LBP-11-22

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Richard F. Cole
Dr. Alice C. Mignerey

In the Matter of VIRGINIA ELECTRIC and POWER COMPANY d/b/a DOMINION VIRGINIA POWER and OLD DOMINION ELECTRIC COOPERATIVE (Combined License Application for North Anna Unit 3)	Docket No. 52-017-COL ASLBP No. 08-863-01-COL September 1, 2011

MEMORANDUM AND ORDER
(Denying Dominion's Motion for Clarification of LBP-11-10)

Before the Board is a Motion for Clarification of LBP-11-10, timely filed on April 18, 2011, by Virginia Electric and Power Company, d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion or Applicant).[1] Although labeled a Motion for Clarification, the Motion argues that the Board must immediately terminate this proceeding, and we have accordingly treated it as a motion seeking that relief. We deny Dominion's request to terminate the proceeding.

I. BACKGROUND

On November 26, 2007, Dominion filed its Combined License Application (COLA) for North Anna Unit 3 pursuant to Subpart C of 10 C.F.R. Part 52.[2] The Commission subsequently issued a Notice of Hearing and Opportunity to Petition for Leave to Intervene on February 29,

[1] Dominion's Motion for Clarification of LBP-11-10 (Apr. 18, 2011) [hereinafter Dominion Motion].

[2] See Notice of Receipt and Availability of Application for a Combined License Dominion Virginia Power—North Anna Unit 3, 72 Fed. Reg. 70,619 (Dec. 12, 2007).

2008.[3] On May 9, 2008, the Blue Ridge Environmental Defense League (BREDL) submitted a Petition to Intervene and Request for Hearing, which included eight contentions.[4] The Board issued a Memorandum and Order on August 15, 2008, in which it found that BREDL had standing, admitted BREDL's Contention One in part, determined that BREDL's remaining contentions were inadmissible, admitted BREDL as a party, and granted BREDL's request for a hearing.[5]

Our Initial Scheduling Order adopted the schedule proposed by the parties for disclosures, the filing of motions for summary disposition and written direct testimony, and the evidentiary hearing.[6] That Order further stated that "[f]or any filing not covered by the deadlines listed [in the items described earlier in the Order], including the filing of any late-filed contentions, the Board will, absent compelling circumstances, expect compliance with the applicable model milestones for hearings conducted under 10 C.F.R. Part 2, Subpart L."[7] The Model Milestones permit the filing of "[p]roposed late-filed contentions on [Safety Evaluation Report] SER and necessary [National Environmental Policy Act] NEPA documents" to be filed within thirty days of the issuance of those documents.[8] Thus, by adopting the Model Milestones

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[3] Dominion Virginia Power; Notice of Hearing and Opportunity To Petition for Leave To Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 12,760 (Mar. 10, 2008).

[4] See LBP-08-15, 68 NRC 294, 302 (2008).

[5] Id. at 337-38.

[6] Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) at 1-2 (unpublished) [hereafter Initial Scheduling Order].

[7] Id. at 2.

[8] 10 C.F.R. Part 2, app. B, § II.

in our Initial Scheduling Order, we allowed proposed new and/or amended contentions to be filed within thirty days of the NRC Staff's issuance of its SER and NEPA documents.[9]

We later dismissed BREDL's Contention One as moot but, given that BREDL's new Contention 10 (an amended version of Contention One) was pending before the Board, we emphasized that our Order "should not be construed as terminating this case. On the contrary, we retain jurisdiction to decide whether to admit proposed Contention 10. See 10 C.F.R. § 2.318(a)."[10] We subsequently issued an Order admitting Contention 10 in part.[11] The Board later updated the schedule for the proceeding to reflect the status of the NRC Staff's review of Dominion's COLA and the procedure for resolving Contention 10.[12] We reiterated that "[f]or filings not covered by the deadlines [in the Order], see the reference to the Model Milestones of 10 C.F.R. Part 2, App. B, in the Initial Scheduling Order."[13] Thus, by incorporating the Model Milestones in our updated Scheduling Order, we again allowed BREDL to file proposed new and/or amended contentions within 30 days of the NRC Staff's issuance of its SER and necessary NEPA documents, as we had done in the Initial Scheduling Order.

On June 1, 2010, the NRC Staff informed the parties that Dominion intended to revise its COLA to incorporate the U.S. Advanced Pressurized Water Reactor (US-APWR) design instead

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[9] By filing the proposed new or amended contention within the time specified in the Initial Scheduling Order, BREDL would satisfy the timeliness requirement of 10 C.F.R. § 2.309(f)(2)(iii). BREDL would still have to satisfy the other requirements of Section 2.309(f)(2) or the requirements of Section 2.309(c), as well as the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).

[10] Licensing Board Order (Dismissing Contention 1 as Moot) (Aug. 19, 2009) at 1, 4 (unpublished) [hereinafter Aug. 19, 2009 Licensing Board Order].

[11] LBP-09-27, 70 NRC 992, 1016 (2009).

[12] Licensing Board Order (Updating Schedule Governing Proceeding) (Mar. 22, 2010) at 2 (unpublished) [hereinafter Mar. 22, 2010 Licensing Board Scheduling Order].

[13] Id. at 3.

of the Economic Simplified Boiling Water Reactor (ESBWR) design.[14] On July 1, 2010, Dominion confirmed the NRC Staff's letter by filing a notice of its revision to its COLA to incorporate the US-APWR design.[15] Following the submission of Dominion's revised COLA, the Board dismissed Contention 10 as moot because the revised COLA omitted the claim of improved fuel efficiency that was the subject of Contention 10.[16]

In the same Order, the Board declined to admit BREDL's proposed Contention 11, which alleged that, because the revised COLA incorporated a new reactor design, it represented such a substantial change that Dominion was required to file an entirely new license application.[17] BREDL argued, among other things, that that the revised COLA compromised its right to a hearing under Section 189(a) of the Atomic Energy Act (AEA) [18] because the opportunity for public participation had passed by the time the revision was filed.[19] We responded that "NRC regulations . . . preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information."[20] We further noted 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

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[14] Letter from Robert M. Weisman, Counsel for the NRC Staff, to Atomic Safety and Licensing Board at 1 (June 1, 2010).

[15] Letter from David R. Lewis, Counsel for Dominion, to Atomic Safety and Licensing Board at 1 (July 1, 2010).

[16] LBP-10-17, 72 NRC __, __ (slip op. at 4-5, 19) (Sept. 2, 2010).

[17] Id. at __ (slip op. at 18).

[18] 42 U.S.C. § 2239(a)(1)(A).

[19] LBP-10-17, 72 NRC at __ (slip op. at 15).

[20] Id. (citing 10 C.F.R. § 2.309(f)(2)).

information."[21] We concluded that because "licensing boards have the authority to establish reasonable schedules for the filing of new or amended contentions based on changes to a license application, we see no inherent conflict between Section 189(a)'s right to a hearing and the filing of a revised license application that incorporates a different reactor design."[22]

Although we dismissed Contention 10 as moot and did not admit Contention 11, we did not terminate the case. Instead, we noted that "[u]nder the Board's supplemental scheduling order of August 11, 2010, BREDL has until October 4, 2010, to file new contentions based on the June 29, 2010 COLA revision," and stated that we would "retain jurisdiction to decide whether to admit any new contentions BREDL might file pursuant to that order."[23] BREDL subsequently filed two proposed new contentions based on Dominion's revised COLA (Contentions 12 and 13). In LBP-11-10, we declined to admit those two new contentions.[24] But, as in our earlier rulings, we did not terminate the proceeding. Instead, because the NRC Staff had not yet issued documents that could be the subject of new contentions, the SER and the new Supplemental Environmental Impact Statement (SEIS) required by NEPA,[25] we reiterated

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[21] Id. at __ (slip op. at 16).

