRC 27, 29 (2010)); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-11-9, 74 NRC 233, 237 (2011).

⁵⁵ *Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009); see also *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 364 (2009) (speculative arguments “do not form the basis for a litigable contention”).

The Commission affords licensing board rulings on contention admissibility “substantial deference,”⁵⁶ absent an error of law or abuse of discretion.⁵⁷ Thus, when a licensing board has reviewed the record in detail, the Commission generally is disinclined to upset its findings, particularly on matters involving fact-specific issues or consideration of expert affidavits or submissions.⁵⁸ The Commission reviews questions of law de novo, and will “reverse a licensing board’s legal rulings if they are ‘a departure from[,] or contrary to[,] established law.’”⁵⁹ To prevail on an abuse of discretion claim, the appellant must persuade the Commission “that a reasonable mind could reach no other result.”⁶⁰

An appeal that does not point to an error of law or an abuse of discretion, but simply restates the petitioner’s arguments, is not a valid appeal.⁶¹ When a licensing board holds that a contention is inadmissible for failing to meet more than one of the admissibility requirements in 10 C.F.R. § 2.309(f)(1)(i)–(vi), a petitioner’s failure to acknowledge and rebut each ground for the Board’s ruling is sufficient justification for the Commission to reject the petitioner’s appeal.⁶² As the Commission has made clear, it will not consider new arguments raised for the first time on appeal that the Board never had an opportunity to consider.⁶³

⁵⁶ *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 26 (2014).

⁵⁷ *Interim Storage Partners, LLC* (WCS Consol. Interim Storage Facility), CLI-20-15, 92 NRC 491, 494 (2020) (citing *Crow Butte*, CLI-14-2, 79 NRC at 26).

⁵⁸ *Hydro Res., Inc.* (Crownpoint, NM), CLI-06-1, 63 NRC 1, 2 (2006).

⁵⁹ *Oyster Creek*, CLI-09-7, 69 NRC at 259 (citation omitted).

⁶⁰ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 532 (1991), *aff’d*, CLI-91-13, 34 NRC 185 (1991) (internal citation omitted).

⁶¹ *Shieldalloy Metallurgical Corp.* (Newfield, N.J. Facility), CLI-07-20, 65 NRC 499, 503–05 (2007).

⁶² *See, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004).

⁶³ *USEC Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) (quotations and citation omitted). The purpose of an appeal “is to point out errors made in the Board’s decision,” not to present “arguments and evidence never provided to the Board.” *Id.* (quotations and citation omitted).

III. THE COMMISSION SHOULD AFFIRM LBP-24-07 BECAUSE PETITIONERS IDENTIFY NO ERROR OF LAW OR ABUSE OF DISCRETION

Petitioners argue the Board erred by finding all three contentions inadmissible. As to Contention 1, Petitioners argue the Board erred and failed to “take a ‘hard look’” at the seismic issue identified in the contention. As to Contention 2, Petitioners argue that the Board “exalted form over substance” by rejecting the contention because it relied on and incorporated by reference Mr. Mitman’s declaration. And as to Contention 3, Petitioners “incorporate by reference” Judge Gibson’s dissenting opinion and attempt to refute the Board’s conclusions on the admissibility of the contention. As discussed below, Petitioners fail to identify an error of law or abuse of discretion in any portion of the Board’s decision and therefore, the Commission should uphold LBP-24-07.

A. Petitioners Identify No Error of Law or Abuse of Discretion in the Board’s Ruling on Proposed Contention 1

In Contention 1 (2011 Mineral Earthquake), Petitioners alleged that the 2023 DSEIS “fails to satisfy NEPA or NRC implementing regulations at 10 C.F.R. § 51.71 because it does not address the environmental significance of the 2011 Mineral Earthquake.”⁶⁴ The Board analyzed Contention 1 as both a contention of omission and a contention of adequacy and found the contention was inadmissible for several reasons. On appeal, Petitioners largely repeat the arguments from their Petition and argue that the Board failed to take a “hard look” at their claims. But that is not enough. To raise a valid appeal, an appellant must show that the Board’s decision is impacted by an error of law or abuse of discretion. Petitioners do neither here, and thus present no basis to overturn the Board’s decision.

⁶⁴ Petition at 9.

