RAS 9315

January 31, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



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

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

Dominion Nuclear North Anna, LLC ("Dominion") hereby moves the Atomic Safety and Licensing Board ("the Board") for reconsideration of the portion of its January 19, 2005 Initial Scheduling Order establishing a June 15, 2005 deadline for a request for a Subpart G proceeding. Dominion respectfully submits that this portion of the Initial Scheduling Order is inconsistent with the new Rules of Practice, which require the applicable hearing procedures to be addressed and established at the outset of a proceeding. Moreover, switching to subpart G procedures (with the time-consuming and expensive formal discovery procedures that would then apply) in mid-proceeding, and shortly before the evidentiary hearing, would significantly delay and disrupt this proceeding. If the Board denies this motion for reconsideration, Dominion requests that the Board certify this question to the Commission for interlocutory review.

Under the new Rules of Practice, a person petitioning to intervene in a proceeding has the burden of demonstrating, in its initial petition, that Subpart G procedures are appropriate. 10

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SECY-02

C.F.R. § 2.309(g) permits[1] a petitioner to address the selection of hearing procedures in its intervention petition, and provides:

> If a request/petition relies upon § 2.310(d) [governing use of Subpart G procedures in reactor licensing proceedings], **the request/petition must demonstrate** by reference to the contention and bases provided and the specific procedures in subpart G of this part, that resolution of the contentions necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

10 C.F.R. § 2.309(g) (emphasis added). In promulgating this provisions, the Commission explained,

> Section 2.309(g) requires that the request for hearing/petition to intervene address the question of the type of hearing procedures (*e.g.*, formal hearing under Subpart G, informal hearings under Subpart L, "fast track" informal procedures under Subpart N) that should be used for the proceeding. This is not a requirement for admission as a party to a proceeding, but a requestor/petitioner who fails to address the hearing procedure issue would not later be heard to complain in any appeal of the hearing procedure selection ruling. In addition, the final rule requires that if the requestor/petitioner asks for a formal hearing on the basis of § 2.310(d), the request for hearing/petition to intervene must demonstrate, by reference to the contentions and the bases provided and the specific procedures in Subpart G, that resolution of the contention necessitates resolution of material issues of fact which may best be determined through use of the identified procedures.

69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004). See also id. at 2,202-03. Thus, the new Rules of Practice contemplate that the petition must address the potential use of Subpart G procedures as a threshold matter.

Similarly, the new rules require a Licensing Board to establish the applicable hearing procedures at the outset of the proceeding. 10 C.F.R. § 2.310 requires a Licensing Board to

[1] The first sentence of 10 C.F.R. § 2.309(g) is permissive presumably because there is no need for a petitioner to address the selection of hearing procedures if the petitioners accepts the Subpart L procedures as appropriate. The second sentence of 10 C.F.R. § 2.309(g) make it clear that if a petitioner wants to use Subpart G procedures, its petition must demonstrate that those procedures are appropriate.

determine the hearing procedures to be used "[u]pon determination that a request for hearing will be granted."

Moreover, the selection of hearing procedures is determined by the nature of the admitted contentions, and not by the subsequent selection of witnesses. 10 C.F.R. § 2.309(g) requires a demonstration by a petitioner "by reference to the contention and bases" that resolution of a contention necessitates use of Subpart G procedures. 10 C.F.R. § 2.310(d) provides that the hearing on the contention will be conducted under Subpart G if a Licensing Board finds "that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue. . . ." The statement of consideration explains that this finding is "based upon the materials submitted in the request for hearing/petition to intervene under § 2.309." 69 Fed. Reg. at 2,222. Accordingly, under these rules, if – and only if – an intervention petition requests that certain contentions be resolved through Subpart G procedures, the Licensing Board examines each such contention to determine (1) whether it necessitates resolution of material facts related to the occurrence of a past activity, and (2) if so, whether the credibility of eyewitnesses "may reasonably be expected." 69 Fed. Reg. at 2,222. The test is not based on the identification of actual witnesses.

Consistent with these procedures, the Licensing Board in this proceeding has already ruled, in its Memorandum and Order (Ruling on Standing and Contentions), that "Unless all parties agree that this proceeding should be conducted pursuant to 10 C.F.R. Part 2, Subpart N, this proceeding will be conducted in accordance with the procedures of 10 C.F.R. Part 2, Subparts C and L." Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP

Site), LBP-04-18, 60 N.R.C. 253, 272 (2004).[2] As reported during the September 15, 2004 conference call, Intervenors have not agreed to follow Subpart N. Tr. 420 (Parrish).

Pursuant to 10 C.F.R. § 2.311(d), the Board's ruling selecting hearing procedures could be appealed no later than ten days after issuance of the order selecting the procedure. Intervenors filed no such appeal.

