

August 25, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

_____)	
In the Matter of)	Docket Nos. 52-017
Virginia Electric and Power Company)	
d/b/a Dominion Virginia Power and)	
Old Dominion Electric Cooperative)	
North Anna Unit 3)	ASLBP No. 08-863-01-COL
Combined License)	
_____)	

**MOTION FOR LEAVE TO FILE FOR RECONSIDERATION
AND MOTION FOR RECONSIDERATION IN PART OF ATOMIC SAFETY
AND LICENSING BOARD'S ORDER OF AUGUST 15, 2008**

Blue Ridge Environmental Defense League {"BREDL" or "Petitioner"} hereby requests leave to file a motion for reconsideration in the matter captioned above.

Petitioner believes that the Atomic Safety and Licensing Board ("ASLB" or "Board") has made clear and material errors. Specifically, in their August 15 Memorandum and Order, the ASLB erred in rejecting Contention Seven and Eight regarding high-level nuclear waste. Regarding Contention One, Petitioner accepts the decision of the ASLB and therefore does not here seek reconsideration of that part of the August 15th order.

Before beginning the discussion of these issues on page 4, Petitioner below explains the problems which we have observed subsequent to the ASLB's holding of the initial pre-hearing conference via telephone. Our objections in this matter are on record, but we wish to provide additional information to assist this Board and others to lessen problems regarding public perception of NRC fairness and open communication.

Telephonic Hearing and Ex Parte Communication

Failure to conduct a pre-hearing conference in the vicinity of the proposed licensed facility is not in keeping with the Commission's traditional approach to dealing with the public. The public has difficulty effectively participating in a telephonic hearing. Telephonic hearings greatly reduce both the number interested persons who may participate in the hearing process and the effectiveness of the participation of those who can call in. It is also unfair to the parties who are forced to have their rights to meaningful public participation in the hearing process truncated by limited access to that process via a telephone line.

We believe this is not a matter of limited resources. The NRC has the means to go where proposed facilities would be constructed. At the same time, large numbers of potentially affected individuals do not have the means to journey to Rockville, Maryland. Nor may they effectively participate through a telephonic connection. By opting for telephonic communication, the public participation and, importantly, public education on proposed nuclear licenses is subverted. Further, if either NRC staff attorneys or license applicant attorneys participate in the Rockville hearing room while the petitioners attend by telephone, it would arbitrarily curtail equal party access to the hearing. Telephonic hearings tip the balance in favor of those in the hearing room and against those present via a telephone line.

Institutionally, the ASLB has long been aware that direct participation of local citizens in nuclear reactor licensing improves the safety of nuclear reactor operations and NRC oversight of the construction and licensing process. *See, e.g., Gulf States Utility Co. (River Bend Units 1 and 2), ALAB-183, RAI-74-3, Slip Op. at 10-12 (March 12,*

1974); (former Chief ASLB Judge) Paul Cotter, Jr., "Memorandum to Commissioner Ahearne on the NRC hearing process," at 8 (May 1, 1981); 1 Rogovin Report on TMI at 143-44; The 292d Meeting of the ACRS, transcript, at 509-510 (August 10, 1984); "Reactor Safety Improvements Resulting from the Hearing Process," ASLB, attachment to ACRS meeting transcript of August 10, 1984.

When the ASLB encourages and supports full, open and direct public participation and, as a consequence, a greater the flow of information to the public, there is a higher level of public understanding of the nature, purposes and outcomes of the licensing process. As an ASLB panel chairman stated in a concurrence to a recent decision:

[P]otential intervenors' right to a hearing [] is an empty promise unless there is an opportunity to be heard "at a meaningful time and in a meaningful manner." [A]djudications should be conducted in a way that more nearly assures that the agency's hearing process – one of the means by which nuclear safety is promoted and the natural environment protected – makes the hearings mandated by the Atomic Energy Act "meaningful." [T]he adjudicatory system established by the Commission can become contorted so as to place artificial – even unfair – barriers in the way of those citizens, organizations or governments genuinely seeking to participate in a constructive manner[.]¹

Use of telephonic communications for a prehearing conference is a barrier which undercuts the public's right to a meaningful hearing opportunity. There is little doubt that Congress, like Judge Farrar, when enacting the Atomic Energy Act, took very seriously the role of the ASLB and hearing participants. See, e.g., Atomic Energy Act, Section 192 (c).²

¹ *SHAW AREVA MOX SERVICES*, US NRC, Atomic Safety and Licensing Board, LBP-08-10, ASLBP No. 07-856-02-MLA-BD01, Docket No. 70-3098-MLA, Concurring Opinion of Judge Farrar, Slip. Op. at 44-45 (June 27, 2008) (citations omitted).