[22] Id.

[23] Id. at __ (slip op. at 19).

[24] LBP-11-10, 73 NRC __, __ (slip op. at 1, 36) (Apr. 6, 2011).

[25] Id. at __ (slip op. at 36). The Staff issued an SEIS for North Anna Unit 3 in March of 2010 (NUREG-1917), but the analysis of environmental impacts in that document was based, in part, on the design, construction, and operation of an ESBWR at the North Anna site. Accordingly, after Dominion substituted the US-APWR for the ESBWR as its reactor design, the Staff announced its intent to prepare a new SEIS. See Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative, North Anna Combined License Application; Notice of Intent to Prepare a Supplemental Environmental Impact Statement and Conduct Scoping Process, 76 Fed. Reg. 6638 (Feb. 7, 2011). We will refer to this second SEIS as the "new SEIS."

the requirement of the Model Milestones that any new contention based on either of those documents must be filed within thirty days of the document's availability.[26]

On or about April 18, 2011, BREDL and other organizations filed an Emergency Petition to the Commission in this and other proceedings.[27] The Emergency Petition requests that the Commission suspend all decisions regarding the issuance of combined licenses (COLs), as well as various other types of licenses, "pending completion by the NRC's Task Force . . . of its investigation of the near-term and long-term lessons of the Fukushima accident and the issuance of any proposed regulatory decisions and/or environmental analyses of those issues."[28] The Emergency Petition contains a number of additional requests related to the Fukushima accident, including that the Commission

> [e]stablish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings. The Commission should allow all current intervenors in NRC licensing proceedings, all petitioners who seek to re-open closed licensing or re-licensing proceedings, and all parties who seek to comment on design certification proposed rules, a period of at least 60 days following the publication of proposed regulatory measures or environmental decisions, in which to raise new issues relating to the Fukushima accident.[29]

The Commission has not yet ruled on the Emergency Petition.

Dominion filed its Motion for Clarification of LBP-11-10 on April 18, 2011, insisting that the Board must immediately terminate this proceeding due to the absence of any contentions

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[26] LBP-11-10, 73 NRC at __ (slip op. at 36) (permitting new contentions based on SER or SEIS to be filed within the time period specified in the Board's prior scheduling orders); see Mar. 22, 2010 Licensing Board Scheduling Order at 3 (adhering to the Model Milestones); Initial Scheduling Order at 2 (adhering to the Model Milestones).

[27] Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Corrected version, filed Apr. 19, 2011) [hereinafter Emergency Petition].

[28] Id. at 1-2.

[29] Id. at 3.

currently pending before the Board.[30] In our April 22, 2011 Order, we announced we would treat Dominion's Motion as a motion to terminate this proceeding and provided five questions for BREDL and the NRC Staff to respond to in their answers to Dominion's Motion, as well as an opportunity for Dominion to reply to those answers.[31] We allowed BREDL and the NRC Staff to respond to these issues and Dominion's Motion by May 2, 2011, and permitted Dominion to reply by May 12, 2011.[32] The NRC Staff responded on May 2, 2011, supporting Dominion's Motion.[33]

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[30] Dominion Motion at 1.

[31] Licensing Board Order (Regarding Dominion's Motion for Clarification of LBP-11-10) (Apr. 22, 2010) at 2-3 (unpublished) [hereinafter Apr. 22, 2011 Licensing Board Order]. The questions were:

> 1. "Whether applicable NRC regulations require termination of a proceeding in the circumstances present here";
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> 2. "[W]hether [the parties] contend [10 C.F.R. § 2.318(a)] or any other relevant regulation or applicable Commission or Appeal Board decision mandates termination of a licensing board proceeding in the circumstances of this case";
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> 3. "If the Board's jurisdiction is not automatically terminated by any regulation or controlling decision . . . [which] factors [the parties] believe the Board should consider in deciding whether termination is appropriate";
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> 4. "[W]hether, if the Board were to terminate the proceeding at this point, the Intervenor would have a right of appeal under 10 C.F.R. §§ 2.311, 2.341, or any other provision"; and
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> 5. "[T]he relevance to the termination issue, if any, of the Emergency Petition recently filed before the Commission in this and other proceedings."

Id. at 2.

[32] Id. at 2-3.

[33] NRC Staff Answer to Dominion's Motion for Clarification and Response to Licensing Board Order Dated April 22, 2011 (May 2, 2011) [hereinafter NRC Staff Answer].

BREDL responded on May 5, 2011, opposing Dominion's Motion.[34] Dominion filed its Reply on May 12, 2011.[35]

BREDL recently submitted "Supplemental Comments" to its Emergency Petition that is currently pending before the Commission.[36] BREDL requests that the Commission provide

> a complete review and hearing on the significant – indeed extraordinary – safety and environmental implications for the applications for the [North Anna Unit 3] ESP and COL and their related environmental documents of the conclusions and recommendations of the [NRC's] Near-Term Task Force.[37]

As yet, however, BREDL has not filed with the Board any new contentions related to the Fukushima accident.

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[34] Intervenor's Reply Regarding Dominion's Motion for Clarification of LBP-11-10 (May 5, 2011) [hereinafter BREDL Answer]. BREDL's Answer was not timely filed within the deadline established by our April 22, 2011 Order, but BREDL claimed that it was unable to timely respond due to a family illness. Id. at 1. Ordinarily, this method of response without a motion for an extension of time would be insufficient to excuse such a late filing, but our interpretation of governing regulations and case law was not affected by BREDL's Answer. In the future, we admonish BREDL to follow instructions in our Orders and seek an extension of time.

BREDL interprets LBP-11-10 to mean that we kept this proceeding open because proposed Contention 13 (which we dismissed) may be litigated in the future. See BREDL Answer at 2. This is incorrect. In LBP-11-10, we only evaluated the admissibility of the contention, finding that Dominion's exemption request could be subject to litigation. We did not admit the contention and were not predicting the future litigation of this issue. See LBP-11-10, 73 NRC at __ (slip op. at 34-35).

[35] Dominion's Reply to Licensing Board's April 22, 2011 Order (May 12, 2011) [hereinafter Dominion Reply].

[36] Supplemental Comments by the Blue Ridge Environmental Defense League in Support of Emergency Petition Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) [hereinafter BREDL's Supplemental Comments]. Dominion and the NRC Staff responded to these comments on August 22, 2011. Dominion's Objection to the Blue Ridge Environmental Defense League's Supplemental Comments Relating to Petition to Suspend Pending Licensing Proceedings (Aug. 22, 2011); NRC Staff's Answer to Supplemental Comments in Support of Emergency Petition Regarding Fukushima Task Force Report (Aug. 22, 2011).

[37] BREDL's Supplemental Comments at 2.

II. ANALYSIS

A. Summary of the Issue. The current status of this adjudicatory proceeding is that, although the Intervenors have established standing and have previously proffered several viable contentions that the Board admitted, those contentions have recently been dismissed and, at the moment, there are no pending admitted contentions. This is because the Board dismissed Contention 10 as moot[38] and has declined to admit proposed new Contentions 12 and 13.[39] Meanwhile, the Applicant and the NRC Staff are actively continuing to process the COLA. Assuming that the Applicant does not amend its COLA again, the Staff expects to issue the final new SEIS in October 2012 and the Final SER in July 2013.[40] BREDL seeks to preserve its right to file new contentions, as contemplated by the Board's scheduling orders, if there is new information in the SER or the new SEIS that it finds objectionable or problematic.