1. Petitioners Identify No Error of Law or Abuse of Discretion in the Board’s Decision That Contention 1 Is Inadmissible as a Contention of Omission

In their Petition, Petitioners claimed that the 2023 DSEIS “*does not address* the environmental significance of the 2011 Mineral Earthquake.”⁶⁵ The Board reasonably read this allegation as a contention of omission.⁶⁶ However, the Board found this claim inadmissible because Petitioners’ fundamental assertion—that the 2023 DSEIS omitted a discussion of the 2011 Mineral earthquake—is simply untrue. The Board correctly noted that Section 3.4.4 of the 2023 DSEIS “discuss[ed] the 2011 Mineral earthquake and the extensive regulatory review that followed it.”⁶⁷ The Board also highlighted the indisputable fact that the 2023 DSEIS discussed “the probability-weighted consequences of a postulated severe accident” and confirmed “that the probabilistic modeling *expressly takes into account* the 2011 Mineral earthquake.”⁶⁸ Because the 2023 DSEIS contained the allegedly missing information, the Board concluded that, as a contention of omission, Petitioners failed to show the existence of a genuine dispute with the 2023 DSEIS.⁶⁹

On appeal, Petitioners do not refute the Board’s conclusion that the 2023 DSEIS discusses the 2011 Mineral earthquake.⁷⁰ Instead, Petitioners argue that the Commission should reverse the Board’s ruling because the Board failed to “take a ‘hard look’ at the salient problems” raised by the contention.⁷¹ The salient problems, according to Petitioners, are two-fold. But, neither argument exposes any error of law or abuse of discretion.

⁶⁵ *Id.* at 9–10 (emphasis added).

⁶⁶ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 14).

⁶⁷ *Id.*

⁶⁸ *Id.* (emphasis added).

⁶⁹ *Id.*

⁷⁰ Appeal at 16–20.

⁷¹ *Id.* at 18.

First, Petitioners argue that the Board overlooked their claim that the 2023 DSEIS did not address why it could assume North Anna would continue to operate within its design basis when it had already experienced a beyond-design-basis seismic event.⁷² However, this argument is counterfactual. The relevant discussion is found in Section 3.4.4 of the 2023 DSEIS, which the Board plainly cited. Therein, the NRC staff noted that, when the 2011 Mineral earthquake occurred, North Anna was operating at full power and the earthquake caused the plant’s safety features to respond as designed.⁷³ Section 3.4.4 states that, after the earthquake, Dominion performed inspections, testing, and analyses to verify that earthquake caused no functional damage and that the plant could operate “without undue risk to the health of the safety and public.”⁷⁴ Section 3.4.4 also states that “NRC inspection teams performed independent technical evaluations ... and concluded that ... safety-related structures, systems, and components had not been adversely affected by the earthquake.”⁷⁵ Section 3.4.4 mentions the “long-term seismic margin management plan” implemented to “further ensure that the nuclear power plant can continue to operate safely and without undue risk in the event of another earthquake,” and the plan “requires that the design change process and qualification of new and replacement equipment at North Anna account for the Mineral earthquake.”⁷⁶ In other words, Section 3.4.4 summarizes the NRC staff’s conclusion, which was reached prior to restarting the reactors, that North Anna would continue to operate within its design basis following the 2011 Mineral earthquake. Petitioners’ appeal exposes no defect—and certainly no error of law or abuse of

⁷² *Id.* at 17–18.

⁷³ 2023 DSEIS at 3-24.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 3-24 to 3-25.

discretion—in the Board’s manifestly correct factual finding that this discussion was, in fact, presented in the 2023 DSEIS.

Second, Petitioners concede on appeal that the Severe Accidents analysis in the 2023 DSEIS expressly accounted for the 2011 Mineral earthquake, but they complain that the analysis was “exclusively probabilistic.”⁷⁷ It is unclear how this relates to the Board’s analysis of Petitioners’ claim of omission. Moreover, Petitioners’ complaint about the *type* of analysis identified by the Board does not refute the Board’s plainly correct observation that an analysis was, in fact, presented. Thus, this argument exposes no defect in the Board’s ruling as to Petitioners’ claim that an analysis was entirely omitted.

In sum, the 2023 DSEIS contains the allegedly missing information. Thus, the Board’s conclusion that Contention 1 fails as a contention of omission is correct and Petitioners provide no reason for the Commission to disturb this conclusion on appeal.

2. Petitioners Identify No Error of Law or Abuse of Discretion in the Board’s Decision That Contention 1 Is Vague and Unparticularized

The Board also found Contention 1 to be “vague and unparticularized” because Petitioners cited no *requirement* that the 2023 DSEIS address the information they seek, specifically: (1) the “fundamental difference between a finding of no significant or small impact that is based on a deterministic analysis and a finding of no significant impact that is based on a probabilistic analysis” or (2) “an explanation of the purported ‘significant disparity’ in the results of the Unit 3 seismic risk analysis compared with the same analysis for Units 1 and 2.”⁷⁸ Petitioners argue on appeal that the Board erred in this finding because it again “failed to take a

⁷⁷ Appeal at 17.

⁷⁸ *N. Anna.*, LBP-24-07, 100 NRC at __ (slip op. at 14–15).

‘hard look’ at the claims” in Contention 1.⁷⁹ However, Petitioners do not refute the Board’s analysis and expose no error of law or abuse of discretion in its conclusion.

