

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

EXELON GENERATION COMPANY, LLC

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

Docket Nos. 50-277-SLR  
50-278-SLR

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NRC STAFF BRIEF IN OPPOSITION TO  
BEYOND NUCLEAR APPEAL OF LBP-19-5

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby responds to the Beyond Nuclear, Inc. (Beyond Nuclear) appeal of the Atomic Safety and Licensing Board (Board) decision, LBP-19-5, to the extent that it denied intervention based on finding Contention 2 inadmissible.<sup>1</sup> As set forth below, the Staff submits that Beyond Nuclear has not shown any error of law or abuse of discretion on the part of the Board with respect to the Board's rejection of Contention 2. Moreover, the arguments raised about Exelon Generation Company, LLC's (Exelon) failure to adequately incorporate the GEIS were not raised below and should not be entertained for the first time on appeal. Therefore, the Commission should affirm the Board's decision.

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<sup>1</sup> *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC \_\_ (Jun. 20, 2019) (slip op.); see Beyond Nuclear's Notice of Appeal of LBP-19-05 (Jul. 15, 2019); Beyond Nuclear's Brief on Appeal of LBP-19-05 (Jul. 15, 2019) (Appeal) at 1.

## BACKGROUND

This proceeding concerns the subsequent license renewal application (SLRA), submitted July 10, 2018 by Exelon,<sup>2</sup> that asks the NRC to authorize an additional 20 years of operation for Peach Bottom Atomic Power Station, Units 2 and 3. The current renewed operating licenses for Unit 2 and Unit 3 expire on August 8, 2033, and July 2, 2034, respectively.<sup>3</sup> Thus, Exelon seeks to extend the Peach Bottom 2 and 3 operating licenses to August 8, 2053, and July 2, 2054.<sup>4</sup>

Notices indicating the receipt of the application<sup>5</sup> and affording the public an opportunity to request a hearing and leave to intervene<sup>6</sup> were published in the *Federal Register* on August 1 and September 6, 2018, respectively. The latter notice established an intervention petition filing deadline of within 60 days after publication of the Notice;<sup>7</sup> however, at Beyond Nuclear's request, the Secretary of the Commission extended the intervention

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<sup>2</sup> See Letter from Michael Gallagher (Exelon) to NRC Document Control Desk (July 10, 2018) (ADAMS Accession No. ML18193A697); Subsequent License Renewal Application, Peach Bottom Atomic Power Station Units 2 and 3, (July 2018) (ML18193A773) ("SLRA"). The application includes "Appendix E—Applicant's Environmental Report—Operating License Renewal Stage—Subsequent License Renewal" (ML18201A219) ("Environmental Report" or "ER").

<sup>3</sup> Peach Bottom Atomic Power Station, Unit 2, Renewed Facility Operating License No. DPR-44, Section 4 (ML052720266); Peach Bottom Atomic Power Station, Unit 3, Renewed Facility Operating License No. DPR-56, Section 4 (ML052720269); see also SLRA at 1-4. Condition 2(C)(1) in License Nos. DPR-44 and DPR-56 indicates that Peach Bottom Units 2 and 3 are General Electric Type 4 boiling water reactors with Mark I containment systems. See SLRA at 1-8.

<sup>4</sup> ER at 1-1. Adjacent to Peach Bottom 2 and 3 is Peach Bottom Unit 1 -- an experimental high temperature helium cooled and graphite-moderated reactor that operated from 1967 through October 1974 and entered safe storage (SAFSTOR) mode in 1987 and that currently has no fuel in its spent fuel pool. *Id.* at 2-2 and 2-3.

<sup>5</sup> Exelon Generation Company, LLC; Peach Bottom Atomic Power Station, Units 2 and 3; License renewal application; receipt, 83 Fed. Reg. 37,529 (Aug. 1, 2018).

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

<sup>7</sup> *Id.* at 45,285-86.



petition filing deadline by fourteen days.<sup>8</sup> Beyond Nuclear filed a request for hearing and petition to intervene.<sup>9</sup> The Board was established on December 11, 2018 to preside over the proceeding.<sup>10</sup> Exelon and the Staff filed answers to the intervention petition, to which Beyond Nuclear replied.<sup>11</sup> After the Board held oral argument on contention admissibility on March 27, 2019,<sup>12</sup> Beyond Nuclear moved to amend its hearing request.<sup>13</sup>

On June 20, 2019, the Board issued LBP-19-5, in which it ruled that Beyond Nuclear has standing to intervene in this proceeding and permitted Beyond Nuclear to amend its petition, but denied the hearing request for failure to file an admissible contention as required by 10 C.F.R. § 2.309(f)(1)(iv) – (vi).<sup>14</sup>

Beyond Nuclear now appeals LBP-19-5 pursuant to 10 C.F.R. § 2.311(c), asserting that, because the Board erred in rejecting Contention 2, the decision should be reversed and

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

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

<sup>10</sup> *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station Units 2 & 3), Establishment of Atomic Safety and Licensing Board (Dec. 11, 2018) (ML18345A260); Establishment of Atomic Safety and Licensing Board; Exelon Generation Company, LLC, 83 Fed. Reg. 64,902 (Dec. 18, 2018).