Despite our rulings dismissing Contention 10 as moot and declining to admit Contentions 12 and 13, the licensing proceeding remains in existence.[41] Because the Board granted BREDL's request for a hearing and petition to intervene in the licensing proceeding, it remains a party to that proceeding and may propose new contentions for litigation.[42] Indeed, a party such as BREDL that has successfully intervened in a licensing proceeding may propose new

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[38] See LBP-10-17, 72 NRC at __ (slip op. at 19).

[39] See LBP-11-10, 73 NRC at __ (slip op. at 36).

[40] See Application Review Schedule for the Combined License Application for North Anna, Unit 3, http://www.nrc.gov/reactors/new-reactors/col/north-anna/review-schedule.html (last visited Sept. 1, 2011).

[41] See Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-01, 35 NRC 1, 6 n.5 (1992).

[42] See id. at 6.

contentions for litigation until the license is issued.[43] Thus, BREDL may still propose new contentions based on the Fukushima accident, the SER, the new SEIS, or other sources of new and materially different information, provided that it does so promptly after the new information becomes available and that it successfully fulfills the general contention admissibility requirements.[44]

In light of the ongoing licensing process and BREDL's continuing right to file new contentions, the Board did not terminate this adjudicatory proceeding when it issued LBP-11-10.[45] Instead, the Board reiterated the deadlines in its scheduling orders concerning the filing of proposed new contentions based on new information in the SER or the new SEIS.[46]

Dominion and the NRC Staff argue that the Board exceeded its jurisdiction. They maintain that, because we dismissed BREDL's Contention 10 as moot and declined to admit proposed Contentions 12 and 13, we are compelled to terminate this adjudicatory proceeding before the SER and new SEIS have been issued, and therefore before BREDL could file any proposed new contentions based on those documents.[47] Dominion and the Staff also maintain that we should terminate the proceeding now even though the Commission is considering the

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[43] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 24 (2006). In that case, the State of Utah moved to reopen the case to allow it to litigate a new version of a previously rejected contention, even though the licensing board had closed the evidentiary record and the Commission had issued its final decision authorizing the Staff to issue the license for the proposed facility. Id. at 21-22. The applicant argued that the Commission lacked jurisdiction over Utah's motion to reopen. Id. at 23. The Staff had not yet issued the license, however, and the Commission accordingly rejected the applicant's jurisdictional argument. Id. at 24. Here, the licensing proceeding is far less advanced than in Private Fuel Storage, so BREDL clearly may still file proposed new contentions.

[44] See 10 C.F.R. § 2.309(f)(1), (2).

[45] LBP-11-10, 73 NRC at __ (slip op. at 36).

[46] Id.

[47] Dominion Reply at 3-8; NRC Staff Answer at 6-8; Dominion Motion at 2-3, 5-6.

Emergency Petition,[48] which includes the request that the Commission "[e]stablish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings."[49] If BREDL files new contentions based on the Fukushima accident, the SER, or the new SEIS, they would have to be filed with the Commission, which would decide whether to refer the matter to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel to appoint a new licensing board, or to conduct the new adjudicatory proceeding itself. Thus, there could be multiple adjudicatory proceedings and multiple licensing boards in the same licensing proceeding.[50]

Even more importantly, granting Dominion's request to terminate the adjudication would have significant implications for the rights of intervenors under AEA Section 189a, which instructs the Commission to grant a hearing to and to admit as a party to any licensing proceeding "any person whose interest may be affected by the proceeding."[51] Section 189a has been interpreted to require that the hearing "must encompass all material factors bearing on the

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[48] See id. at 9-10.

[49] Emergency Petition at 3.

[50] That scenario occurred in the Vogtle COL proceeding, where a newly constituted board, inter alia, applied the reopening standard to new contentions filed after the prior proceeding was terminated for want of pending or admitted contentions. Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-21, 72 NRC __, __ (slip op. at 4-5, 22-26) (Nov. 30, 2010). More than eight months after the second Vogtle COL Board declined to reopen that proceeding, new contentions were again filed before the Commission. The NRC Secretary again referred such new contentions (as well as contentions filed regarding another previously terminated COL proceeding) "to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action consistent with 10 C.F.R. §§ 2.309 and 2.326." Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2) and Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4) Secretary Order (Aug. 18, 2011) at 1 (unpublished); see also Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant), and Luminant Generation Co. LLC (Comanche Peak Nuclear Power Plant Units 3 and 4) Secretary Order (Aug. 30, 2011) at 2-3 (unpublished).

[51] 42 U.S.C. § 2239(a)(1)(A).

licensing decision raised by the requester."[52] The right granted by Section 189a is thus not limited to only those material issues that were raised during the initial stages of the licensing proceeding. But Dominion maintains that, once the adjudication terminates, BREDL would not only have to satisfy the generally applicable timeliness and admissibility requirements for any new contentions it might file based on new information,[53] but would also have to satisfy the additional requirements for reopening the terminated adjudicatory proceeding.[54] Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention."[55] The Commission has further stated that reopening the record is an "'extraordinary' action"[56] and that "proponents of motions seeking to reopen the record bear a 'heavy burden.'"[57] Thus, granting Dominion's motion would create a substantial barrier to BREDL's ability to file proposed contentions based on new information,

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[52] Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1443 (D.C. Cir. 1984) (emphasis added).

[53] In general, a new contention must satisfy the timeliness requirement of either 10 C.F.R. §§ 2.309(f)(2) or 2.309(c), and the admissibility requirements of Section 2.309(f)(1). See Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-76 (2006).

[54] Dominion Motion at 6 n.3. The agency's requirements for reopening a "closed record" are found in 10 C.F.R. § 2.326. As we explain infra at Part II.B.3, this provision has no logical application to a proceeding such as this, in which the evidentiary record never opened. Unfortunately, the agency's regulations provide no alternative means of reopening a terminated adjudication.

[55] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005); see also Entergy Nuclear Vermont Yankee, L.L.C., & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC __, __ (slip op. at 2 & Attach. A) (Oct. 28, 2010), aff'd, CLI-11-02, 73 NRC __ (slip op.) (Mar. 10, 2011).

[56] Shaw AREVA MOX Servs., LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC 55, 65-66 n.48 (2009) (quoting 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

[57] Id. (quoting Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983) (quoting Kansas Gas & Elec. Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978))).

including new information arising from the Fukushima accident, the SER, or the new SEIS, even though BREDL has established its right to a hearing on "all material factors bearing on the licensing decision."[58]

The Commission applied the requirements for reopening a closed record to the proposed new contention in Private Fuel Storage,[59] but in that case the licensing board had conducted a lengthy evidentiary hearing, and both the board and the Commission had issued their decisions on the merits.[60] Thus, the evidentiary record had long since closed by the time the new proposed contention was filed. Here, by contrast, not only has there been no decision on the merits of any admitted contention,[61] but no evidentiary hearing has even begun. Moreover, BREDL could not have filed any contention based on either the SER or the new SEIS because neither document has been issued yet. When, as in Private Fuel Storage, a case has been fully litigated on the merits and the intervenor seeks to file a new contention on the verge of the NRC's issuance of the license, the agency may reasonably require that the intervenor provide compelling reasons for reopening the closed record. Otherwise, litigation might never end. But there are no sound reasons for imposing such a demanding burden in this case, where not only has there been no evidentiary hearing, but BREDL could not have filed

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[58] Union of Concerned Scientists, 735 F.2d at 1443.

[59] Private Fuel Storage, CLI-06-03, 63 NRC at 25-31; see supra note 43.