Petitioners’ appeal fails to address the pivotal omission the Board identified in its decision. In the proceedings before the Board, Petitioners neither cited any prescriptive requirement for the 2023 DSEIS to include the allegedly missing information nor articulated any legal theory for why some non-prescriptive requirement imposed such an obligation.⁸⁰ And the Board correctly highlighted this failure in its ruling, finding that Petitioners had failed to carry their burden to plead a genuine dispute with the specificity required for an admissible contention. On appeal, Petitioners do not refute the Board’s plainly correct observation that they failed to cite some allegedly unmet requirement (and they still do not identify any such requirement on appeal).

Instead, Petitioners merely claim that “Contention 1 identifies and cites the location in the [2023 DSEIS] of the incorrect assumption on which the [2023 DSEIS] relies and explains the environmental significance of the incorrect assumption” and cites pages 9–11 of their Petition.⁸¹ But those pages do not cite to a single page or section in the 2023 DSEIS. And beyond a passing reference to the NRC’s NEPA “implementing regulation in 10 C.F.R. § 51.71,” Petitioners cite no requirement that the 2023 DSEIS address the difference between a deterministic assumption and probabilistic analyses. Nor could they because no such requirement exists. Petitioners simply argue that “Contention 1 makes explicit demands” for this information.⁸² It is all well and good that Petitioners make such demands. But, as the Board correctly observed, Petitioners

⁷⁹ Appeal at 18.

⁸⁰ *See id.*

⁸¹ *Id.* (citing Petition at 9–11).

⁸² *Id.* (emphasis in original).

identified no legal requirement that this information be provided.⁸³ Thus, on appeal, Petitioners do not refute the Board’s logic and expose no defect in its ruling.

To successfully appeal the Board’s decision, Petitioners must do more than express disagreement with the Board’s ruling and hope for a different result from the Commission. Petitioners must identify an error of law or abuse of discretion by the Board. And when the Board identifies a failure to satisfy a contention admissibility factor, the Petitioner must explain why that admissibility factor was satisfied.⁸⁴ Petitioners failed to do so and thus provide no grounds to disturb the Board’s ruling that Contention 1 lacked the requisite specificity.

3. Petitioners Identify No Error of Law or Abuse of Discretion in The Board’s Decision that Contention 1 Is Inadmissible as a Contention of Adequacy

Petitioners also argue that the Board incorrectly found that Contention 1, if considered a contention of adequacy, is inadmissible because it raised safety instead of environmental concerns.⁸⁵ According to Petitioners, this conclusion was wrong for two reasons. First, the safety-based requirements in the Atomic Energy Act (“AEA”) and the procedural requirements in the National Environmental Policy Act (“NEPA”) overlap.⁸⁶ Second, the 2023 DSEIS “renders safety issues relevant by incorporating a safety determination into its environmental analysis of accident risks.”⁸⁷ Thus, according to Petitioners, the NRC (and by extension the Board) is trying to “have it both ways: relying for NEPA purposes on a safety determination and

⁸³ See *N. Anna*, LBP-24-07, 100 NRC at ___ (slip op. at 14–15).

⁸⁴ See *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 142 (2016) (Petitioner’s argument that a seismic analysis “fail[ed] to consider the most up-to-date information . . . misconstrues our contention admissibility standards” and on appeal, the petitioner failed to “identify any error of law or abuse of discretion with respect to the Board’s ruling on the updated seismic studies.”).

⁸⁵ Appeal at 19.

⁸⁶ *Id.*

⁸⁷ *Id.*

then declaring the continued validity of that determination out-of-scope when it is challenged.”⁸⁸

Petitioners arguments misconstrue both the Board’s decision and the NRC’s license renewal and environmental regulations, however, and do not provide a basis for a valid appeal.

The Board’s decision distinguished between ongoing seismic safety issues and the environmental impacts from a beyond-design-basis accident. Seismic *safety*, as the Board observed, is “addressed on an ongoing basis as part of the plant’s [CLB].”⁸⁹ And NRC license renewal regulations and Commission decision make clear that a plant’s CLB is outside the scope of a license renewal proceeding.⁹⁰ In contrast, the NRC’s *environmental* review, focuses on environmental impacts.⁹¹ Safety issues become important to the environmental review when they “could result in environmental impacts, which is why the environmental effects of postulated accidents are considered in the GEIS and in plant-specific supplements to the GEIS.”⁹²

The Board did not say, as Petitioners’ argument assumes, that all safety issues are outside the scope of a license renewal proceeding. Rather, the Board said that “*insofar as*” the contention raises purely safety issues, i.e., challenges the plant’s CLB, then those safety issues are outside the scope of this proceeding.⁹³ Petitioners miss this critical distinction. And the Board is correct as a well-settled matter of law that challenges to a plant’s CLB are beyond the

⁸⁸ *Id.* at 20.

⁸⁹ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 15).

⁹⁰ See 10 C.F.R. §§ 54.3 (defining CLB), 54.4 (defining the scope of license renewal); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-15-6, 81 NRC 340, 347 (2015) (license renewal is not an opportunity to reexamine a plant’s CLB); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 8–9 (2001) (citation omitted) (ongoing agency oversight and a plant’s CLB are beyond the limited scope of license renewal and beyond challenge in a license renewal adjudicatory proceeding).

