

June 3, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
VIRGINIA ELECTRIC AND POWER CO.,)
dba DOMINION VIRGINIA POWER,)
and OLD DOMINION ELECTRIC) Docket No. 52-017
COOPERATIVE¹)
)
(North Anna Power Station, Unit 3))

NRC STAFF ANSWER TO "REQUEST OF THE NORTH CAROLINA UTILITIES COMMISSION
FOR AN OPPORTUNITY TO PARTICIPATE IN ANY HEARING AND TO BE
ADDED TO THE OFFICIAL SERVICE LIST"

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission (NRC staff) answers the "Request of the North Carolina Utilities Commission for an Opportunity to Participate in any Hearing and to be Added to the Official Service List" (Request) filed on May 9, 2008. For the reasons set forth below, the NRC staff (Staff) is opposed to granting the North Carolina Utilities Commission (NCUC) interested State status pursuant to 10 C.F.R. § 2.315 at this time.

BACKGROUND

On November 26, 2007, the Virginia Electric and Power Co., doing business as Dominion Virginia Power (Dominion), and the Old Dominion Electric Cooperative (ODEC) (collectively Applicants) filed an application for a combined operating license (COL) with the NRC. Notice of Receipt and Availability of Application for a Combined License Dominion Virginia Power-North

¹ The style of this document reflects the Applicants' names identified in the notice published in the *Federal Register* on June 2, 2008. See "Virginia Electric and Power Company, d/b/a Dominion Virginia Power, and Old Dominion Electric Cooperative; Correction to Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3," 73 Fed. Reg. 31516 (June 2, 2008).

Anna Unit 3, 72 Fed. Reg. 70619, 70619 (Dec. 12, 2007). The NRC docketed the application on January 28, 2008. Dominion Virginia Power; Acceptance for Docketing of an Application for Combined License for North Anna Unit 3, 73 Fed. Reg. 6528, 6528 (Feb. 4, 2008). On March 10, 2008, the NRC published a notice of hearing, which provided members of the public with sixty days from the date of publication to file a petition for leave to intervene in this proceeding. 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. 12760, 12760-61 (March 10, 2008) ("Notice of Hearing").² In response to the Notice of Hearing, NCUC submitted its request on May 9, 2008.³

DISCUSSION

A. Legal Standards:

Section 274l. of the Atomic Energy Act of 1954, as amended (Act), requires that:

[w]ith respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to [§ 274c. of the Act], the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.⁴

² On April 18, 2008, the NRC issued a supplement to the Notice of Hearing. Dominion Virginia Power; Supplement to Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3; Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguard Information (SUNSI) and Safeguards Information (SGI) for Contention Preparation, 73 Fed. Reg. 21162, 21162 (Apr. 18, 2008).

³ The regulations do not prescribe a time within which an interested state must file a request to participate in a hearing. 10 C.F.R. § 2.315(c); *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 n.5 (1998).

⁴ Section 274c. of the Act specifies that the Commission will retain authority (rather than transferring that authority to a state with which it has entered into an agreement pursuant to § 274b.) with respect to the regulation of, *inter alia*, the construction and operation of any utilization facility, *i.e.*, including a nuclear power reactor. Section 274c. of the Act, 42 U.S.C. § 2021(c).

Section 274I. of the Act, 42 U.S.C. § 2021(I). The Commission has implemented this statutory requirement in 10 C.F.R. § 2.315(c) (formerly § 2.715(c)), which requires the presiding officer to “afford an interested State, local governmental body (county, municipality or other subdivision), and affected, Federally-recognized Indian Tribe, which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing.” 10 C.F.R. 2.315(c) (2008). In § 2.315(c), the Commission has done more than § 274I. requires, since the regulation extends to “an interested State,” not merely to a state in which the reactor will be located.⁵ *Exxon Nuclear Co. Inc.* (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873, 876 (1977) (*Exxon*). The Commission has often afforded a governmental entity an opportunity under § 2.315(c) (§ 2.715(c)) to participate in a proceeding on an application for a facility that is not located within its borders. *Exxon*, ALAB-447, 6 NRC at 875 n.8 (citing cases). Such an entity need not satisfy the standing requirements of § 2.309(d) in order to participate in an NRC proceeding under § 2.315(c). See *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 n.5 (1998). Rather, the Commission has granted such participation by dint of the connection between the entity and the application, e.g., a discharge from a proposed facility close to the borders of an adjoining State may affect the quality of the waters in the adjoining State. See, e.g., *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-74-32, 8 AEC 217, 217-18 (1974)(Maryland waters may be affected by facility in Pennsylvania).⁶

⁵ The Commission has long recognized the benefits of participation in its proceedings by representatives of interested states, counties, municipalities, and other interested governmental entities. *Power Authority of the State of New York, and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000) (FitzPatrick), *citing Niagara Mohawk Power Corp., New York State Elec. & Gas Corp., and Amergen Energy Co., LLC* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 344 (1999)(Nine Mile Point).