[60] Private Fuel Storage, CLI-06-03, 63 NRC at 21-23; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 406 (2005).

[61] The Board dismissed BREDL's contentions 1 and 10 as moot, but a dismissal based on mootness is a jurisdictional ruling, not a decision on the merits of the claim. See Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear Operating Servs., LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-15, 70 NRC 198, 210 (2009).

contentions based on the SER or the new SEIS because both documents are still in preparation as a result of Dominion's change in reactor design.[62]

BREDL supports the more generous interpretation of the Board's authority applied in LPB-11-10, which avoids the problems just discussed.[63] Under that interpretation, as a licensing board appointed to conduct the hearing provided for in AEA Section 189a, we continue to have jurisdiction over contentions that the Intervenor proposes for hearing within the deadlines in our scheduling orders, even though contentions admitted during the initial stages of the licensing proceeding might have been dismissed. The Board may therefore continue the adjudicatory proceeding until the deadlines for filing proposed new contentions have expired and the Board has resolved all admitted and proposed contentions filed within the deadlines.[64] Because the Board decided not to terminate this adjudication before the SER and new SEIS have been issued, BREDL will not be required to satisfy the stringent requirements for reopening a closed proceeding merely to be able to file contentions based on information in those documents that was not previously available. This approach also avoids the inefficiency and delay likely to result from multiple adjudicatory proceedings in the same licensing proceeding.

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[62] See supra note 25 and infra note 69 (noting that the Staff plans on issuing a new SEIS).

[63] BREDL Answer at 1-2 (citing 10 C.F.R. § 2.318(a)).

[64] See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-15, 62 NRC 53, 54 (2005). The adjudicatory proceeding would also terminate in the specific circumstances identified by the Commission and the Appeal Board, where the intervenor either settles or abandons all of its contentions. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188 n.1 (1991) (citing Pub. Serv. Co. of Colorado (Fort St. Vrain Independent Spent Fuel Storage Installation) Commission Order (Oct. 29, 1990) (unpublished)); Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-796, 21 NRC 4, 5 (1985). Neither of those circumstances is present in this case. BREDL has neither withdrawn from this litigation nor entered into a settlement with Dominion. The potential for future litigation between the parties remains, and a hearing may still be required.

The issue before us is not unique to this case. It arises from what the Commission has termed "the dynamic licensing process followed in Commission licensing proceedings."[65] The NRC normally publishes its Federal Register notice of opportunity to petition for leave to intervene or request a hearing shortly after a license application is docketed. Petitions must be filed within sixty days based on the documents then in existence, which means that the petition must be based on the documents submitted with the application.[66] The Staff's SER and NEPA documents will not be issued until much later, usually several years after the application is filed. In the interim, the applicant will often submit substantial additional information to the NRC Staff, including revisions to the application.[67] As this COL proceeding demonstrates, the applicant's revisions may be substantial. The applicant's new information might render moot the contention(s) admitted by the Board, as has already happened twice in this case.[68] Until the SER and Staff NEPA documents have been issued, however, a licensing board is generally prohibited from holding the hearing on the license application.[69] In the interim, the intervenor

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[65] Curators of the Univ. of Missouri (TRUMP-S Project), CLI-95-08, 41 NRC 386, 395 (1995) (citation omitted); see also Entergy Nuclear Vermont Yankee, L.L.C., & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749, 753 (2004).

[66] See 10 C.F.R. § 2.309(b)(3)(i)-(ii), (f)(1)(vi).

[67] Cf. Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998) (explaining the process of revising an application after its initial submission and docketing).

[68] Cf. LBP-10-17, 72 NRC at __ (slip op. at 4-5, 19); Aug. 19, 2009 Licensing Board Order at 4.

[69] The Board may not commence a hearing on environmental issues before the Final Environmental Impact Statement (FEIS) is issued, and may only commence a hearing with respect to safety issues prior to issuance of the Final Safety Evaluation Report if it "'will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner.'" Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392, 395 (2007) (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 214 (2001)); see also 10 C.F.R. § 2.332(d). For North Anna Unit 3, although the NRC Staff has already issued an

may submit proposed new contentions based on new information, including new information in the SER and Staff NEPA documents.[70] The filing of new contentions based on the SER and Staff NEPA documents is expressly contemplated by the Model Milestones and our scheduling orders in this case.[71]

Thus, because of the dynamic licensing process, other boards are likely to face situations like this, where substantial changes to the application have mooted previously admitted contentions but new information, including information in Staff documents still in preparation, may result in the filing of new contentions prior to the evidentiary hearing. Accordingly, the question now before the Board has significant implications not only for BREDL's rights in this case, but for the rights of intervenors in other licensing proceedings.

B. Board Ruling. The Board concludes that it continues to have jurisdiction and that it is appropriate in the present circumstances not to terminate this adjudication. Under the plain language of the Commission's Notice of Hearing for the North Anna Unit 3 COLA and the regulations governing our jurisdiction, the Board's authority is not confined to a specific set of previously admitted contentions. Rather, the Board's delegated authority to provide the hearing mandated by AEA Section 189a is sufficient to permit it to keep adjudication open to take account of the dynamic nature of the licensing process, particularly in a case such as this where the Applicant has made substantial changes to the COLA that are still being evaluated by the

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SEIS based, in part, on the design, construction, and operation of an ESBWR at the North Anna site, it subsequently announced its intent to prepare a new SEIS based on the US-APWR design. See supra note 25. Although the Commission's Vogtle ESP ruling did not directly address the situation where an SEIS is being prepared, it would be inconsistent with the rationale of that decision for the Board to hold a hearing on environmental issues in this proceeding before the new SEIS is issued.

[70] 10 C.F.R. § 2.309(f)(2).

[71] See 10 C.F.R. Part 2, app. B, § II; Mar. 22, 2010 Licensing Board Scheduling Order at 3; Initial Scheduling Order at 2.

NRC Staff. We therefore have the authority to keep the adjudication open to provide a forum in which BREDL may file proposed new contentions based on the SER and the new SEIS, essential Staff documents that are clearly material to the agency's licensing decision but have not yet been issued because of Dominion's change in reactor design.[72]

We should also await the Commission's ruling on BREDL's Emergency Petition before terminating this proceeding. The Commission might grant the request to "[e]stablish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings."[73] Even if the Commission does not grant that request, it might provide guidance to licensing boards in this and other cases and to parties concerning the filing of contentions related to the Fukushima accident. By continuing this proceeding, we will provide a forum in which BREDL could file any contentions that might be appropriate under a potential ruling from the Commission without the need to reopen the proceeding or to appoint a new licensing board.

We recognize, however, that an adjudication must have a "defined endpoint."[74] Accordingly, as in Savannah River, this proceeding will terminate when (1) the deadlines in our scheduling orders for filing new or amended contentions have expired and (2) the Board has resolved all contentions that were admitted or proposed before those deadlines expired.[75] At

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[72] BREDL may not challenge the adequacy of the SER. It may, however, file contentions challenging the COLA based on new information in the SER. See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC __, __ (slip op. at 13 n.56) (Sept. 30, 2010); AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station) et al., CLI-08-23, 68 NRC 461, 476 (2008). Contentions may also challenge the adequacy of the review contained in the Staff's NEPA documents. See Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear Operating Servs., LLC (Combined License Application for Calvert Cliffs Unit 3), LBP-10-24, 72 NRC __, __ (slip op. at 6-8) (Dec. 28, 2010).

[73] Emergency Petition at 3.

[74] MOX, CLI-09-02, 69 NRC at 66.