² "Any party to a hearing required pursuant to section 189a on the final operating license for a facility for which a temporary operating license has been issued under subsection b., and any member of the Atomic Safety and Licensing Board conducting such hearing, shall promptly notify the Commission of any

At least 23 individuals expressed their displeasure with the July 2nd telephonic pre-hearing conference.³ See Email from NRC Chief Counsel Anthony Eitriem. The e-mail reply list includes people from across the nation, many of whom represent public interest organizations familiar with Nuclear Regulatory Commission proceedings. The NRC's e-mail was perceived to be brusque and even rude by many. The Board may be sowing the wind if it continues to treat the public in this manner.

Fairness, openness and access of the affected community to the hearing process should be the guide posts on how to conduct licensing hearings on the construction of new nuclear reactors. Given the importance public participation in the hearing process mandated by the Atomic Energy Act and precedent, this Commission should prohibit the conduct of telephonic hearing conferences.

Motion for Reconsideration: Background

On May 9, 2008 and pursuant to 10 CFR § 2.309, BREDL filed a petition for intervention and request for hearing ("COL Petition") regarding the application for a combined operating and construction license filed by Virginia Electric and Power Company, doing business as Dominion Virginia Power ("Dominion" or "DVP"). NRC Staff and DVP filed their respective answers to the petition on June 3rd and BREDL filed its reply on June 11th.⁴ On July 2, 2008, oral arguments were held via teleconference. See ASLB Order dated June 20, 2008. On August 15, 2008 the ASLB issued a

information indicating that the terms and conditions of the temporary operating license are not being met, or that such terms and conditions are not sufficient to comply with the provisions of paragraph (2) of subsection b" AEA § 192(a) (emphasis added).

³ 2008/07/01-Ex Parte E-mails Regarding Telephonic Oral Argument in ASLBP Adjudications. Accession No. ML081830849

Memorandum and Order Ruling on Petitioner’s Standing and Contentions.

Discussion

ESP Contention on High Level Nuclear Waste Not Admitted

Prior to its application for a COL, DVP applied for and received an Early Site Permit (“ESP”) at the North Anna nuclear power station pursuant to 10 C.F.R. § 52.24. On May 3, 2004 BREDL *et al* filed a hearing request and petition to intervene in that license procedure⁵ (“ESP Petition”). In that case, the ASLB admitted some contentions proffered by the intervenors; however, two contentions which were not admitted included: (a) Contention 3.2.1—Failure to Evaluate Whether and in What Time Frame Spent Fuel Generated by Proposed Reactors Can Be Safely Disposed Of, and (b) Contention 3.2.2—Even if the Waste Confidence Decision Applies to This Proceeding, It Should Be Reconsidered. ESP Petition at 15 and 20.

COL Contention on High Level Nuclear Waste Not Admitted

BREDL’s COL Petition filed May 9, 2008 offered Contentions Seven and Eight.⁶ COL Petition at 21 and 27. Although similar in many respects, the COL contention included current information; for example: “63,000 metric tons of commercial irradiated nuclear fuel—enough to fill Yucca to its legal limit—will exist in the U.S. by the spring

⁴ Pursuant to 10 C.F.R. § 2.307, the presiding officer extended the prescribed deadline to June 11 for “good cause.” June 16, 2008 Order Granting Petitioner’s Request to File a Late Reply

⁵ Contentions of Blue Ridge Environmental Defense League, Nuclear Information Resource Service, and Public Citizen Regarding Early Site Permit Application for the Site of North Anna Nuclear Power plant, May 3, 2004

⁶ CONTENTION SEVEN: Failure to Evaluate Whether and in What Time Frame Spent Fuel Generated by Unit 3 Can Be Safely Disposed Of and CONTENTION EIGHT: Even if the Waste Confidence Decision Applies to This Proceeding, It Should be Reconsidered.

of 2010.”⁷ COL Petition at 24. This assessment of high-level nuclear waste confidence, perhaps more properly deemed no-confidence, added urgency to the nuclear waste problem at DVP’s North Anna station, slated to begin operation in 2016. Nevertheless, in its August 15th Memorandum and Order⁸ (“M&O”) the ASLB has now deemed COL Contentions Seven and Eight inadmissible. As we will explain below, the logic and the legal reasoning are faulty.

The ASLB Erred in Applying the Test for Determining How Contentions were Resolved

In its August 15th M&O, the ASLB describes its choice of method for judging whether contentions are admissible. In accord with 10 C.F.R. § 52.39(a), the NRC must “treat as resolved those matters resolved in the proceeding on the application for . . . the early site permit.” Since *resolved* is not defined anywhere in 10 C.F.R. § 52, the Board may rely on the plain meaning: to reach a decision about or make an official determination. However, the ASLB furnishes two views of how such matters may be resolved by the NRC. M&O at 10.