<sup>11</sup> See Exelon’s Answer Opposing Beyond Nuclear Inc.’s Hearing Request and Petition to Intervene (Dec. 14, 2018) (Exelon Answer); NRC Staff Answer to Beyond Nuclear Inc.’s Hearing Request and Petition to Intervene (Dec. 14, 2018) (Staff Answer); Beyond Nuclear’s Reply to Exelon’s and NRC Staff’s Oppositions to Hearing Request and Petition to Intervene (Dec. 21, 2018) (Beyond Nuclear Reply).

<sup>12</sup> See *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), Official Transcript of Proceedings, at 1-218 (Mar. 27, 2019).

<sup>13</sup> Beyond Nuclear, Inc.’s Amended Hearing Request and Petition to Intervene (May 1, 2019) (Amended Petition). Exelon and the Staff filed answers to this request, and Beyond Nuclear replied. Exelon’s Opposition to Beyond Nuclear, Inc.’s Amended Hearing Request and Petition to Intervene (May 17, 2019) (Exelon Answer to Amended Petition); NRC Staff Answer to Beyond Nuclear, Inc.’s Amended Hearing Request and Petition to Intervene (May 17, 2019) (Staff Answer to Amended Petition); Beyond Nuclear, Inc.’s Reply to Exelon’s and NRC Staff’s Oppositions to Amended Hearing Request and Petition to Intervene (May 22, 2019) (Amended Petition Reply).

<sup>14</sup> LBP-19-5, slip op. at 1, 16-24.

remanded to address the applicability of 10 C.F.R. § 51.53(c)(3).<sup>15</sup> Beyond Nuclear claims the decision violated National Environmental Policy Act (NEPA) requirements and NRC regulations in 10 C.F.R. Part 51 and incorrectly applied the contention admissibility standards.<sup>16</sup>

## ARGUMENT

The Staff's views with respect to the standards for review and Beyond Nuclear's arguments are set forth below.

### I. Legal Standards for Review

The Commission's regulations at 10 C.F.R. § 2.311(c) provide a right to file an appeal on the question of whether a request for hearing should have been granted. The Commission generally defers to Board rulings "on contention admissibility absent error of law or abuse of discretion."<sup>17</sup> An appellant's recitation of its prior positions in a proceeding or a statement of general disagreement with a Board's decision is not sufficient; unless the appellant points out an error of law or abuse of discretion by the Board, the decision will be affirmed.<sup>18</sup>

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<sup>15</sup> Appeal at 1, 16. Beyond Nuclear states that it does not challenge the rejection of Contention 1 and asserts, without argument or citation, that it does not concede the lawfulness of the Board's ruling on Contention 1. Appeal at 1 n.1. Arguments not raised are waived. *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); see *Gen. Pub. Utils. Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10, 12 (1990) (inadequately briefed issues are deemed to be waived). Therefore, the Staff does not discuss this matter further.

<sup>16</sup> Appeal at 1. Noting that the litigants briefed the issue of the applicability of 10 C.F.R. § 51.53(c)(3), Beyond Nuclear requests a separate briefing opportunity if the Commission decides to address this issue without first remanding it to the Board, or, alternatively, that the Commission consider the arguments made in its Reply. Appeal at 10 n.4. If the Commission decides to grant Beyond Nuclear's request, the Staff requests that the Commission also afford the Staff a briefing opportunity.

<sup>17</sup> *Tennessee Valley Authority* (Clinch River Nuclear Site Early Site Permit Application), CLI-18-5, 87 NRC 119, 121 (2018) (citing *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-9, 83 NRC 472, 482 (2016); *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014)).

<sup>18</sup> See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

An appeal may not be based on new arguments that were not previously raised before the licensing board.<sup>19</sup> The disinclination to entertain an issue for the first time on appeal is particularly strong where the issue and factual averments underlying it could have been put before a licensing board.<sup>20</sup> Accordingly, absent a serious, substantive issue, arguments raised for the first time on appeal are not ordinarily entertained.<sup>21</sup>

Moreover, the brief must contain sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issues sought to be raised on appeal.<sup>22</sup> Failure to include such information is tantamount to abandonment of an issue.<sup>23</sup>

The Commission's contention admissibility requirements are intentionally strict and ensure that only focused, well-supported issues are admitted for hearing.<sup>24</sup> Intervention petitioners must structure their participation in a way that is meaningful. In framing their proposed contentions, petitioners have an "ironclad obligation" to examine, with sufficient care, publicly available information and are not entitled to discovery to flesh out vague and unparticularized contentions.<sup>25</sup> A petitioner "must 'read the pertinent portions of the license

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<sup>19</sup> *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 82-83 (1985).

<sup>20</sup> *Puerto Rico Elec. Power Auth.* (North Coast Nuclear Plant), ALAB-648, 14 NRC 34, 37-38 (1981).