⁹¹ See NUREG-1437, Rev. 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants at 1-8 (June 2013) (Vol. 1, ML13106A241) (“2013 GEIS”); see also 2024 GEIS at 1-9 to 1-10.

⁹² 2013 GEIS at 1-8.

⁹³ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 15) (emphasis added).

scope of a license renewal proceeding and challenges thereto cannot demonstrate a genuine dispute with the LRA on a material issue of fact or law.⁹⁴ Accordingly, Petitioners' appeal on this issue fails to identify an error of law or abuse of discretion to overturn the Board's decision.⁹⁵

Lastly, Petitioners criticize the Board's reference to a prior licensing board decision, LBP-21-4. The Board found that prior decision to be consistent with its ruling on Contention 1 two reasons: (1) because LBP-21-4 rejected a "nearly identical contention" to the one presented in Contention 1, whereas (2) Contention 1 was not supplemented by any "new evidence or support."⁹⁶ On appeal, Petitioners do not dispute either of those factually correct observations.

Ultimately, nothing in the appeal demonstrates any error of law or abuse of discretion in the Board's well-reasoned decision on Contention 1, which the Commission should AFFIRM.

B. Petitioners Identify No Error of Law or Abuse of Discretion in the Board's Ruling on Proposed Contention 2

In Contention 2 (Severe Accidents), Petitioners alleged that the 2023 DSEIS "does not contain a complete or adequately rigorous evaluation of accident risks because essential data are missing and important analytical assertions are erroneous or misleading."⁹⁷ The Board found Contention 2 is inadmissible because it (1) failed to "set forth with particularity the [contention] sought to be raised," and (2) failed "to show a genuine dispute exists with the [2023 DSEIS] on a

⁹⁴ *Indian Point*, CLI-15-6, 81 NRC at 347; *Turkey Point*, CLI-01-17, 54 NRC at 8–9 (2001).

⁹⁵ Petitioners also complain that the Board's reference to a prior licensing board's decision rejecting a nearly identical contention was misplaced because the majority of the prior licensing board's decision was dedicated to the statutory waiver issue. Appeal at 20. But Petitioners ignore the prior licensing board's determination that the similar contention was inadmissible because it failed to satisfy several of the admissibility criteria in 10 C.F.R. § 2.309(f)(1). See *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), LBP-21-4, 93 NRC 179, 209–12 (2021).

⁹⁶ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 15).

⁹⁷ Petition at 13.

material issue of law or fact.”⁹⁸ As discussed below, Petitioners’ appeal provides no basis to overturn the Board’s decision.

1. Petitioners Identify No Error of Law or Abuse of Discretion in The Board’s Decision That Contention 2 Lacked the Requisite Particularity

The Commission’s admissibility criteria require a petition to state “with particularity the contentions sought to be raised” including “a specific statement of the issue of law or fact to be raised or controverted.”⁹⁹ In Contention 2, Petitioners sought to satisfy these requirements by incorporating an entire section of Mr. Mitman’s declaration without explaining how or why the referenced content somehow satisfied the Commission’s contention admissibility requirements. The Board correctly held that “the Commission prohibits this kind of wholesale incorporation of documents as alleged support for contention admissibility.”¹⁰⁰ On appeal, Petitioners provide no reasoned explanation for why this portion of the Board’s decision should be overturned.

In Contention 2, Petitioners provided a bulleted list of nine statements or conclusions from Section C.2 of Mr. Mitman’s declaration as part of their statement of the contention.¹⁰¹ But Petitioners cited no specific page or paragraph in Mr. Mitman’s declaration for the statements in each bullet.¹⁰² This forced Applicants and the Board to guess at the specific support for the statements in every bullet. Moreover, Section C.2 of Mr. Mitman’s declaration cross-references several pages from Mr. Mitman’s comments on the 2023 DSEIS Comments.¹⁰³ And those pages from the 2023 DSEIS Comments themselves contain multiple paragraphs with various claims,

⁹⁸ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 16).

⁹⁹ 10 C.F.R. §§ 2.309(f)(1), (f)(1)(i).

¹⁰⁰ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 16) (citing *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 100 (2008); *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240–41 (1989)).

¹⁰¹ Petition at 13–14.

