

February 10, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DOMINION NUCLEAR NORTH ANNA, LLC)	Docket No. 52-008-ESP
)	
(Early Site Permit for North Anna ESP Site))	ASLBP No. 04-822-02-ESP

NRC STAFF ANSWER SUPPORTING DOMINION'S MOTION FOR RECONSIDERATION OF
INITIAL SCHEDULING ORDER, OR, IN THE ALTERNATIVE, FOR CERTIFICATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the Nuclear Regulatory Commission ("Staff") herein answers the motion of applicant Dominion Nuclear North Anna, LLC ("Dominion" or "Applicant")¹ requesting that the Atomic Safety and Licensing Board ("Licensing Board") reconsider that portion of its Initial Scheduling Order² providing for an opportunity to request the use of 10 C.F.R. Part 2, Subpart G procedures in this proceeding. For the reasons set forth below, the Staff agrees with the Applicant that an opportunity to request Subpart G procedures at this juncture in the proceeding is neither necessary nor consistent with the intent of the revised Part 2 rules.

DISCUSSION

On January 19, 2005, the Licensing Board issued the Initial Scheduling Order for this proceeding. Among other things, the Licensing Board established the following deadline with respect to the contested portion of this proceeding, pertaining to EC 3.3.2:

¹ See "Dominion's Motion for Reconsideration of Initial Scheduling Order, or in the Alternative, for Certification," dated January 31, 2005 ("Motion").

² See *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), Initial Scheduling Order, slip op. Jan. 19, 2005.

June 15, 2005: Deadline for filing request pursuant to 10 C.F.R. §§ 2.309(g) and 2.310(d) for a Subpart G proceeding based on credibility of an eyewitness newly identified under paragraph 1(c) above.³

Initial Hearing Order, slip op. at 4. Thereafter, on January 31, 2005, Dominion filed the instant Motion. While the Staff agrees generally with the arguments set forth by Dominion in its Motion, and will not repeat them here, the Staff believes that two points merit additional discussion.

First, the Initial Scheduling Order permits a request for a Subpart G proceeding for a particular narrow circumstance: the credibility of a newly identified eyewitness. In its Motion (at 5), Dominion notes that “there could be special circumstances where the [Licensing] Board might allow some cross-examination of particular witnesses.” Indeed, the Staff submits that the provisions of 10 C.F.R. § 2.1204(b) are intended, *inter alia*, for just such circumstances. Section 2.1204(b) specifically provides, among other things, that a party may file a motion to permit cross-examination by the parties on particular admitted contentions or issues, if the Presiding Officer determines that cross-examination is necessary to ensure the development of an adequate record for decision. Eyewitness credibility on a particular issue or contention might form a basis for such a motion under appropriate circumstances. As noted by Dominion, however, the Presiding Officer selects hearing procedures pursuant to 10 C.F.R. § 2.309(g) with respect to a particular *contention*, not a particular *witness*. To allow a switch to Subpart G procedures based on an allegation that the credibility of a single eyewitness may reasonably be at issue with respect to the resolution of an admitted contention in a proceeding, seems to render Section 2.1204(b) a nullity.

Second, a primary purpose of the revised Part 2 rules is to make the NRC’s hearing process more effective and efficient. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2182 col. 1 (Jan. 14, 2004). In determining the governing hearing track at the outset of a

³ Paragraph 1(c) provides that, no later than June 1, 2005, the parties “shall file a final list of eyewitnesses for whom written testimony is to be submitted under 10 C.F.R. § 2.1207(a)(1) and, if known, 2.1207(a)(2).”

proceeding, all parties can plan and prepare for a certain type of proceeding. Allowing a hearing track to be switched to Subpart G mid-stream, even late, in a proceeding, increases the burden on all parties, contrary to the intent of the revised rules of practice.

In sum, the Staff agrees with Dominion's alternative proposal setting a deadline for requests for cross-examination or other procedural modification relating to the presentation of testimony or evidence.⁴ The Staff believes that the existing Subpart L procedures provide sufficient procedural protections for all parties, without resorting to a Subpart G proceeding at a later date.

CONCLUSION

For the reasons set forth above, the Staff agrees that the Licensing Board should reconsider the portion of the Initial Scheduling Order discussed herein or, in the alternative, certify its ruling to the Commission for further review.

Respectfully submitted,

/RA/

Robert M. Weisman
Brooke D. Poole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of February, 2005

⁴ On February 7, 2005, Intervenor Blue Ridge Environmental Defense League, Nuclear Information and Resource Service and Public Citizen filed an answer to the Motion, in which they stated that they did not oppose Dominion's request modification as it applies to EC 3.3.2 only. See "Intervenor's Response to Dominion's Motion for Reconsideration," dated February 7, 2005. In this vein, the Staff notes that, should any late-filed contention be admitted in this proceeding, the Licensing Board will determine the hearing track to be followed for such a contention at the time of its admission. See 10 C.F.R. § 2.310.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER SUPPORTING DOMINION'S MOTION FOR RECONSIDERATION OF INITIAL SCHEDULING ORDER, OR, IN THE ALTERNATIVE, FOR CERTIFICATION" in the captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail, this 10th day of February, 2005:

Alex S. Karlin, Chairman*
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ASK2@nrc.gov)

Office of Commission Appellate
Adjudication
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Thomas S. Elleman**
Administrative Judge
Atomic Safety and Licensing Board Panel
5207 Creedmoor Road, # 101
Raleigh, NC 27612
(E-mail: TSE@nrc.gov)

Office of the Secretary*
ATTN: Docketing and Service
Mail Stop: 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: HEARINGDOCKET@nrc.gov)

Richard F. Cole*
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: RFC1@nrc.gov)

Diane Curran, Esq.**
Harmon, Curran, Spielberg
& Eisenberg LLP
1726 M Street NW, Suite 600
Washington, DC 20036
(E-mail: dcurran@harmoncurran.com)

Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

David R. Lewis, Esq.**
Robert B. Haemer, Esq.**
Shaw Pittman, LLP
2300 N Street, N.W.
Washington, DC 20037
(E-mail: david.lewis@shawpittman.com
robert.haemer@shawpittman.com)

Lillian M. Cuoco, Esq.**
Dominion Resources Services, Inc.
Rope Ferry Road
Waterford, CT 06385
(E-mail: Lillian_Cuoco@dom.com)

Paul Gunter**
Director, Reactor Watchdog Project
Nuclear Information and Resource Service
1424 16th Street, NW #404
Washington, DC 20036
(E-mail: nirsnet@nirs.org)

Jonathan M. Rund, Esq.*
Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: JMR3@nrc.gov)

Michele Boyd**
Legislative Representative, Public Citizen
215 Pennsylvania Avenue, SE
Washington, DC 20003
(E-mail: mboyd@citizen.org)

Richard A. Parrish, Esq.**
Southern Environmental Law Center
201 West Main Street
Charlottesville, VA 22902
(E-mail: rparrish@selcva.org)

/RA/

Robert M. Weisman
Counsel for NRC Staff