<sup>21</sup> *Pennsylvania Power & Light Co.* (Susquehanna Steam Elec. Station, Units 1 & 2), ALAB-693, 16 NRC 952, 955-56, 956 n.6 (1982) (citations omitted).

<sup>22</sup> *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989).

<sup>23</sup> *White Mesa*, CLI-01-21, 54 NRC at 253; *Three Mile Island*, ALAB-926, 31 NRC at 7-8, 9, 10, 12.

<sup>24</sup> *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 138 (2015); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-15-21, 82 NRC 295, 302 (2015) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001)).

<sup>25</sup> *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1401 (1983).

application, including the Safety Analysis Report and the Environmental Report.”<sup>26</sup> Neither mere speculation nor bare or conclusory assertions, even by an expert, will suffice to allow contention admission.<sup>27</sup>

A contention must be rejected, pursuant to 10 C.F.R. § 2.309(f)(1)(iv), if it does not demonstrate that the issue is material to a finding the NRC must make to support the action in the proceeding. It must also be rejected, pursuant to 10 C.F.R. § 2.309(f)(1)(v), if it does not provide a concise statement of facts or expert opinions that support the contention together with references to specific sources and documents, and rejected, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), if it does not raise a genuine dispute with the applicant or licensee on a material issue of law or fact by including specific references to the application (including the environmental report)<sup>28</sup> and, for matters alleged to be omitted, by identifying each failure and the reasons supporting the petitioner’s belief. An issue is material if it is relevant to a finding the NRC must make to support the action in the proceeding or if it will affect the outcome.<sup>29</sup>

While a Board may view a petitioner’s supporting information in a light favorable to a petitioner, the Board neither has the power to make assumptions or draw inferences

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<sup>26</sup> *Millstone*, CLI-01-24, 54 NRC at 358 (quoting “[Final Rule] Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)).

<sup>27</sup> See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc. (Muskogee, Oklahoma Site)*, CLI-03-13, 58 NRC 195, 203 (2003).

<sup>28</sup> Similarly, 10 C.F.R. § 2.309(f)(2) requires contentions to “be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant’s environmental report.” For a contention of omission, a petitioner must identify each failure to contain information required by law and describe why the petitioner believes the information is required. *American Centrifuge Plant*, CLI-06-10, 63 NRC at 456.

<sup>29</sup> *Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant)*, LBP-15-20, 81 NRC 829, 850 (2015).

favorable to the petitioner, nor to supply missing information, if a petitioner does not provide the requisite support for its contentions.<sup>30</sup> Simply attaching documentary material, without explaining the significance of that information, is inadequate to support contention admission.<sup>31</sup> The adjudicator is not expected to sift through attachments in search of factual support.<sup>32</sup> Thus, the Commission “discourage[s] incorporating pleadings or arguments by reference [and] expect[s] briefs . . . to be ‘comprehensive, concise and self-contained.’”<sup>33</sup>

In addition, “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack . . . in any adjudicatory proceeding” in the absence of a waiver petition granted by the Commission.<sup>34</sup> Thus, a contention “must be rejected where . . . it challenges the basic structure of the Commission’s regulatory process or is an attack on the regulations; it is nothing more than a generalization regarding the Intervenor’s view of what applicable policies ought to be; . . . or it seeks to raise an issue that is not concrete or litigable.”<sup>35</sup>

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321–4370h, requires federal agencies to include, in any recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment, a detailed statement on

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<sup>30</sup> See *Crow Butte Resources Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009); *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units Nos. 1, 2 & 3), CLI-91-12, 34 NRC 149, 155 (1991).

<sup>31</sup> See *Fansteel*, CLI-03-13, 58 NRC at 204-05.

<sup>32</sup> *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

<sup>33</sup> *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station, CLI-12-3, 75 NRC 132, 139 n.41 (2012) (quoting *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 219 (2011)).

<sup>34</sup> 10 C.F.R. § 2.335 (a) – (b).

<sup>35</sup> *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Electric Co.*, (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974)).

the environmental impacts of that action.<sup>36</sup> The requirement that agencies take a “hard look” at the environmental impacts of a proposed major federal action that could significantly affect the environment is tempered by a rule of reason that requires agencies to address only those impacts that are reasonably foreseeable—not remote and speculative.<sup>37</sup>

Since the adoption of 10 C.F.R. Part 54 in 1991, the NRC has expressly provided in 10 C.F.R. § 54.31(d) that a renewed license may be subsequently renewed. The scope and magnitude of environmental impacts of renewing any nuclear power plant license are set forth in the NRC regulations at 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1, “Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants.”<sup>38</sup> Appendix B states that Table B-1, which lists both Category 1 (i.e., generic) and Category 2 (i.e., site-specific) findings, “represents [subject to the evaluation of Category 2 issues and possible new and significant information] *the analysis of the environmental impacts associated with renewal of any operating license* and is to be used in accordance with [10 C.F.R.] § 51.95(c) (emphasis added).”<sup>39</sup> Section 51.95(c) requires the Staff to prepare (for

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<sup>36</sup> NEPA, section 102(2)(C), 42 U.S.C. § 4332(2)(C).

