

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of  
Virginia Electric and Power Company  
d/b/a Dominion Virginia Power and  
Old Dominion Electric Cooperative  
North Anna Unit 3  
Combined License

Docket No. 52-017

June 22, 2012

**PETITION FOR REVIEW OF CLI-12-14**

Pursuant to 10 C.F.R. § 2.341(b), the Blue Ridge Environmental Defense League and its chapter Peoples Alliance for Clean Energy (öBREDLö or öIntervenorö) hereby petition the Nuclear Regulatory Commission for review of its decision to close the record for this proceeding.

**BACKGROUND**

On May 18, 2010 Dominion-Virginia Power (öDominionö or öApplicantö) informed the Nuclear Regulatory Commission that it had altered the basis for its application and selected a Mitsubishi Heavy Industries US Advanced Pressurized Water Reactor (öAPWRö) design as the basis for its Combined License for proposed North Anna Unit 3. On October 2, 2010 Blue Ridge Environmental Defense League filed new contentions including one positing the exceedance of safe shutdown earthquake (SSE) factors at North Anna.<sup>1</sup> The ASLB declined to admit these contentions.

On August 23, 2011, an alert was declared under Emergency Action Level EAL HA6.1 at the North Anna Power Station which was caused by seismic activity onsite.

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<sup>1</sup> In Contention 13, öUnit 3 Seismic Spectra Exceedance,ö Intervenor argued that Dominion improperly requested a site-specific exemption from the APWR Design Control Document for proposed North Anna Unit 3 in violation of 10 C.F.R. §§ 52.7, 52.93, and 100.23.

Thirty days later, BREDL filed a new contention based on the Virginia earthquake: that the Applicant and the NRC have not presented a sound probabilistic basis for the magnitude of the possible adverse consequences and the likelihood of occurrence of each consequence for issuing a license to construct and operate North Anna Unit 3 and that the geology of the North Anna site renders it unsuitable for construction of a new nuclear power reactor. With the consent of BREDL and the NRC Staff, on October 12, 2011, Dominion submitted a motion, granted by the ASLB, to hold the proposed contention in abeyance until Dominion completed its assessment of possible changes in the Unit 3 COL application. Order Granting Consent Motion to Hold BREDL's New Contention in Abeyance (Oct. 20, 2011). The Consent Motion also provided that BREDL would have the opportunity to amend its proposed earthquake contention within 30 days of Dominion's submittal of its assessment of the August 23<sup>rd</sup> earthquake. On June 7, 2012 the Commission, at the request of Dominion, reversed the Board's decision and terminated the contested portion of this proceeding. CLI-12-14.

## **DISCUSSION**

### **A. Decision of which Review is Sought**

As a result of the Commission's June 7, 2012 ruling, the record of the North Anna Unit 3 COL adjudicatory proceeding is closed and Blue Ridge Environmental Defense League must now move to reopen the record and include appropriate support to gain admission of new contentions. CLI-12-14 at 14. We respectfully request that the Commission review this decision and restore the ruling of its Atomic Safety and Licensing Board in this matter.

## **B. Matters of Fact and Law**

Federal regulations state when and how a licensing board proceeding may be terminated:

The presiding officer's jurisdiction in each proceeding terminates when the period within which the Commission may direct that the record be certified to it for final decision expires, when the Commission renders a final decision, or when the presiding officer withdraws from the case upon considering himself or herself disqualified, whichever is earliest.