¹⁰² *See id.*

¹⁰³ *See* Mitman Decl. at 9–14.

assertions, and subject matters; and so, the specific content being cross-referenced was not always apparent.¹⁰⁴ Simply put, trying to follow the statements in the Petition to Mr. Mitman’s declaration and then to his 2023 DSEIS Comments, and beyond, to discern each specific claim and its underlying support is at best confusing, and at times, wholly indecipherable. More importantly, the declaration made no attempt to engage with particular requirements in NEPA or Part 51; and it did not purport to analyze the various claims in the context of contention admissibility requirements. For all of these reasons, the Board found that neither the Petition nor the attachment satisfied the requirement to “set forth with particularity the [contention] sought to be raised.”¹⁰⁵

On appeal, Petitioners primarily argue that the Board’s decision effectively required Petitioners to “paste the entirety of Mr. Mitman’s Section C.2 into the body of Contention 2” and thus “exalt form over substance.”¹⁰⁶ But Petitioners are trying to extend the Board’s holding far beyond what it actually says. The Board’s ruling on this point focused on the very *substantive* deficiencies in the arguments. Despite the presence of a *technical* discussion in the attachment, Petitioners (in the Petition and the attachment) failed to meaningfully engage with any *legal* requirements or contention *admissibility criteria*. The declarant, Mr. Mitman, professed no expertise as to NEPA, Part 51, environmental requirements generally, or NRC contention admissibility standards—and the declaration contained no meaningful discussion of those issues. As the Board noted, the absence of any explanation of a purported connection between the declarant’s technical comments, the legal requirements for NEPA documents, and the NRC’s

¹⁰⁴ See Comments by Beyond Nuclear and the Sierra Club on Proposed Rule and Draft Generic Environmental Impact Statement for Renewing Nuclear Power Plant Licenses (May 2, 2023) (ML23123A411), corrected on May 19, 2023 (ML23139A275).

¹⁰⁵ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 16).

¹⁰⁶ Appeal at 21 (quoting *U.S. Dept. of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC 367, 408 (2006)).

contention admissibility criteria “deprive[d] the Board of the ability to make the necessary, reflective assessment of the opinion.”¹⁰⁷ As a matter of settled law, the parties and the Board are entitled to “be told at the outset, *with clarity and precision*, what arguments are being advanced.”¹⁰⁸ The Board’s decision to apply that controlling precedent does not unreasonably place “form over substance” as Petitioners claim here. Therefore, they fail to demonstrate any way in which that decision was affected by any error of law or abuse of discretion.

Petitioners also argue that the Commission’s *Seabrook* decision cited by the Board only prohibits the incorporation of “massive documents” but does not prohibit the incorporation of a section of an expert declaration.¹⁰⁹ But Petitioners’ narrow focus on two words in *Seabrook* misses the Commission’s broader point. The Commission does not allow “wholesale incorporation by reference” in a pleading because such incorporation does not satisfy the burden for a party “to clearly identify” the basis for their contention.¹¹⁰ Petitioners’ wholesale incorporation of Mr. Mitman’s technical comments without further explanation, even if those technical comments were not a “massive document,” still failed “to clearly identify” the other information necessary to articulate a basis for Contention 2. Petitioners do not claim or demonstrate otherwise, and certainly have not identified any error of law or abuse of discretion in the Board’s ruling.

¹⁰⁷ *N. Anna*, LBP-24-07, 100 NRC at ___ (slip op. at 17).

¹⁰⁸ *Kan. City Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975) (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ *Seabrook*, CLI-89-3, 29 NRC at 241.

2. Petitioners Identify No Error of Law or Abuse of Discretion in The Board’s Decision That Contention 2 Fails to Demonstrate a Genuine Dispute

The Commission’s contention admissibility criteria require Petitioners to show that a genuine dispute exists with the 2023 DSEIS on a material issue of law or fact.¹¹¹ And an expert opinion that merely states a conclusion “without providing a reasoned basis or explanation for that conclusion is inadequate” to show a genuine dispute exists.¹¹² With these standards in mind, the Board reviewed each of the nine bulleted statements in the Petition and found that they made either “broad generalizations,” lacked support, lacked any explanation for why certain statements were misleading or insufficient, failed to explain why certain data was legally required, or fell outside the scope of this proceeding.¹¹³ The Board reached individual conclusions as to each bullet point and found that they did not, individually or collectively, satisfy the requirements in 10 C.F.R. § 2.309(f)(1)(iii)–(vi).¹¹⁴

On appeal, Petitioners ignore the Board’s specific analysis of eight of those nine bullet points. For that reason, they have waived any challenges thereto and essentially conceded that those eight rulings should be affirmed.¹¹⁵ The appeal only engages specifically with the Board’s conclusion on the fourth bullet, which claimed:

The Draft EIS fails to demonstrate consideration of external flooding risk with subsequent ingress of water into the turbine building. As demonstrated

¹¹¹ See 10 C.F.R. § 2.309(f)(1)(iv).

¹¹² *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 16–17) (citing *USEC Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (quoting citation omitted)).

¹¹³ *Id.* at 17–19.

¹¹⁴ *Id.* at 20.