<sup>37</sup> See, e.g., *Long Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-156, 6 AEC 831, 836 (1973); *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1996); *New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012).

<sup>38</sup> Table B-1, note 1, explains that supporting technical data are in NUREG-1437, Revision 1, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants (Jun. 2013) (“2013 GEIS”).

<sup>39</sup> Table B-1, note 2 states:

The numerical entries in [the “Category” column of Table B-1] are based on the following category definitions:

Category 1: For the issue, the analysis reported in the Generic Environmental Impact Statement has shown:

(1) The environmental impacts associated with the issue have been determined to apply either to all plants or, for some issues, to plants having a specific type of cooling system or other specified plant or site characteristic;

(2) A single significance level (i.e., small, moderate, or large) has been assigned to the impacts (except for Offsite radiological impacts—collective impacts from other than the disposal of spent fuel and high-level waste); and

each license renewal review) an environmental impact statement (EIS) that supplements the GEIS and requires the Staff, adjudicatory officers, and the Commission to integrate the conclusions on Category 1 issues in the GEIS with information on Category 2 issues and any new and significant information.<sup>40</sup> For Category 1 issues, the applicant may reference and adopt the codified findings in Table B-1.<sup>41</sup> Because the impacts of Category 1 issues have been determined to be similar for all plants, the renewal applicant is not required to evaluate Category 1 issues in a plant-specific analysis unless there is new and significant information that differs from the determinations in Part 51, Table B-1, and the GEIS.<sup>42</sup>

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(3) Mitigation of adverse impacts associated with the issue has been considered in the analysis, and it has been determined that additional plant-specific mitigation measures are not likely to be sufficiently beneficial to warrant implementation.

Category 2 findings are defined as issues for which the GEIS analysis has shown that one or more of the criteria of Category 1 cannot be met, so that additional plant-specific review is required. *Id.*

<sup>40</sup> 10 C.F.R. § 51.95(c). Further, § 51.95(c)(4) requires that “the NRC staff, adjudicatory officers, and Commission shall determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable”—based on integrating GEIS conclusions on Category 1 issues with site-specific information on applicable Category 2 issues. This would include the GEIS findings on Category 1 issues set out in 10 C.F.R. Part 51, Appendix B, Table B-1. Moreover, 10 C.F.R. § 51.71(d) states that the NRC’s draft supplemental environmental impact statement “prepared under § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in [Part 51, Appendix B, Table B-1],” in addition to considering applicable Category 2 issues.

<sup>41</sup> *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 2 & 3), CLI-01-17, 54 NRC 3, 11 (2001).

<sup>42</sup> *See id.* Thus, the information “must present ‘a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.’” *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 167-68 (2011) (citations omitted).

II. The Board's Rejection of Contention 2 Should Be Upheld

In Contention 2, Beyond Nuclear asserted that Exelon's Environmental Report (ER) violates NEPA and 10 C.F.R. § 51.53(c)(2)<sup>43</sup> by failing to address accident risks posed by aging equipment and incorrectly relying on the Category 1 designation for design-basis accidents by using § 51.53(c)(3).<sup>44</sup> The Board viewed Contention 2 as alleging concerns that: 1) Exelon omitted accident risks posed by operating aging reactor equipment; 2) Exelon failed to include and evaluate certain literature in its application; and 3) the significance of declining operating experience due to reactor facility shutdowns.<sup>45</sup>

With respect to the concern about design-basis accident risks posed by aging equipment, the Board noted that the Staff and Exelon argued, in part, that: 1) the contention impermissibly challenged generic NRC findings codified in Table B-1 without the requisite petition for waiver or exception under 10 C.F.R. § 2.335(b);<sup>46</sup> and 2) 10 C.F.R. § 51.53(a) allows an ER to incorporate by reference the 2013 GEIS analyses and findings codified in Table B-1.<sup>47</sup> Cognizant that another board had already referred the issue of applicability of

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<sup>43</sup> Section 51.53(c)(2) requires that an environmental report include a description of the affected environment around the plant, any plant modification directly affecting the environment or any plant effluents, and any planned refurbishment activities. In addition, the environmental report must discuss the impacts of the proposed action in proportion to their significance and discuss alternatives thereto as required by 10 C.F.R. § 51.45.

<sup>44</sup> See Petition at 6-8. Contention 2 incorporated by reference a report by Beyond Nuclear's expert, David Lochbaum, and referred to studies discussed or listed as references therein. "Proposed Subsequent License Renewal of Peach Bottom Units 2 and 3: Exelon's Aging Management Programs Fail to Provide Adequate Measures for Consideration of Operating Experience Throughout the Period of Extended Operation: A Report By David A. Lochbaum Prepared for Beyond Nuclear, Inc." (Nov. 16, 2018) ("Lochbaum Report").

<sup>45</sup> LBP-19-5, slip op. at 17.

<sup>46</sup> *Id.*, slip op. at 18 (citing Exelon Answer at 29-30; Staff Answer at 56).