One possible reading is that a disputed issue has been resolved only when it was litigated and decided by a licensing board or by the Commission in the ESP proceeding. But there is a broader interpretation – that an issue has been resolved when it could have been litigated during the ESP proceeding, as well as when it actually was litigated. Under this second reading, if the issue was within the scope of the ESP proceeding as defined in the Notice of Opportunity for a Hearing, and thus could have been litigated during that proceeding, a participant in a subsequent COL proceeding may not raise the issue if the application references the ESP unless one of the exceptions listed in Section 52.39 applies. (emphasis added)

The ASLB favors the broader interpretation, that if an issue *could have been* litigated, it

⁷ Ward Sproat III, Director of the U.S. Department of Energy’s Office of Civilian Radioactive Waste Management, U.S. Nuclear Regulatory Commission’s Regulatory Information Conference, March 2008

⁸ MEMORANDUM AND ORDER (Ruling on Petitioner’s Standing and Contentions and NCUC’s Request to Participate as a Non-Party Interested State), Docket No. 52-017-COL, ASLBP No. 08-863-01-COL August 15, 2008

is resolved in the view of the NRC, even if it was never litigated. The Board's conclusion is illogical. Issues which have not been litigated cannot be considered resolved, according to the plain meaning of the term: to come to a decision, to make clear, to settle.⁹ The ASLB avers that if issues were not deemed resolved, a party could "pick and choose the issues it would raise," but offers no examples of when or where this tactic would have been employed. Finally, the ASLB cites the rule of collateral estoppel which, the Board states, "bars parties from relitigating issues actually and necessarily decided in prior litigation between the same parties." M&O at 17. Indeed, collateral estoppel and res judicata preclude relitigation. However, collateral estoppel's restriction is not applicable if the parties have not had a full and fair opportunity to litigate an issue. See *Rue v. K-Mart Corp.*¹⁰ In *Rue*, the same issues and the same parties were involved in an unemployment claim and a subsequent defamation suit, but the Court held that there must be "full and fair opportunity to litigate the issue in the prior action" before collateral estoppel can be applied. In the instant case, Petitioners' contentions were not afforded a full opportunity to be litigated; e.g., there was no discovery or argument in a court of

⁹ Webster's New Universal Unabridged Dictionary, Second Edition

¹⁰ Overall, the doctrine of collateral estoppel, or issue preclusion, applies where the following four prongs are met:

- (1) An issue decided in a prior action is identical to one presented in a later action;
- (2) The prior action resulted in a final judgment on the merits;
- (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and
- (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

See, e.g., *Shaffer v. Smith*, 543 Pa. 526, 673 A.2d 872 (1996); *Safeguard Mutual Insurance Co. v. Williams*, 463 Pa. 567, 345 A.2d 664 (1975). . . . However, proceedings before a Referee clearly do not allow parties to litigate issues in the manner available in a court of record. For example, the Rules of Evidence do not apply in Referees' hearings, and there is no procedure for prehearing discovery.

From: *Rue v. K-Mart Corp.*, Pennsylvania Supreme Court, June 16, 1998 Appeal from the Order of the Superior Court entered March 20, 1997 at No. 2531PHL95, Reversing and Remanding for a New Trial the Order of the Court of Common Pleas of Bucks County, entered June 26, 1995 at No. 90-00248-19-2

record.

Conclusion and Request for Reconsideration

Contentions Seven and Eight cannot be dismissed based on the ESP proceeding because the issues raised by the Petitioners were not resolved. Further, the rule of collateral estoppel does not apply in this case because the issue has not been given a full and fair hearing. For the forgoing reasons, Petitioner requests that the ASLB reconsider and admit Contentions Seven and Eight.

. Pursuant to 10 CFR § 2.323(b), Petitioner has consulted with counsel for the NRC and DVP; both indicated they would not consent to a motion to reconsider.

Respectfully submitted,

A handwritten signature in black ink that reads "Louis A. Zeller". The signature is written in a cursive style and is followed by a horizontal line.

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CERTIFICATE OF SERVICE

**I hereby certify that copies of the August 25, 2008
MOTION FOR LEAVE TO FILE FOR RECONSIDERATION
AND MOTION FOR RECONSIDERATION IN PART OF ATOMIC SAFETY
AND LICENSING BOARD'S ORDER OF AUGUST 15, 2008**
was served on the following persons via Electronic Information Exchange this 25th day of
August, 2008.