¹¹⁵ See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 75 NRC 245, 257, n.70 (2010) (“We deem waived arguments made before the Board that are abandoned on appeal.”); (citing *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001)); see also *Pub. Serv. Co. of Ind., Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 315 (1978) (“We generally follow the course charted by the Federal courts and disregard unbriefed issues as waived.”).

by Mr. Mitman’s Declaration, flooding poses a significant accident risk that has not been addressed in the Draft EIS.¹¹⁶

The Board found this argument inadmissible for two reasons: because Petitioners provided “no support for this assertion,” and because Petitioners did not “engage with the sections of the Draft EIS, namely sections 3-24 to 3-26 and F-21, that do indeed consider external flooding risks post-Fukushima.”¹¹⁷

On appeal, Petitioners confront only the first of those two reasons for finding the fourth bullet inadmissible. Petitioners say the Board could only reach its conclusion regarding the lack of support “by completely disregarding ¶¶ 34–36 in Section C.2 of Mr. Mitman’s Declaration.”¹¹⁸ As a general matter, the Petition did not specifically identify those paragraphs (or any others) in the declaration as providing the alleged support for the fourth bullet, so the Board (and the parties) were forced to guess where to look for support for Petitioners’ claim. Petitioners cannot fault the Board if it guessed incorrectly about where to look for potential support for Petitioners’ claim.¹¹⁹

More importantly, the appeal fails to confront the Board’s second reason for finding the fourth bullet is inadmissible, i.e., because Petitioners failed to engage with or dispute specific, relevant content on pages 3-24 to 3-26 and F-21 of the 2023 DSEIS. To be clear, paragraphs 34 to 36 in Section C.2 of Mr. Mitman’s Declaration do not cite, mention, analyze, discuss, or acknowledge pages 3-24 to 3-26 or page F-21 of the 2023 DSEIS. Because Petitioners disregard this portion of the ruling, they have waived any challenge thereto; and because they failed to

¹¹⁶ Appeal at 23 (quoting Petition at 13).

¹¹⁷ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 18).

¹¹⁸ Appeal at 23.

¹¹⁹ *See Seabrook*, CLI-89-3, 29 NRC at 241 (“The Commission cannot be faulted for not having searched for a needle that may be in a haystack.”).

address *each* reason for the Board’s rejection of the fourth bullet, they have not identified any error of law or abuse of discretion by the Board.

Lastly, Petitioners present a generic argument that Mr. Mitman’s declaration demonstrated the existence of a genuine dispute simply because it “reflects the application of his professional expertise as a risk analyst to the specific facts of the [2023 DSEIS].”¹²⁰ But whether Mr. Mitman is a qualified risk expert, as Petitioners claim, does not confront the defect identified by the Board—that the statements (regardless of whether they were made by an expert) were conclusory and unsupported.¹²¹ As a matter of settled law, conclusory statements—even by an expert—cannot supply the basis for admissibility.¹²² Petitioners do not confront this settled law or explain why the Board’s application thereof was in any way erroneous.

In sum, Petitioners identified no error of law or abuse of discretion in the Board’s decision finding Contention 2 inadmissible, and the Board’s decision should be upheld on appeal.

C. Petitioners Identify No Error of Law or Abuse of Discretion in the Board’s Ruling on Proposed Contention 3

In Contention 3, Petitioners alleged that the 2023 DSEIS fails to consider the impact of climate change on accident risk at North Anna. The Board found that Contention 3 was inadmissible because Petitioners did not explain the basis for the contention, show that the contention is within the scope of the proceeding, provide a concise statement of facts or expert opinions that support the contention, or show the existence of a genuine dispute on a material

¹²⁰ Appeal at 22.

¹²¹ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 16–19).

¹²² *See S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC 1, 19 (2010) (an expert’s “merely conclusory statements, without supporting facts or detail” does not “demonstrate the existence of a genuine dispute.”); *USEC*, CLI-06-10, 63 NRC at 472.

issue of law or fact.¹²³ Thus, as the Board correctly held, the contention fails to satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1)(ii), (iii), (v), and (vi).¹²⁴ As explained below, on appeal, Petitioners identify no basis to overturn the Board’s decision that Contention 3 is inadmissible.

1. Petitioners’ Incorporation by Reference of Judge Gibson’s Dissent Is Not a Valid Appeal

To support their appeal, Petitioners “rely on and incorporate by reference Judge Gibson’s dissenting opinion on Contention 3.”¹²⁵ But the Commission disfavors such incorporation by reference. Instead, the Commission requires briefs to be “comprehensive, concise, and self-contained.”¹²⁶ The Commission “will not augment [an appellate] brief by incorporating ‘by reference’ other pleadings or arguments contained in other pleadings” and the Commission’s decision will respond only to those “arguments made *explicitly* in [Petitioners’] appellate brief.”¹²⁷ Thus, Petitioners’ incorporation by reference of Judge Gibson’s dissent is improper and does not provide the basis for a valid appeal of Contention 3.¹²⁸

¹²³ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 20–25).

¹²⁴ *Id.* at __ (slip op. at 25).

¹²⁵ Appeal at 24.

¹²⁶ *Southern Nuclear Operating Co.* (Vogle Electric Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 219 (2011) (citing *Tex. Util. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987) (citations omitted)).