<sup>47</sup> *Id.*, slip op. at 18 (citation omitted). Exelon also argued that Contention 2 failed to meet 10 C.F.R. § 2.309(f)(1)(ii) – (iv), and (vi), because it lacked basis, failed to show materiality to required findings, sought to raise issues beyond the scope of the proceeding, and failed to show a genuine dispute. See Exelon Answer at 29-40. The Staff argued the contention did not meet 10 C.F.R. § 2.309(f)(1)(iii), (v), and (vi) in that it raised a matter beyond the scope of the proceeding, was not adequately supported and did not show a genuine dispute on a material issue of law or fact with the application. See Exelon Answer at 29-30; Staff Answer at 44-57.



10 C.F.R. § 51.53(c)(3) to the Commission, the Board concluded that, regardless of whether § 51.53(c)(3) applies, Exelon could and did incorporate by reference the 2013 GEIS analyses and Table B-1 findings concerning design-basis accidents.<sup>48</sup> Further, the Board concluded that Contention 2 was inadmissible under § 2.309(f)(1)(vi) for lack of a genuine dispute because Beyond Nuclear had not shown why Exelon could not use the GEIS under § 51.53(a). The Board also found that the Lochbaum Report did not support Beyond Nuclear's position, given that the Report did not support the position that the GEIS was deficient or inapplicable to SLR applications.<sup>49</sup>

With respect to the other matters raised by Contention 2, the Board concluded that the alleged failure to consider reactor aging phenomena in the "Expanded Materials Degradation Assessment" (EMDA) report, other items listed in the reference section of the Lochbaum Report, and issues raised in a Staff rulemaking paper (SECY-14-0016)<sup>50</sup> did not present a genuine dispute since no legal basis was provided to require their consideration in the ER.<sup>51</sup>

With respect to the alleged failure to address the significance of declining operating experience, i.e. the concern that relied on (and incorporated by reference) the Lochbaum Report, the Board agreed with the Staff's assertions that the contention was premised on speculative assertions "because 'it is obvious that the body of external operating experience that exists today could not decline [because] [a]s long as other nuclear power plants, whether

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<sup>48</sup> LBP-19-5, slip op. at 18-20 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-19-3, 89 NRC at \_\_\_ (slip op. at 25 n.46)). The referred ruling is pending before the Commission.

<sup>49</sup> LBP-19-5, slip op. at 20.

<sup>50</sup> SECY-14-0016, "Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal" (Jan. 13, 2014) (ML14050A306).

<sup>51</sup> LBP-19-5, slip op. at 21-22.

here or abroad, continue to operate that body will continue to grow.”<sup>52</sup> The Board also agreed with Exelon’s argument that Beyond Nuclear provided no information to indicate that the vague and speculative concerns about the sufficiency of future operating experience would lead to “any significant increase in the consequences of design-basis accidents (or the probability-weighted consequences of severe accidents).”<sup>53</sup>

As described in greater detail below, Beyond Nuclear does not identify any error of law or fact in the Board’s decision, demonstrate an abuse of discretion, or otherwise show grounds that would warrant setting aside LBP-19-5 with respect to the inadmissibility of Contention 2. Accordingly, the Board’s decision should be upheld.

A. Arguments Raised for the First Time on Appeal Should Be Rejected

Beyond Nuclear argues on appeal that Exelon did not adequately incorporate the 2013 GEIS analyses in its ER in accordance with NRC regulations and guidance.<sup>54</sup> As the Board noted, Beyond Nuclear did not dispute Exelon’s reliance on 10 C.F.R. § 51.53(a) in its reply to the Staff’s and Exelon’s answers to the petition.<sup>55</sup> Nor can it now inasmuch as this issue was not raised before the Board; Beyond Nuclear may not raise this issue for the first time on appeal.

Beyond Nuclear had an “ironclad obligation” to examine the ER and other publicly available information to frame its contention and put forth its positions in its initial petition.<sup>56</sup> The cited regulation, guidance, caselaw, and ER passages were all publicly available before

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<sup>52</sup> *Id.*, slip op. at 23 (quoting Staff Answer at 57-58).

<sup>53</sup> *Id.* (quoting Exelon Answer at 38).

<sup>54</sup> Appeal at 5, 6-7 (citing 10 C.F.R. Part 51, Subpart A, Appendix A.1(b); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-16-8, 83 NRC 417, 422 (2016); NUREG-1555, Standard Review Plans for Environmental Review for Nuclear Plants (Oct. 1999) (NUREG-1555)).

<sup>55</sup> See LBP-19-5, slip op. at 20 n.98.