Section II.1.d of the Initial Scheduling Order now provides a 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." Initial Scheduling Order at 4. Neither 10 C.F.R. § 2.309(g) nor 10 C.F.R. § 2.310(d) provides for such requests except in an initial intervention petition. Intervenors did not argue for the need to use Subpart G procedures when they filed their contentions, did not appeal the Board's previous selection of procedures, and have no entitlement to a second opportunity.[3]

Further, the second opportunity for Subpart G requires could seriously disrupt and delay this proceeding. A subpart G proceeding includes an opportunity for interrogatories, documents requests, requests for admission, and depositions. If the Board were to grant a request made in mid-June for a Subpart G proceeding, the added discovery alone could add many months to the

[2] Intervenors declined to address the selection of hearing procedures in their petition for intervention. Dominion argued that Subpart L procedures were appropriate, both because of the nature of the contentions and because Intervenors had not met the burden of demonstrating that Subpart G procedures are appropriate. Dominion's Answer to Petitioners' Contentions (May 25, 2004) at 59.

[3] Dominion is also concerned that the Initial Scheduling Order could be construed as changing the standard for selection of hearing procedures. As discussed above, the test in the NRC rules for determining use of Subpart G focuses on the contention and bases (see 10 C.F.R. § 2.309(d)), and the threshold question is whether resolution of the contention necessitates resolution of material issues of fact **"related to the occurrence of a past activity."** 10 C.F.R. § 2.311(d). Dominion does not understand how the identification of witnesses on the remaining contention EC 3.3.2 could change the Board's prior determination under this test. Contention EC 3.3.2 relates to whether the Environmental Report has adequately considered the future impacts of proposed reactors on striped bass arising from the projected increased water temperature resulting from new units, and not to "to the occurrence of a past activity."

schedule, at time when all the parties contemplated that they would be preparing to proceed with the evidentiary hearing. It is likely for this very reason that the Commission's new rules require the hearing procedure to be selected at the outset of a proceeding.

In addition, a wholesale shift to Subpart G procedures would apply the formal rules to all testimony. As a result, the subsequent identification of any eyewitness could result not only in discovery and cross-examination pertaining to that witness, but discovery and cross-examination of all other witnesses, including experts whose testimony is unrelated to past occurrences. Further, such an approach could effectively eliminate the use of informal hearing procedures intended by the Commission, because resolution of virtually every contention will involve establishing some facts (such as the foundation for the expert testimony).

Dominion recognizes that there could be special circumstances where the Board might allow some cross-examination of particular witnesses. Motions to allow cross-examination are permitted by 10 C.F.R. § 2.1204(b), and can be granted within the framework of Subpart L. In addition, Dominion recognizes that there could be special circumstances where a party might seek the Board's leave to depose a witness (or where parties voluntarily agree to a limited number of depositions). The Board has the authority under 10 C.F.R. § 2.336(a) to modify the discovery rules in a Subpart L proceeding if such a request is warranted. By these means, if the credibility of a particular witness becomes an issue, a Licensing Board can allow additional procedures pertaining just to that witness, without upsetting the entire proceeding. Dominion does not object to a deadline for requesting cross-examination or other procedures, but believes that allowing requests "for a Subpart G proceeding" would exceed the Commission's expectations, the regulatory text, and the rulemaking history.

Accordingly, Dominion requests that the Board reconsider its Initial Scheduling Order and modify section II.1.d to instead state:

> June 15, 2005. Deadline for requests pursuant to 10 C.F.R. § 2.1204 for cross-examination by the parties, or for any other procedural modification relating to the presentation of testimony or evidence.

In the event that the Board denies this motion for reconsideration, Dominion requests, in the alternative, that the Board certify and refer the following question to the Commission for immediate review:

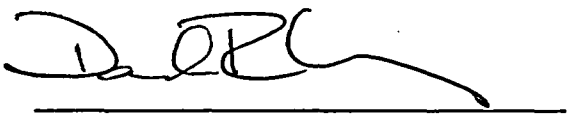
> Do the Commission's rules allow an intervenor a second opportunity to request use of Subpart G procedures, prior to the filing of testimony?

Pursuant to 10 C.F.R. §§ 2.319(l), 2.323(f), and 2.341(f), certification and referral of this issue to the Commission is appropriate, because it raises significant and novel legal and policy issues, the resolution of which would materially advance the orderly disposition of the proceeding. The provisions for selecting hearing procedures are new, having been issued in January 2004, and there is no precedent on how they should be applied. Dominion submits that a change in hearing procedures shortly before the evidentiary hearings could significantly disrupt and delay the proceeding. The potential need for Dominion to comply with the additional discovery rules that would result from a change to Subpart G would add many months to the schedule. It would also subject Dominion (which has already complied with the initial disclosure obligations) to the unusual expense of having to comply with two sets of discovery procedures. As a matter of policy, the selection of hearing procedures should be established at the outset of a proceeding, as the rules contemplate.

In accordance with 10 C.F.R. § 2.323(b), counsel for Dominion has discussed this motion with counsel for the other parties in this proceeding in an attempt to resolve this issue.

For all of the above stated reasons, the Board should reconsider its Initial Scheduling Order, or in the alternative, certify its ruling to requests for Subpart G proceedings to the Commission for immediate review.

Respectfully submitted,

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Dated: January 31, 2005

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## CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion's Motion for Reconsideration of Initial Scheduling Order, or in the Alternative, for Certification" were served on the persons listed below by deposit in the U.S. mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 31st day of January, 2005.

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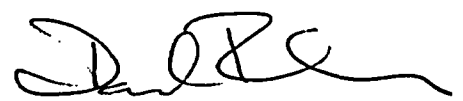

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