¹²⁷ *Id.* (citing *Shearon Harris*, CLI-10-9, 71 NRC at 278 n.205) (emphasis added).

¹²⁸ In any event, the dissent also fails to identify any defect in the Board’s decision. At a fundamental level, it overlooks the fact that the term “climate change” (as used by Petitioners here) refers to meteorological phenomena such as rain, wind, and ambient temperature. The dissent would have admitted Contention 3 as a contention of omission—as if these phenomena had not been considered at all. But that is not the case. The Postulated Accidents discussion in the 2023 DSEIS relies on PRA-based risk analyses that *certainly do* evaluate those phenomena as potential contributors to accident risk. Petitioners did not attempt to dispute any particular portion of those obviously-not-omitted analyses; and the dissent points to no obligation (much less one identified by Petitioners) that those analyses be presented, duplicatively, under a separate “climate change” heading.

2. Petitioners Identify No Error of Law or Abuse of Discretion in the Board’s Decision that Contention 3 Is Based on Speculation

The Board found Contention 3 is inadmissible because it is based on speculation.¹²⁹

According to the Board, Mr. Mitman, on whose opinion the contention relies, “never addressed whether expected climate change effects near North Anna were sufficient to actually affect North Anna accident risk.”¹³⁰ The Board also found that neither the Petition nor Mr. Mitman engaged with the climate projections in 2023 DSEIS § 3.14.3.2 and thus, the contention did “not present a ‘seriously’ different picture of the environmental impact” necessary for an admissible contention.¹³¹

On appeal, Petitioners argue the Board erred by ignoring the analysis and conclusions in paragraphs 34 to 36 of Mr. Mitman’s declaration.¹³² But Petitioners never cited these paragraphs in their Petition.¹³³ Petitioners cannot now fault the Board for overlooking uncited support for their claims. To hold otherwise would effectively repeal the requirement that parties “be told at the outset, *with clarity and precision*, what arguments are being advanced.”¹³⁴ For this reason alone, Petitioners failed to identify an error of law or abuse of discretion in the Board’s decision.

More importantly, the Board is manifestly correct that this contention relies on impermissible speculation. To start, Petitioners note that certain meteorological parameters (e.g., rainfall) are expected to change as a result of climate change. But that assertion is not disputed by any party here; in fact, it is entirely consistent with statements made in 2023 DSEIS § 3.14.3.2. However, the remainder of Petitioners’ theory is left unexplained:

¹²⁹ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 22–23).

¹³⁰ *Id.*

¹³¹ *Id.* at __ (slip op. at 23).

¹³² Appeal at 26.

¹³³ See Petition at 16–17.

¹³⁴ *Wolf Creek*, ALAB-279, 1 NRC at 576 (emphasis added).

- Petitioners proffered no assertion (or support) about how much those meteorological parameters might change over the license renewal term;
- Petitioners did not compare any speculative changes in those values to the values used in some unspecified analysis in the 2023 DSEIS;
- Petitioners did not explain why a comparison of the unspecified values in those unidentified analyses reveals some alleged deficiency; and
- Petitioners failed to demonstrate that this speculative deficiency would, in fact, be material to the underlying (but unspecified) analysis.

These gaps in Petitioners’ theory are filled-in by one thing: speculation.

As the Board noted, “[w]hile Petitioners have provided reasonable support for the proposition that climate change effects can alter accident risk, they have provided no factual or expert opinion support for the assertion that climate change effects will affect accident risk at North Anna” in some material way that has not already been captured in the existing analyses presented in the 2023 DSEIS.¹³⁵ Aside from citations to conclusory assertions from Mr. Mitman, which cannot supply the basis for a contention, nothing in the appeal confronts or disputes this conclusion. Thus, Petitioners demonstrate no error of law or abuse of discretion on this aspect of the Board’s ruling.

3. Petitioners Identify No Error of Law or Abuse of Discretion in the Board’s Decision That Contention 3 Lacks Specificity

The Board found that Contention 3 lacks the specificity required for an admissible contention.¹³⁶ In particular, the Board concluded that Contention 3 fails to provide the required concise statement of alleged facts or expert opinion which support the contention because Petitioners once again referred to Mr. Mitman’s declaration without providing citations to the

¹³⁵ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 23).

¹³⁶ *Id.* at __ (slip op. at 23–25).

specific portions of the 37-page declaration that supports Contention 3.¹³⁷ The Board also concluded that the “basis statement” for Contention 3 outlines no train of logic and legal foundation for the contention, and noted (consistent with controlling case law) that the Board would not infer any “unarticulated bases” for the contention.¹³⁸ On appeal, Petitioners disagree with the Board’s conclusion and argue that their reference to Mr. Mitman’s declaration and citation to *New York v. NRC* were specific enough to satisfy the Commission’s contention admissibility requirements.¹³⁹ But they do not explain why that result is required as a matter of law. Simply put, more is required to show reversible error. Again, Petitioners merely repeat arguments they made before the Board and hope for a different result from the Commission. But that is insufficient for an appeal. Ultimately, Petitioners provide no grounds to disturb the Board’s ruling on Contention 3.