10 CFR § 2.318(a) Commencement and termination of jurisdiction of presiding officer.

The schedule for Dominion's North Anna Unit 3 combined operating license has been in an arrested state of development for years, brought about by two factors:

1) Dominion's substitution of an ESBWR for a US-APWR as the basis for its plant design and 2) the August 23, 2011 earthquake in Mineral, Virginia. Although the NRC Staff had issued an SEIS for North Anna Unit 3 in March of 2010 (NUREG-1917), the analysis of environmental impacts in that document was based on a General Electric economic simplified boiling water reactor (ESBWR) at the North Anna site. Subsequent to Dominion's substitution of the Mitsubishi Heavy Industries US-Advanced Pressurized Water Reactor (US-APWR) for the ESBWR as its reactor of choice, the NRC Staff published a notice of intent to prepare a new SEIS. 76 Fed. Reg. 6638 (Feb. 7, 2011). On March 2, 2011, the NRC updated the schedule for review of the Unit 3 COLA, proposing issuance of the final Supplemental Environmental Impact Statement in October 2012 and the Final Safety Evaluation Report (FSER) in July 2013.

The current Application Review Schedule for the Combined License Application for North Anna Unit 3 indicates that the following dates for safety and environmental reviews and mandatory hearing are all yet to be determined:<sup>2</sup>

<i>Safety Review</i>	
Phase A - Preliminary Safety Evaluation Report (SER) and Requests for Additional Information Issued	TBD*
Phase B - Advanced SER with no Open Items (OIs) Issued	TBD*
Phase C - Advisory Committee on Reactor Safeguards Review of SER with no Open Items Complete	TBD*
Phase D - Final SER Issued	TBD*
<i>Environmental Review</i>	
Draft Supplemental Environmental Impact Statement (EIS) issued	TBD
Final Supplemental EIS issued	TBD
<i>Hearing</i>	
Commission hold mandatory hearing	TBD*
<i>License</i>	
Commission decision on issuance of COL application	TBD*

Moreover, the asterisks in the above table carry the following proviso: "The NRC staff is planning to revise North Anna 3 COLA review schedule to implement recent changes in the review schedules for US-APWR Design Certification and Comanche Peak, Units 3 and 4, COLA." *Id.*

The objectives of the Nuclear Regulatory Commission's adjudicatory process are three: 1) to provide a fair hearing, 2) to avoid unnecessary delay and 3) to produce an informed record which supports sound decision making for the protection of public health and safety and the environment. *Hydro Resources Inc. CLI-01-4, 52 NRC 31, 38 (2001).*

<sup>2</sup> <http://www.nrc.gov/reactors/new-reactors/col/north-anna/review-schedule.html>, Website states: "Page Last Reviewed/Updated Thursday, March 29, 2012," Accessed June 22, 2012

### **C. The Commission's Decision is Erroneous, Premature and Unfair**

Dominion's revision of its COLA sets this proceeding apart from other licenses because it has compromised the Intervenor's rights to a hearing under Section 189(a) of the Atomic Energy Act (AEA); specifically, the opportunity for public participation had long passed by the time Dominion's substitute design-basis plant design was filed. In order to balance the rights of the Intervenor with those of the Applicant, the Board exercised its power to keep the record open. Specifically in reference to this ability, the ASLB stated that "licensing boards have the authority to control the schedule for a proceeding to ensure that intervenors have adequate time to prepare new or amended contentions in response to new information." LBP-11-22, Denying Dominion's Motion for Clarification (September 1, 2011).

On April 6, 2011 the Board, while declining to admit Intervenor's new contentions, nevertheless found that the seismic issues raised therein remained subject to litigation within the ongoing proceeding: "Whether the SSE [safe shutdown earthquake] exceedance in Dominion's exemption request does in fact comply with 10 C.F.R. Part 50, Appendix S and 10 C.F.R. § 100.23 is a question currently before the NRC Staff and is thus material to the NRC's licensing decision in this proceeding under 10 C.F.R. § 2.309(f)(1)(iv). Moreover, that exemption request could be subject to litigation in this COL proceeding, and thus is within the scope of the proceeding pursuant to 10 C.F.R. § 2.309(f)(1)(iii)." LBP-11-10, Memorandum and Order (Declining to Admit New Contentions 12 and 13), April 6, 2011, at 34. Today, there is still no final decision and the matter remains open to further adjudication.