<sup>56</sup> *Catawba*, ALAB-687, 16 NRC at 468.

the intervention petition was filed. Beyond Nuclear's attempt to rehabilitate the shortcomings in its advocacy before the Board reveals its failure to adequately support its petition below and should be rejected. Arguments not made below may not be raised for the first time on appeal, particularly where the issue and factual bases could have been placed before the Board.<sup>57</sup> They are waived.<sup>58</sup>

The failure to plead this matter below also deprived the Board of the opportunity to consider such arguments before ruling on the contention. Fundamentally, Beyond Nuclear seeks to raise a new contention rather than articulate a Board error. Beyond Nuclear makes no attempt to address the 10 C.F.R. § 2.309(c) standards for raising a new contention after the deadline for intervention petitions. Beyond Nuclear does not point to any new and previously unavailable information to support its concern, nor does it provide a showing of good cause for raising concerns challenging the adequacy of Exelon's use of incorporation by reference at this juncture, much less a showing that the concern raised is a serious or substantive issue.<sup>59</sup> Therefore, these arguments should not be entertained.

If, however, the Commission decides to address the merits of these assertions, the Staff addresses them below.

B. Beyond Nuclear Does Not Show Error in Board Ruling on Incorporation of the 2013 GEIS

Beyond Nuclear next claims that the Board erred when it "disregarded" 10 C.F.R. Part 51, Subpart A, Appendix A § 1(b), in concluding that Exelon properly incorporated the 2013 GEIS by reference.<sup>60</sup> Beyond Nuclear also cites a *Turkey Point* licensing board decision that discusses incorporation by reference and NRC guidance concerning EIS

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<sup>57</sup> See *Catawba*, ALAB-813, 22 NRC at 82-83; *North Coast*, ALAB-648, 14 NRC at 34.

<sup>58</sup> See *White Mesa*, CLI-01-21, 54 NRC at 253.

<sup>59</sup> See LBP-19-5, slip op. at 20 n.98.

<sup>60</sup> Appeal at 5.

preparation, arguing that the ER should contain more discussion, including a summary and references to specific sections, to ensure that the public has easy access to relevant information.<sup>61</sup>

The cited regulation and guidance upon which Beyond Nuclear relies, however, apply to the NRC and its NEPA obligations as a federal agency. Section 1(b) of “Appendix A to Subpart A of Part 51—Format for Presentation of Material in Environmental Impact Statements,” and NUREG-1555, “Standard Review Plans for Environmental Reviews for Nuclear Power Plants,” dated October 1999, apply to the agency’s preparation of EISs. Neither the regulation nor the guidance cited imposes a requirement on Exelon.<sup>62</sup> An applicant is not required to follow regulations that impose requirements on the NRC.

In addition, Beyond Nuclear misapplies the *Turkey Point* decision. The adequacy of a NRC staff environmental assessment (EA), not an applicant’s environmental report, was at issue in that case and the proposed action was not license renewal.<sup>63</sup> Noting that Commission caselaw disfavors wholesale incorporation by reference in pleadings, the licensing board in *Turkey Point* was concerned, in part, about incorporating into an environmental assessment the entirety of documents totaling over one thousand pages; moreover, contradictory descriptors in two documents made it difficult to comprehend the

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<sup>61</sup> Appeal at 6-7 (citing *Turkey Point*, LBP-16-8, 83 NRC 417, 422 (2016), *aff’d on other grounds*, CLI-16-18, 84 NRC 167 (incorporation by reference requires specific reference to the material incorporated, consideration of environmental changes that occur after the incorporated study, and consideration of the environmental impacts of the license at issue)).

<sup>62</sup> Even if it did apply, as the Staff noted before the Board, NRC “[g]uidance documents ‘are advisory by nature . . . . [and a] licensee is free either to rely on [guidance documents] or to take alternative approaches to meet legal requirements.’” Staff Answer at 14 (citing *Curators of the Univ. of Missouri*, CLI-95-8, 41 NRC 386, 397 (1995)).

<sup>63</sup> See *Turkey Point*, LBP-16-8, 83 NRC 417, 430 n.83, 431 (2016).

subject matters being discussed.<sup>64</sup> Those concerns do not apply here and the import of—and relationship between—Table B-1 and the GEIS is overlooked.

The NRC relies on the generic determinations in 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1, and the GEIS to improve regulatory efficiency and regulatory focus in its evaluation of the environmental impacts of license renewal.<sup>65</sup> As noted above, Appendix B to 10 C.F.R. Part 51, Subpart A, states that Table B-1 represents the analysis of the environmental impacts associated with renewal of *any operating license*. Thus, the Table addresses the impacts of a proposed SLR. Because Exelon referenced and adopted the 2013 GEIS findings in Table B-1 and iterated those findings in its ER,<sup>66</sup> no further specification of page or section was needed to comprehend which conclusions were being incorporated.<sup>67</sup>

The Commission long ago explained that applicants may reference and adopt the generic environmental impact findings codified in Table B-1.<sup>68</sup> Note 1 to Table B-1 further

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<sup>64</sup> See *id.*, 83 NRC at 435-36.