[75] See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-15, 62 NRC 53, 54 (2005) (Board terminated the proceeding after all admitted contentions had been resolved and the time for late-filed contentions arising out of information

that point, BREDL will have had the opportunity to file new contentions based on SER and the new SEIS. This procedure will be more fair and efficient than terminating this proceeding now, which potentially would subject any new contentions to the higher burden assigned to the reopening of a "closed record"[76] — a record that has never been opened in the first instance given that we have not held an evidentiary hearing or admitted any evidence.

Dominion and the NRC Staff argue, however, that we must terminate the adjudication now, regardless of any practical or equitable factors that favor keeping it open. [77] We reject this argument. As explained in more detail below, our ruling follows from the plain language of the Commission's Notice of Hearing and applicable NRC regulations. Furthermore, because terminating the adjudication now would force BREDL to meet the stringent requirements for reopening the proceeding in order to propose new contentions based on information not currently available or that has only recently become available, such action would be inconsistent with the agency's obligation under AEA Section 189a to provide a hearing at the Intervenor's request on any issue material to the licensing decision. We accordingly conclude that we have the authority to keep the adjudication open and that it is appropriate to do so in the present circumstances.

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in the Staff's Final SER had expired without the filing of any such contentions.).

[76] See 10 C.F.R. § 2.326 (governing the standards for reopening a closed record).

[77] We asked the parties to identify the factors the Board should consider in deciding whether termination is appropriate, assuming the Board's jurisdiction is not automatically terminated. Apr. 22, 2011 Licensing Board Order at 2. Dominion chose not to identify any such factors, instead relying solely on its argument that controlling precedent requires "automatic termination." Dominion Reply at 8 n.16. The Staff identified only one factor: that BREDL might want to file an immediate appeal of the Board's previous rulings. NRC Staff Answer at 8-9. BREDL has indicated no intent to file an immediate appeal, however, but rather supports the Board's continuation of the adjudicatory proceeding. BREDL Answer at 1-2. We therefore lack any relevant argument that the Board abused its discretion by not terminating the adjudication. Instead, the sole question we must address is whether we have the discretion to keep the adjudication open in the present circumstances.

1. The Commission's Notice of Hearing

To resolve the jurisdictional question, we must determine the extent of the Commission's delegation of authority to the Board. A licensing board may exercise only the jurisdiction conferred upon it by the Commission.[78] "The various hearing notices are the means by which the Commission identifies the subject matters of the hearings and delegates to the boards the authority to conduct proceedings."[79] We therefore turn to the Commission's hearing notice for this proceeding to define both the nature of the proceeding and the Board's jurisdiction over the proceeding.

The hearing notice for this proceeding stated that a hearing would be held, at a future date to be determined by the Commission or the Board, to consider Dominion's COLA for North Anna Unit 3.[80] The hearing notice further explained that "[t]he hearing will be conducted by a Board that will be designated by the Chairman of the Atomic Safety and Licensing Board Panel or by the Commission," and that "[a]ny person whose interest may be affected by this proceeding and desires to participate as a party to this proceeding must file a written petition for leave to intervene in accordance with 10 CFR 2.309."[81] "Those permitted to intervene," the Commission further explained, "become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing."[82]

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[78] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).

[79] Id. (footnotes and citations omitted).

[80] 73 Fed. Reg. at 12,760.

[81] Id. at 12,761.

[82] Id.

The hearing notice implemented the mandate of AEA Section 189a, which as previously noted instructs the Commission to grant a hearing to and to admit as a party to any licensing proceeding "any person whose interest may be affected by the proceeding."[83] Given that the hearing notice does not restrict the hearing to any particular set of issues, the hearing should be understood as encompassing all issues raised by a party to the licensing proceeding that may properly be litigated under Section 189a. Section 189a requires that the hearing "encompass all material factors bearing on the licensing decision raised by the requester."[84] Thus, the potential subject matter of the hearing includes all material issues raised by a party to the licensing proceeding that have a bearing on the licensing decision, which necessarily includes material issues based on new information in the SER and the required Staff NEPA document.[85]

This Board was created subsequent to the hearing notice to conduct the contested hearing on the North Anna Unit 3 COLA mandated by AEA Section 189a.[86] We see nothing in the notice of hearing for the North Anna Unit 3 COLA that restricts the presiding officer's authority to a narrower set of issues than those that a party to the licensing proceeding may properly raise under the broad mandate of Section 189a. Accordingly, this Board has the delegated authority to consider all issues raised by the Intervenor that are material to the agency's licensing decision, including those arising under the SER and the new SEIS.

To be sure, a contested hearing would not have been required if no petitioner had satisfied the criteria for intervention.[87] But we have already found that BREDL demonstrated

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[83] 42 U.S.C. § 2239(a)(1)(A).

[84] Union of Concerned Scientists, 735 F.2d at 1443.

[85] See supra note 72.

[86] Dominion Virginia Power; Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 29,541, 29,541-42 (May 21, 2008).

[87] See 10 C.F.R. § 2.309(a).

standing pursuant to 10 C.F.R. § 2.309(d), and that it proffered one admissible contention as required by 10 C.F.R. § 2.309(f).[88] Therefore, BREDL met the criteria for intervention and, as explained in the Commission's hearing notice, it became a party to the licensing proceeding and entitled to participate fully in the conduct of the hearing. This necessarily entails the right to propose contentions that have a bearing on the licensing decision, including those based on the SER and the new SEIS when they are issued, or on the Fukushima accident.

Because the Board was delegated the authority to conduct a hearing on all issues material to the licensing decision, including those arising under the SER and the new SEIS, we decline to terminate this proceeding before those documents have been issued and BREDL has had the time provided in our scheduling orders to propose new contentions based on those documents. Although Contention 10 was mooted by Dominion's decision to change its referenced reactor design and the Board rejected BREDL's proposed Contentions 12 and 13, those rulings tell us little or nothing about whether BREDL might be able to successfully propose new contentions based on the Fukushima accident, the SER, or the new SEIS. If BREDL proposes new contentions and at least one is admitted, the agency would be obligated to hold an evidentiary hearing absent summary disposition, settlement, or withdrawal of the admitted contention. It is therefore entirely possible that a hearing will still be required to fulfill the mandate of the Commission's hearing notice in this proceeding and, ultimately, the requirement of AEA Section 189a to provide a hearing to any person whose interest might be affected by the proceeding on all issues that entity may raise that are material to the licensing decision.

We therefore conclude that it is within our authority, as delegated by the Commission, to retain jurisdiction of this proceeding despite the current absence of a pending contention.

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[88] See LBP-08-15, 68 NRC at 337-38.

2. NRC Regulations

The plain language of the agency's procedural regulations confirms that we continue to have jurisdiction in this adjudicatory proceeding.[89]

The NRC is of course bound by the unambiguous language of its own regulations.[90] The plain text of 10 C.F.R. § 2.318(a) refutes the argument of Dominion and the Staff that the Board's jurisdiction has ended. In that regulation, entitled "[c]ommencement and termination of jurisdiction of presiding officer," the Commission delineated three occasions that could trigger termination of the presiding officer's jurisdiction: "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."[91] Here, we are faced with neither the expiration of any period within which the Commission may direct that the record in this proceeding be certified for final decision nor a final decision rendered by the Commission. This is obvious, given that the final license review documents have not yet been issued by the NRC Staff. Further, the presiding officer has not withdrawn from the case upon considering itself disqualified.[92]

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[89] Dominion and the NRC Staff acknowledge that no agency regulation mandates termination of this proceeding. Dominion Reply at 3; NRC Staff Answer at 4. We agree on that much, but we think the regulations also fully support our continued jurisdiction.