Moreover, a petition on waste confidence is now before the Commission which, if accepted, would call for further proceedings which would materially affect licensing decisions at North Anna Unit 3. On the day after the Commission issued CLI-12-14 the U.S. Court of Appeals for the District of Columbia Circuit vacated the NRC's Waste Confidence Decision Update and its Temporary Storage Rule and remanded them to the Commission.<sup>3</sup> On June 18<sup>th</sup> twenty-four petitioners requested that the Commission suspend its final licensing decisions in all unresolved NRC licensing proceedings pending completion of the remanded proceedings on the WCD Update and TSR and establish a process for ensuring that the remanded proceeding complies with the public participation requirements of Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a). *See* Petition to Suspend Final Decisions in all Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012). In fact, BREDL's original petition in this proceeding included a contention on this very issue. *See* Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (May 9, 2008) at 21.<sup>4</sup>

The Commission's June 7<sup>th</sup> order is unfair because it raises the bar for the Intervenor and is contrary to the order of October 20, 2011 holding BREDL's new contention in abeyance. The Commission's offhand reference the outstanding earthquake

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<sup>3</sup> *State of New York v. Nuclear Reg. Comm.*, No. 11-1045, June 8, 2012

<sup>4</sup> CONTENTION SEVEN, *Failure to Evaluate Whether and in What Time Frame Spent Fuel Generated by Unit 3 Can Be Safely Disposed Of*, stated: "The Environmental Report for the Dominion COLA is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated (*i.e.*, spent) fuel that will be generated by the proposed reactors if built and operated. Nor has the NRC made an assessment on which DVP [Dominion] can rely regarding the degree of assurance now available that radioactive waste generated by the proposed reactors "can be safely disposed of [and] when such disposal or off-site storage will be available." Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (August 31, 1984), citing *State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). Accordingly, the ER fails to provide a sufficient discussion of the environmental impacts of the proposed new nuclear reactors. The ER for the proposed new reactors does not contain any discussion of the environmental implications of the lack of options for permanent disposal of the irradiated fuel to be generated by North Anna site. Therefore, it is fatally deficient. *State of Minnesota v. NRC*, 602 F.2d at 416-17."

contention alters that understanding: “Several reasons support referral of the earthquake contention to the Board. As an initial matter, the earthquake contention has already been raised before the Board, although Blue Ridge Environmental Defense League must now move to reopen the record and include appropriate support to gain admission.” CLI-12-14 at 14. (emphasis added) At the request of Dominion, BREDL agreed to a motion which stated: “The parties have agreed that this proposed contention should be held in abeyance until Dominion completes its assessment of whether any changes should be made to the Unit 3 application in light of the August 23, 2011 Mineral Virginia earthquake, and if so, what those changes are.” The NRC Staff counsel also authorized the motion. *See Consent Motion to Hold BREDL’s New Contention in Abeyance.* Would the Intervenor again agree to the October 12<sup>th</sup> consent motion knowing what it knows now? Why would they? We believe the legal maxim here would be: *Lacto et vicissitudo.*

#### **D. Commission Review**

In view of 10 CFR § 2.318(a), “Commencement and termination of jurisdiction of presiding officer,” the Commission should exercise review of its decision to reverse the judgment of its Board. The presiding officer’s jurisdiction in a proceeding terminates in but three circumstances: 1) when the period within which the Commission may direct that the record be certified to it for final decision expires, 2) when the Commission renders a final decision, or 3) when the presiding officer withdraws from the case. The expression of one thing is the exclusion of another. *Expressio unius est exclusio alterius.*

## CONCLUSION

In order to provide a fair hearing, avoid unnecessary delay and produce an informed record which supports sound decision making for the protection of public health and safety and the environment, the Intervenor requests that the Commission exercise its power to review its June 7 memorandum and reinstate the ruling of the Atomic Safety and Licensing Board keeping the proceeding open.

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  
**PETITION FOR REVIEW OF CLI-12-14**  
were served on the following persons via Electronic Information Exchange this 22<sup>nd</sup> day  
of June, 2012.

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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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