<sup>65</sup> See “[Final Rule] Environmental Review for Renewal of Operating Licenses,” 61 Fed. Reg. 28,467 (Jun. 5, 1996) (the amendment defining generic impacts for adoption in plant-specific reviews “improves regulatory efficiency in environmental reviews by drawing on the considerable experience of operating nuclear power reactors to generically assess many of the environmental impacts that are likely to be associated with license renewal. The increased efficiency will result in lower costs to both the applicant in preparing a renewal application and to the NRC for reviewing plant specific applications and better focus of review resources on significant case-specific concerns. The results should be a more focused and therefore more effective NEPA review for each license renewal.”); *Turkey Point*, CLI-01-17, 54 NRC at 11.

<sup>66</sup> The ER states that Exelon adopts by reference the findings for applicable Category 1 issues and lists design-basis accidents and corresponding findings in table form. See ER at 4-4, 4-12. The ER states (at 4-69) that “[n]o new and significant information was identified regarding impacts from design-basis accidents. Therefore, the conclusions in the 2013 GEIS are considered appropriate for PBAPS [Peach Bottom] SLR, are incorporated herein by reference, and do not need further analysis.”

<sup>67</sup> The Staff’s position on the requisite specificity for incorporation by reference only addresses what is sufficient to include 2013 GEIS conclusions and Table-B-1 impact determinations in an environmental report submitted with a license renewal application. In other contexts, references may need to be more detailed. See 10 C.F.R. § 50.32 (allowing an application “to incorporate by reference information contained in previous applications, statements or reports filed with the Commission,” provided that “such references are clear and specific”).

<sup>68</sup> *Turkey Point*, CLI-01-17, 54 NRC at 11. *Accord* 10 C.F.R. § 50.32.

states that data supporting this table are contained in the 2013 GEIS. The references adequately informed the Staff and the public of the GEIS conclusions being incorporated, particularly given the structure of the GEIS, which includes a summary section, introduction, table summary of impacts of license renewal, and a section discussing the impacts of postulated accidents, which references the discussion of accident risks in Appendix E to the 2013 GEIS.<sup>69</sup> Those sections clearly demarcate where design-basis accidents are discussed. By missing the import of the ER references, Beyond Nuclear seeks to flyspeck the document rather than raise a factual error.<sup>70</sup>

Finally, Beyond Nuclear argues that Exelon did not take a hard look at the environmental impacts of design basis accidents at Peach Bottom because the ER lacks information about likely environmental changes during the SLR period, does not indicate that Exelon performed a review of such impacts, does not evaluate whether the 2013 GEIS analyzed those impacts, and does not justify its reliance on the 2013 GEIS.<sup>71</sup> Beyond Nuclear's argument does not take into account the framework of license renewal environmental reviews. This analysis has already been completed as a generic matter, given the 2013 GEIS and Table B-1 findings that the impacts of such accidents are SMALL.<sup>72</sup>

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<sup>69</sup> Conclusions regarding design-basis accidents are discussed in the summary section (at S-17), the introduction (at 1-26), the Table 2.1-1 summary (at 2-15), section 4.9.1.2, and Appendix E in the 2013 GEIS.

<sup>70</sup> See *Systems Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005) ("Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances (citation omitted).").

<sup>71</sup> Appeal at 8-10 (citing LBP-16-8, 83 NRC at 431 & n.94, 441) (citations omitted).

<sup>72</sup> As stated in the 2013 GEIS (at 1-26) and published in the *Federal Register* ([Final Rule] Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282, 37,289 (Jun. 20, 2013)),

The 1996 GEIS, in Section 5.2, discusses the impacts of potential accidents. . . . This discussion addresses general characteristics of design basis (and severe) accidents, characteristics of fission products, meteorological considerations, possible exposure pathways, potential adverse health effects, avoiding adverse health effects, accident

Beyond Nuclear has not identified new and significant information that would raise a genuine dispute as to whether this analysis remains bounding. In the absence of such new and significant information, 10 C.F.R. §§ 51.71(d) and 51.95(c) call for reliance on the GEIS and Table B-1 determinations and conclusions on Category 1 issues. Beyond Nuclear has not articulated a basis for reversal of the Board's decision on this issue.

In sum, a reasonable person could discern the portions of the GEIS being relied upon inasmuch as the GEIS summary conclusions (i.e., the impact determinations) on design-basis accidents were stated multiple times in the ER, the codified conclusions are set forth in Table B-1—which summarizes the “scope and magnitude” of the environmental impacts of license renewal—and (subject to an evaluation of possible new and significant information) the GEIS “represents the analysis of the environmental impacts associated with the renewal of any operating license.”<sup>73</sup> Beyond Nuclear has not demonstrated that additional references were needed under NRC rules. Thus, the Board did not err in concluding that Exelon “did incorporate by reference GEIS analyses and Table B-1 findings related to design-basis accidents in its [ER] (as permitted by section 51.53(a)).”<sup>74</sup>

C. Beyond Nuclear Failed to Support Its Claim that the Environmental Report Does Not Satisfy NEPA or NRC Regulations

In LBP-19-5, the Board concluded that Beyond Nuclear's claim that the ER's failure to consider certain technical studies violated NEPA or NRC implementing regulations was inadmissible. The Board found that Beyond Nuclear had not “offer[ed] any evidence that

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experience and observed impacts, and emergency preparedness. The revised GEIS reexamined the information from the 1996 GEIS and concluded that it is still valid.