[90] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988) (citing Abourezk v. Reagan, 785 F.2d 1043, 1053 (D.C. Cir. 1986), aff'd, 484 U.S. 1 (1987); GUARD v. NRC, 753 F.2d 1144, 1146 (D.C. Cir. 1985)).

[91] 10 C.F.R. § 2.318(a).

[92] 10 C.F.R. Part 2 defines the presiding officer in NRC adjudicatory proceedings as "the Commission, an administrative law judge, an administrative judge, an Atomic Safety and Licensing Board, or other person designated in accordance with the provisions of this part, presiding over the conduct of a hearing conducted under the provisions of this part." 10 C.F.R. § 2.4.

Applying the rule of statutory construction that the mention of one thing implies the exclusion of another, the fact that the regulation sets forth three specific circumstances in which a board's jurisdiction ends implies that jurisdiction does not end in other circumstances not listed.[93] Accordingly, the plain language of Section 2.318(a) supports our conclusion that a licensing board does not lose its jurisdiction whenever during some period of the lengthy and dynamic licensing process there is no pending contention.[94]

Indeed, as the Staff acknowledges, it is not unusual for a board to continue to operate and to retain jurisdiction even when there are no admitted contentions.[95] Although the Staff argues for a rule that would generally require a board to terminate an adjudication whenever it lacks a pending contention, it acknowledges an exception when a contention of omission is mooted by new information. The Staff notes that in that situation licensing boards have commonly afforded intervenors the opportunity to propose new contentions to challenge the new information, even though no contention is pending.[96] We agree that under those conditions a board retains jurisdiction to consider new contentions. We have, without objection, twice kept this proceeding open for the purpose that the Staff identifies.[97] The Staff's acknowledgement of continuing board jurisdiction under such conditions is consistent with our view that the presence

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[93] See Bruesewitz v. Wyeth LLC, 131 S.Ct. 1068, 1076 (2011) (applying doctrine of expressio unius, exclusio alterius).

[94] Dominion argues that "Section 2.318(a) does not apply to present circumstances where there are no longer any admitted contentions that may result in a hearing, record, and decision." Dominion Reply at 4. This argument, however, rests on the implausible and premature assumption that because there is no contention pending at the moment, no new contentions will be admitted, no evidentiary hearing will be required, and no decision will issue. See supra at page 21.

[95] NRC Staff Answer at 6.

[96] Id. (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002); LBP-10-17, 72 NRC at ___ (slip op. at 4-5, 19)).

[97] See supra pages 3-5.

of a pending contention is not invariably required for licensing board jurisdiction, and that licensing boards need not necessarily dismiss adjudicatory proceedings whenever the last pending contention is resolved. We fail to see any basis in the agency's regulations, however, for limiting a board's continuing jurisdiction to only the specific situation noted by the Staff. As we have explained, during the licensing process the application is often amended multiple times before the SER and EIS are issued, the initially admitted contentions are commonly mooted and dismissed, and new or amended contentions may be proposed for admission. Given the plain language of Section 2.318(a) and the dynamic nature of the licensing process, we think it equally clear that boards have the authority to rule on new or amended contentions arising from the ongoing licensing process even if they do not arise in the specific manner that the Staff identifies.

Also, we find nothing in the regulations to suggest that an intervenor loses its status as a party to the licensing proceeding or forfeits its right to a hearing whenever its admitted contention has become moot prior to the issuance of the SER and required Staff NEPA documents. A foundational aspect of NRC adjudicatory proceedings is that a hearing request and party status as an intervenor may only be granted to a petitioner if it demonstrates standing pursuant to 10 C.F.R. § 2.309(d) and proffers at least one admissible contention pursuant to 10 C.F.R. § 2.309(f).[98] But once these criteria have been satisfied and the request for a hearing has been granted, neither Section 2.309 nor any other regulation mandates that the intervenor must at all times prior to the hearing have an admitted or proposed contention pending before the Board. Of course, the intervenor must have at least one pending contention by the time of the evidentiary hearing, but nothing in Section 2.309 requires that throughout the course of the adjudicatory proceeding there must always be at least one contention pending before the

[98] 10 C.F.R. § 2.309(a).

board.[99] This is significant because Section 2.309 contains a detailed list of requirements governing both the timing and admissibility of contentions. The Commission has emphasized that the rules on contention admissibility are "strict by design."[100] Had the Commission intended to require that the proceeding be terminated and the intervenor lose its party status and right to a hearing whenever it temporarily lacks a pending contention, the Commission would have included such a mandate in its comprehensive list of strict requirements.

The agency's regulations also show that the Commission expects boards to take into account the dynamic nature of the licensing process in managing adjudicatory proceedings. Shortly after a hearing request has been granted, the board must set a schedule to govern the proceeding.[101] The board must use the applicable Model Milestones in 10 C.F.R. Part 2, Appendix B as a "starting point" for the schedule, although the board "shall make appropriate modifications" based upon the circumstances of each case.[102] The Model Milestones permit the filing of "[p]roposed late-filed contentions on SER and necessary NEPA documents" to be filed within thirty days of the issuance of those documents.[103] As explained previously, our

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[99] Similarly, we find nothing in the definition of "contested proceeding" to require that the proceeding terminate during any period when there is no contention pending before the Board. As relevant here, a "contested proceeding" is defined as "[a] proceeding in which a petition for leave to intervene in opposition to an application for a license or permit has been granted or is pending before the Commission." Id. § 2.4. Thus, the Board's ruling granting BREDL's Petition for Intervention and Request for Hearing initiated a contested proceeding. Given that the definition contains no specific termination point for a contested proceeding, it provides no support to Dominion's argument that we must terminate this proceeding before BREDL can file new contentions based on the SER, the new SEIS, or the Fukushima accident.

[100] Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), pet. for reconsideration denied, CLI-02-01, 55 NRC 1 (2002).

[101] 10 C.F.R. § 2.332(a).

[102] Id. § 2.332(b).

[103] 10 C.F.R. Part 2, app. B, § II.

scheduling orders incorporated this Model Milestone, among others. Nothing in Appendix B conditions an intervenor's right to file new contentions based on the SER and necessary NEPA documents on whether previously admitted contentions are still pending.

Moreover, in the Model Milestones for Subpart L proceedings, the Commission directs boards to consider when establishing a schedule "the NRC's interest in providing a fair and expeditious resolution of the issues sought to be admitted for adjudication in the proceeding," along with other factors.[104] The Commission's choice of language is significant because, in the preceding section, which concerns scheduling in an enforcement or other action conducted under 10 C.F.R. Part 2, Subpart G, the Commission referred only to "the NRC's interest in providing a fair and expeditious resolution of the issues to be adjudicated in the proceeding."[105] In Subpart L proceedings such as this, the Commission, by referring instead to "a fair and expeditious resolution of the issues sought to be admitted for adjudication in the proceeding,"[106] made clear that boards should develop schedules that would provide a fair and expeditious procedure for resolving new or amended contentions that might be proposed during the course of the proceeding, not just those already admitted.

The Commission has also provided that "[a] presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order," and that "[t]he presiding officer has all the powers necessary to those ends . . . ."[107] We see nothing terminating this broad grant of authority to manage the prehearing and hearing process solely because, during an intermediate stage of that process, the previously pending contentions have been mooted and they have not

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[104] Id.

[105] 10 C.F.R. Part 2, app. B, § I.

[106] 10 C.F.R. Part 2, app. B, § II (emphasis added).