4. Petitioners Identify No Error of Law or Abuse of Discretion in the Board’s Decision That Petitioners Failed to Demonstrate that Contention 3 Was Within the Scope of This Proceeding

As the Board correctly held, the scope of this proceeding was limited by the notice of opportunity to intervene to “contentions based on new information in the DEIS.”¹⁴⁰ At the same time, as noted above, Petitioners’ claims in Contention 3 were vague and failed to identify the specific analysis being challenged.¹⁴¹ So, in addition to being inadmissible for lacking the requisite specificity, the Board correctly held that Contention 3 was inadmissible for the separate reason that Petitioners failed to carry their *affirmative burden* to show that their contention

¹³⁷ *Id.* at __ (slip op. at 24).

¹³⁸ *Id.* at __ (slip op at 24–25).

¹³⁹ Appeal at 28.

¹⁴⁰ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 21) (citing 89 Fed. Reg at 962).

¹⁴¹ *See supra* Section III.C.3; *see also* Answer at 38–39.

(challenging an unspecified analysis) met the scope requirement imposed on this proceeding.¹⁴² Petitioners identify no reversible error in that determination.

In the proceedings before the Board, Petitioners argued that they had no obligation to demonstrate satisfaction of the scope criterion.¹⁴³ But that is plainly incorrect as a matter of law; the petitioner alone bears the affirmative burden to satisfy the contention admissibility criteria.¹⁴⁴ Moreover, Petitioners claimed they were seeking to challenge some unspecified “new reactor-specific accident analysis” in the 2023 DSEIS.¹⁴⁵ But they were not clear on what, exactly, they were trying to challenge. Then, when Petitioners finally revealed at oral argument that the analysis they were purporting to challenge was the Probabilistic Risk Assessment (PRA) that was used to evaluate accident risk,¹⁴⁶ they *still* failed to provide enough specificity for the Board to discern whether that challenge specifically pertained to new information in the 2023 DSEIS or whether it sought to challenge other information, such as the original SAMA analysis performed for North Anna’s initial license renewal (which is indisputably beyond the scope of the instant proceeding).

On appeal, Petitioners identify no error of law or abuse of discretion in the Board’s ruling. As a matter of law, the Board is manifestly correct that the scope of a proceeding, and indeed its own jurisdiction, is limited by the text of the hearing opportunity notice. As explained in longstanding NRC appellate jurisprudence on this issue:

It is well settled that NRC licensing boards and administrative law judges do not have plenary subject matter jurisdiction in adjudicatory proceedings.

¹⁴² *Id.* at __ (slip op. at 21) (“Petitioners failed to identify that analysis [or] explain how it is ‘new information in the DEIS’”).

¹⁴³ *Id.* at __ (slip op. at 22) (citing Tr. at 203).

¹⁴⁴ *See Palisades*, CLI-15-23, 82 NRC at 325, 329 (“The proponent of a contention is responsible for formulating the contention and providing the necessary support to satisfy the contention admissibility requirements.”).

¹⁴⁵ Appeal at 24.

¹⁴⁶ *N. Anna*, LBP-24-07, 100 NRC at __ (slip op. at 22) (citing Tr. at 154).

Agency fact finders are delegates of the Commission who may exercise jurisdiction only over those matters the Commission specifically commits to them in the various *hearing notices that initiate the proceedings*. Thus, the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission.¹⁴⁷

On appeal, Petitioners point to nothing that demonstrates any error of law in the Board's decision to comply with this controlling case law. And they fail to demonstrate that the Board somehow abused its discretion in finding that Petitioners did not carry their affirmative burden to *demonstrate* that their vague challenge (potentially encompassing out-of-scope issues), was affirmatively within the scope of this proceeding. Overall, Petitioners fail to identify anything that overcomes the "substantial deference" to which the Board's ruling on this issue is entitled.

IV. CONCLUSION

For all of the many reasons set forth above, the Commission should AFFIRM the Board's contention admissibility rulings in LBP-24-07.

¹⁴⁷ *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 1 *et al.*), CLI-04-24, 60 NRC 160, 204 (2004) (quoting *Gen. Pub. Utils. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987) (emphasis added)).

Respectfully submitted,

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Dated in Washington, D.C.
This 30th day of August 2024

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the matter of:

VIRGINIA ELECTRIC AND POWER COMPANY
and OLD DOMINION ELECTRIC
COOPERATIVE

(North Anna Power Station, Units 1 and 2)

Docket Nos. 50-338-SLR-2 and
50-339-SLR-2

August 30, 2024

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the “Applicants’ Answer and Brief in Opposition to the Appeal Of LBP-24-07 Filed by Beyond Nuclear and the Sierra Club” was served on the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned docket.

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