<sup>73</sup> 10 C.F.R. Part 51, Subpart A, Appendix B.

<sup>74</sup> LBP-19-5, slip op. at 19-20 (citing ER at 4-69, 2013 GEIS at S-17, and Table B-1 impact determination for design-basis accidents).

NEPA mandates such a document review and evaluation” or “specified any legal basis” for requiring the ER to address the technical literature.<sup>75</sup> Beyond Nuclear argues that the Board erred in this determination.<sup>76</sup>

Beyond Nuclear reasserts two bases for its claim that NEPA requires the applicant to consider the cited technical studies:<sup>77</sup> a Council on Environmental Quality (CEQ) regulation and a *Diablo Canyon* decision.<sup>78</sup> Neither basis demonstrates that the Board erred.

The inclusion of 40 C.F.R. § 1502.22, a CEQ regulation, in Beyond Nuclear’s contention<sup>79</sup> is insufficient as a legal basis because CEQ regulations are not binding on the NRC, except insofar as the Commission chooses voluntarily to follow them.<sup>80</sup> In its *Diablo Canyon* decision, the Commission stated that “the NRC, as an independent regulatory agency, ‘is not bound by those portions of CEQ NEPA regulations’ that, like [40 C.F.R. §] 1502.22, ‘have a substantive impact on the way in which the Commission performs its regulatory functions.’”<sup>81</sup> In that case, the Commission restated the admitted contention to exclude the CEQ regulation.<sup>82</sup> Furthermore, Beyond Nuclear did not explain why a regulation applicable to what “an agency” must do when preparing an EIS should be interpreted as mandating what an applicant must do when preparing an environmental report. Because

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<sup>75</sup> *Id.*, slip op. at 22.

<sup>76</sup> Appeal at 11–12.

<sup>77</sup> *Id.* at 14-16; see also Petition at 6-8.

<sup>78</sup> *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 443-44 (2011).

<sup>79</sup> See Petition at 8 (citing 40 C.F.R. § 1502.22).

<sup>80</sup> 10 C.F.R. § 51.10(a).

<sup>81</sup> *Diablo Canyon*, CLI-11-11, 74 NRC at 443-44.

<sup>82</sup> *Id.* at 444.



40 C.F.R. § 1502.22 is not binding on the NRC and does not apply to Exelon, this regulation fails as a legal basis for Contention 2.

The decision in *Diablo Canyon* likewise does not support Beyond Nuclear's claims. Citing *Diablo Canyon*, Beyond Nuclear argues that "[r]egardless of whether further research is required, NEPA requires that the lack of information must be addressed."<sup>83</sup> But NEPA does not require an applicant to address *any* lack of information or future research need—nor does *Diablo Canyon* stand for that proposition. That case involved the applicant's omission of information on seismic risk that conflicted with the applicant's conclusions regarding a site at which seismic hazards were acknowledged to be "disproportionately dominant" risk factors.<sup>84</sup> In this case, however, Beyond Nuclear has not linked the information in the technical studies it cites to specific portions of the ER, or shown how any of the information might call into question conclusions in the ER.<sup>85</sup> And Beyond Nuclear does not articulate how *Diablo Canyon* requires Exelon to consider the technical studies it cites.

The Board found that Beyond Nuclear's arguments below had failed to demonstrate "any legal basis" for a requirement to consider the cited technical studies, nor could the Board discover one itself.<sup>86</sup> The brevity of the Board's discussion of this issue reflects Beyond Nuclear's failure to explain how either the *Diablo Canyon* decision or a CEQ regulation, which is non-binding on the NRC, would create such a requirement. Thus, Beyond Nuclear has not demonstrated that the Board erred when it concluded that Contention 2 was inadmissible. Beyond Nuclear has not shown that the issue raised in the

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<sup>83</sup> Appeal at 14.

<sup>84</sup> *Diablo Canyon*, CLI-11-11, 74 NRC at 438.

<sup>85</sup> See Petition at 7.

<sup>86</sup> LBP-19-5, slip op. at 22. See also Staff Answer at 60-61 (explaining that CEQ regulations do not bind NRC and that *Diablo Canyon* can be distinguished); Exelon Answer at 37 (discussing *Diablo Canyon* and the status of SAMA analyses for Peach Bottom).

contention was material to findings the NRC must make to support the action involved in the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iv). Nor did Beyond Nuclear adequately support its contention with facts or expert opinion or demonstrate a genuine dispute concerning a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(v) and (vi).

CONCLUSION

For the reasons set forth above, the Board's decision should be affirmed.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 9<sup>th</sup> day of August 2019

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

EXELON GENERATION COMPANY, LLC

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

Docket Nos. 50-277-SLR  
50-278-SLR

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF BRIEF IN OPPOSITION TO BEYOND NUCLEAR APPEAL OF LBP-19-5," dated August 9, 2019, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 9th day of August 2019.

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 9<sup>th</sup> day of August 2019