[107] 10 C.F.R. § 2.319 (emphasis added).

yet been replaced by at least one other contention. Given the dynamic nature of the licensing process, it would better serve the Commission's goals of avoiding delay and maintaining order for the Board to continue to preside over the adjudicatory proceeding.

If Dominion and the Staff are correct that the adjudicatory proceeding must end now, however, then the binding effect of our scheduling orders would also terminate, the parties would be left to guess what deadlines would govern the filing and adjudication of any future contentions, and there would no longer be any control of the prehearing and hearing process. This would frustrate the Commission's intent that licensing boards provide a fair and expeditious schedule for regulating "the issues sought to be admitted for adjudication in the proceeding,"[108] and would prevent boards from exercising "all the powers necessary" to "control the prehearing and hearing process, to avoid delay and to maintain order."[109]

We therefore conclude that, under the relevant NRC regulations, we continue to have jurisdiction in this adjudicatory proceeding for the conduct of a hearing on the North Anna Unit 3 COLA.

3. Premature termination of this adjudication could unlawfully restrict BREDL's right to a hearing

Dominion's argument presents another significant problem. If the adjudicatory proceeding must be terminated at this point, long before the licensing proceeding is completed, then, to be consistent with AEA Section 189a as interpreted in Union of Concerned Scientists,[110] the agency must provide an appropriate procedure that would allow an intervenor to reopen the terminated proceeding to propose new contentions based on new and material information

[108] 10 C.F.R. Part 2, app. B, § II.

[109] 10 C.F.R. § 2.319.

[110] Union of Concerned Scientists, 735 F.2d at 1443.

generated later in the licensing process.[111] But the regulations do not provide such a procedure. The only relevant regulation that in any way concerns reopening a closed proceeding, 10 C.F.R. § 2.326, is of no help because it concerns reopening a closed evidentiary record, that is, the record that exists after an evidentiary hearing.[112] Section 2.326 expressly refers to "[a] motion to reopen a closed record to consider additional evidence" and "newly proffered evidence."[113] Evidence can only be "additional" or "newly proffered" if an evidentiary record already exists. Thus, the term "closed record" in Section 2.326 must refer to a record developed at an evidentiary hearing. But, in this case, the evidentiary record has not even opened, much less closed. Section 2.326 would also require BREDL to show that a "materially different result would . . . have been likely" if the new contention is admitted.[114] But, if BREDL files a new contention based on new information in future Staff documents, it likely will be arguing issues that differ from those previously resolved by the Board, as is its right under AEA Section 189a, rather than for a change in the Board's earlier rulings dismissing previously admitted contentions as moot. Thus, the requirements of Section 2.326 have no logical application at this juncture of an adjudicatory proceeding.

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[111] The general admissibility and timeliness requirements for new contentions based on new information are in 10 C.F.R. § 2.309(c), (f)(1)(i)-(vi), and (f)(2). Those regulations, however, do not include a procedure for reopening a closed adjudicatory proceeding.

[112] In a proceeding such as ours to be conducted under Subpart L, we view the evidentiary record as opened upon the filing of the first initial written statements of position and written testimony with supporting affidavits on the admitted contentions. See 10 C.F.R. §§ 2.1207 (outlining the procedure for filings in an oral hearing), 2.1208 (outlining the procedure for filings in a written hearing).

[113] 10 C.F.R. § 2.326(a)(3).

[114] Id.

The Commission has implicitly recognized that it would be inequitable to apply the reopening requirements when, due to factors beyond a party's control, it presently lacks the information to frame an admissible contention.

> [B]ecause Intervenors' inability to satisfy our contention admissibility rules in this instance is due to factors beyond their control, we decline to adopt the Staff's and the Applicant's position that we require Intervenors to meet both our strict late-filing requirements and our even stricter reopening standards if Intervenors identify safety issues during the upcoming years of ongoing construction. Rather, if Intervenors file a new or amended Contention 7, with supporting materials, within 60 days after pertinent information . . . first becomes available, then the contention will be deemed timely filed and Intervenors will be absolved of their obligation to satisfy the late-filing requirements of 10 C.F.R. § 2.309(c). Likewise, under those same circumstances, Intervenors need not satisfy our regulatory requirements for reopening the record.[115]

In this case, not only would imposing the reopening requirements be inequitable, it would be unlawful as well if doing so precluded BREDL from litigating an otherwise admissible contention. The AEA does not grant the NRC the discretion "to eliminate from the hearing material issues in its licensing decision."[116] The agency may impose reasonable requirements on new contentions when those requirements are related to legitimate agency goals such as avoiding needless duplication and delay.[117] Nevertheless, "[a]lthough the Commission retains broad authority to define standards and thresholds for determining when new information raises a material issue of a plant's conformity with the [Atomic Energy] Act, if such information is presented, it must provide a hearing upon request."[118] Requiring BREDL to meet the stringent reopening requirements designed for entirely different cases where there has been an

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[115] MOX, CLI-09-02, 69 NRC at 65.

[116] Union of Concerned Scientists, 735 F.2d at 1447.

[117] See Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 920 F.2d 50, 55-56 (D.C. Cir. 1990).

[118] Nuclear Info. & Res. Serv. v. U.S. Nuclear Regulatory Comm'n, 918 F.2d 189, 195 (1990), aff'd and rev'd on reh'g on other grounds, 969 F.2d 1169 (D.C. Cir. 1992).

evidentiary hearing would unreasonably and unfairly restrict BREDL's ability to obtain a hearing based on material new information. Arbitrary and unreasonable restrictions on the right to a hearing would violate AEA Section 189a.[119] Such restrictions would also violate the Administrative Procedure Act's prohibition on agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[120]

The Board "has the duty to conduct a fair and impartial hearing according to law," and has "all the powers necessary" to that end.[121] Given the lack of an appropriate mechanism for an intervenor to reopen a terminated proceeding to propose new contentions based on new and material information generated later in the licensing process, we decline to terminate this proceeding now.

4. NRC case law

None of the NRC case law cited by Dominion or the NRC Staff requires termination of this proceeding in the present circumstances.

Dominion cites Turkey Point, in which the Commission warned licensing boards not to raise issues sua sponte when the sole intervenor has withdrawn from the proceeding.[122] The Commission relied on an unpublished order in Fort St. Vrain for the proposition that once the sole intervenor in a proceeding withdraws, the proceeding has been brought to a close.[123] Here, in contrast, we have not received a notice of withdrawal or any other indication that BREDL

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[119] See id.

[120] 5 U.S.C. § 706(2)(A).

[121] 10 C.F.R. § 2.319.

[122] Turkey Point, CLI-91-13, 34 NRC at 188; Dominion Motion at 2-3.

[123] Turkey Point, CLI-91-13, 34 NRC at 188 n.1 (citing Fort St. Vrain Commission Order).

intends to withdraw from this proceeding, and we have not raised any issues sua sponte. This case is therefore readily distinguishable from Turkey Point.

In the Summer COL proceeding, also cited by Dominion,[124] the licensing board terminated the proceeding on remand from the Commission when it found petitioners proffered no admissible contentions. But that board, unlike this one, neither granted the petition to intervene nor admitted any contentions at the start of the proceeding.[125] The petitioners in Summer appealed, and that appeal was rejected by the Commission, which affirmed the licensing board's dismissal of the petitioners' hearing request and termination of the proceeding.[126] Here, by contrast, we granted BREDL's petition to intervene and hearing request.[127] BREDL accordingly became a party to the licensing proceeding and entitled under AEA Section 189a to a hearing on issues material to the licensing decision. Therefore, neither the Summer board's ruling nor the Commission's decision affirming that ruling dictates that we must terminate this case.[128]

The Staff cites the Appeal Board's decision in Trojan for the proposition that licensing boards may only decide the issues contested by the parties, and that the case should be dismissed once those issues are no longer in dispute.[129] In that spent fuel pool amendment

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[124] Dominion Motion at 3.

[125] South Carolina Elec. & Gas Co. & South Carolina Pub. Serv. Auth. (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-10-06, 71 NRC 350, 357-58, 385-86 (2010), aff'd, CLI-10-21, 72 NRC __ (slip op.) (Aug. 27, 2010).

[126] Summer, CLI-10-21, 72 NRC at __ (slip op. at 6).

[127] LBP-08-15, 68 NRC at 337-38.

[128] The same factors also distinguish this case from Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 120-21 (2009) (affirming a licensing board's use of the reopening standard to evaluate the admissibility of contentions submitted after the board denied petitioners' hearing request).

[129] NRC Staff Answer at 4 (citing Trojan, ALAB-796, 21 NRC at 5).

proceeding, "[a]fter a brief hearing on the admitted contentions, the applicant filed proposed findings of fact and conclusions of law that the intervenor . . . and the NRC Staff then adopted."[130] As the Appeal Board explained, "[a]t that point there was, in effect, a stipulated resolution or a settlement of the contested issues and thus no need for the Board below to do anything more than dismiss the proceeding."[131] Thus, Trojan stands for the unremarkable proposition that, if the parties settle their dispute after a hearing, the board should dismiss the adjudication. Here, however, there has been neither a settlement nor a hearing on admitted contentions, and a hearing might be required to resolve contentions based on the SER, the new SEIS, or the Fukushima accident.

The Staff also cites the Appeal Board's ruling in Indian Point,[132] but that ruling is also inapposite. The decision arose from the application for an operating license for Indian Point Unit 3. The licensing board had conducted the contested hearing, the board had issued its decision, that decision had been reviewed by the Appeal Board, and the Commission had authorized the issuance of a full-term, full-power operating license.[133] After all this, an organization that had not intervened in the adjudicatory proceeding filed a petition seeking to raise issues related to the seismic design of the plant.[134] The Appeal Board held that, because the licensing board's hearing had concluded and the seismic issues raised in that proceeding

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[130] Trojan, ALAB-796, 21 NRC at 5.

[131] Id. at 5.

[132] NRC Staff Answer at 4, 5 n.4 (citing Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1, 2, & 3), ALAB-319, 3 NRC 188, 189-91 (1976)).

[133] Indian Point, 3 NRC at 191-93.

[134] Id. at 188, 191.

had been resolved or abandoned, the adequacy of the seismic design of Indian Point Unit 3 was now a matter within the jurisdiction of the NRC Staff.[135]

Nothing in that ruling addresses the situation presented here, where no hearing has been or could have been held, no decision has been issued, no appellate review has occurred, and no license has been authorized. In Indian Point, the agency had fulfilled its statutory obligation under AEA Section 189a to provide those who had successfully intervened in the adjudicatory proceeding with a hearing on issues material to the licensing decision. Here, by contrast, the Board has held no evidentiary hearing on any issue. It has merely resolved two admitted contentions related to the no longer relevant ESBWR design by declaring them moot, and ruled that various other contentions are inadmissible. We can hardly determine based on those rulings whether the agency has fulfilled its statutory responsibility under Section 189a to provide a hearing on all contested issues material to the licensing decision. Issues related to the new reactor design and its potential environmental consequences have not been, and could not have been, fully resolved because the Staff has neither issued the SER or the new SEIS that will take into account the new design. In addition, the potential remains that BREDL may file contentions related to the Fukushima accident. Thus, in this case, unlike Indian Point, a contested hearing might still be required. It is therefore appropriate that this adjudicatory proceeding, leading potentially to such a hearing, should continue. Nothing in Indian Point suggests otherwise.

Other rulings cited by Dominion and the Staff are licensing board orders, not Commission or Appeal Board decisions. Not only are the rulings of other licensing boards not binding upon us, we also see no indication in any of those orders that the boards believed the particular procedure they chose to follow was compelled by agency regulation or precedent. For example, in the Comanche Peak COL and Vogtle COL proceedings, the licensing boards

[135] Id. at 193.

chose to terminate the adjudications when faced with no pending contentions, but they did not state that they were compelled to do so by Commission precedent or agency regulation.[136] Similarly, in the North Anna ESP proceeding, the licensing board chose to terminate the contested portion of that proceeding after granting summary disposition on the only pending contentions, but that board also did not state that its decision was compelled by either precedent or regulation.[137] The Oyster Creek licensing board said that the dismissal of all pending contentions on mootness grounds due to new information "ordinarily would terminate the proceeding," but that board permitted new contentions to be filed on the new information before terminating the proceeding.[138] On the other hand, the Savannah River board terminated the proceeding only after all admitted contentions were resolved and "the time for late-filed

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[136] Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-11-04, 73 NRC __ (slip op. at 40) (Feb. 24, 2011); Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC __ (slip op. at 18) (May 19, 2010). In Vogtle COL, subsequent to the original board's termination of the proceeding, the intervenors filed a new contention, and the original Vogtle COL board referred that contention to the Commission. Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4) Licensing Board Order (Referring Request to Admit New Contention to the Commission) (Aug. 17, 2010) at 1-3 (unpublished). The Secretary of the Commission, pursuant to her authority under 10 C.F.R. § 2.346(i) to refer requests for hearing to the Atomic Safety and Licensing Board Panel, issued a brief order referring the new contention to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action. Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4) Secretary Order (Aug. 25, 2010) at 1 (unpublished). The Chief Judge appointed a new board (consisting of the same members as the old board), which held that the new contention did not meet the reopening standard, deemed that contention untimely and inadmissible, and again terminated the adjudicatory proceeding. Vogtle, LBP-10-21, 72 NRC __ (slip op. at 2, 4-5, 22-26, 28-41).

[137] Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-06-24, 64 NRC 360, 365 (2006).

[138] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744 (2006). Importantly, the Oyster Creek board did not say what would "ordinarily" terminate a proceeding in similar circumstances.

contentions on the Staff's FSER ha[d] expired without any such contentions being filed."[139] That approach is equivalent to the one we follow here.

The boards in those cases did not attempt to prescribe a rule for all other boards to follow, just as our decision does not announce a categorical rule for all future proceedings. We decide only that the procedure we have followed is within the bounds of our delegated authority and appropriate for this case.

III. CONCLUSION

For the foregoing reasons, we decline to terminate this proceeding and therefore deny Dominion's Motion for Clarification. Unless and until there is at least one admitted contention, however, Dominion's and BREDL's disclosure obligations pursuant to 10 C.F.R. § 2.336(a) and our prior scheduling orders are suspended. The NRC Staff's obligation to update its Hearing File pursuant to 10 C.F.R. §§ 2.336(b) and 2.1203 is not suspended. We will consider suspending that obligation when and if the Staff requests that we take that action.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ronald M. Spritzer, Chairman

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 1, 2011

[139] See Savannah River, LBP-05-15, 62 NRC at 54.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Virginia Electric and Power Company d/b/a	)	
Dominion Virginia Power (DVP or Dominion)	)	Docket No. 52-017-COL
and Old Dominion Electric Cooperative (ODEC)	)	
	)	
(North Anna Power Station, Unit 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Dominion's Motion for Clarification of LBP-11-10) (LBP-11-22)** have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. 52-017-COL
MEMORANDUM AND ORDER (Denying Dominion's Motion for Clarification of LBP-11-10) (LBP-11-22)

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[Original signed by Christine M. Pierpoint]
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Dated at Rockville, Maryland
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