⁶ A state having emergency preparedness responsibilities with respect to a facility located in a neighboring state might be another example. See pg. 5 note 8, *infra*.

Not all organizations with governmental ties are entitled to participate in NRC proceedings as “governmental agencies.” See *Yankee Atomic*, CLI-98-21, 48 NRC at 202. A governmental agency may be so far removed from having the representative authority to speak and act for the public that it does not qualify as a governmental entity for purposes of § 2.315(c). *Id.* at 203.

Whether a governmental entity qualifies as “interested” under § 2.315(c) in a particular proceeding in which the facility is not within its borders appears to have been explicitly considered and adjudicated in only one proceeding, namely, *Exxon*. The Atomic Safety and Licensing Appeal Board (Appeal Board) in *Exxon* was called upon to interpret the meaning of the term “interested state” in determining whether to allow the California Energy Resources Conservation and Development Commission (CERCDC) to participate in the proceeding as an interested state under 10 C.F.R. § 2.715(c), the predecessor to § 2.315(c).⁷ *Id.* at 874. The *Exxon* decision did not sharply define a test for whether a state agency requesting participation under the rule was sufficiently “interested”; moreover, the decision consisted of separate opinions from each of the three judges on the panel, including a dissent. See *id.* at 874 (opinion of Mr. Sharfman); *id.* at 878 (opinion of Mr. Salzman); *id.* at 880 (dissent of Dr. Johnson).

Judge Sharfman analyzed the CERCDC’s interest in the *Exxon* proceeding by first noting that applicable California law prohibits CERCDC certification of a new nuclear power plant unless it finds that there will be facilities available offsite for either the reprocessing or storage of the spent fuel that would be produced. *Exxon*, ALAB-447, 6 NRC at 875, 877. Judge Sharfman reasoned that since no such facility then existed in the United States, the State of California had a significant interest in the NRC’s decision regarding the proposed Exxon facility.

⁷ The provisions of former 10 C.F.R. § 2.715(c) pertinent to the Request remain unchanged in 10 C.F.R. § 2.315(c).

Id. Accordingly, Judge Sharfman concluded that the CERCDC should be granted participation as an interested state under § 2.715(c).⁸ *Id.*

Judge Salzman took a position similar to Judge Sharfman's and joined him in deciding to admit CERCDC to the proceeding but discussed two important differences: First, Judge Salzman noted that the concept of "interest" may be more limited in the context of licensing a nuclear power plant, as compared to the fuel recycling and storage facility at issue in *Exxon*. *Id.* at 879. In this regard, Judge Salzman apparently agreed with a portion of Dr. Johnson's dissent, which is discussed below. Second, Judge Salzman noted California's role in representing an aspect of the public interest, such that it would be entitled to explore the issues

⁸ Judge Sharfman based his opinion, in part, on a Commission decision in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977), in which the Commission agreed "to let Massachusetts participate in the review proceeding" on the application for the Seabrook facility, which is located in New Hampshire. See *Exxon*, ALAB-447, 6 NRC at 876. That decision, however, would appear to be distinguishable, given the wide variety of issues of interest to Massachusetts due to the proximity of the Seabrook facility to Massachusetts. *Id.* at 876 n.9, citing *Public Serv. Co. of New Hampshire, et al.* (Seabrook Station Units 1 and 2), Second Prehearing Conference Order, at 1-2 (March 15, 1974)(unpublished). In this unpublished Prehearing Order, the Seabrook Board cited the Commonwealth of Massachusetts' undated "Request to Participate and to Make a Limited Appearance Pursuant to 10 CFR § 2.715(a) and (c)" (Massachusetts Request), which was received on January 29, 1974. The Massachusetts Request states the Commonwealth's areas of concern as:

air quality control; water quality control control including but not limited to the effects of thermal effluent and radioactive effluent, protection of fish and wildlife, including but not limited to the effects of entrainment of marine organisms in cooling water intake and potential of mass fish-kills; protection of wetlands and estuarine areas which serve as breeding grounds for fish and wildlife; adequate testing and monitoring systems for measuring radio-active, thermal and other discharges and adequate systems for access by appropriate Massachusetts officials to the records thereof; adequate systems for notification of the appropriate Massachusetts officials in the case of accidents, emergencies, and unusual occurrences; the development of plans for the protection of persons including but not limited to ordered evacuation of people from the affected area in the case of emergencies. The Commonwealth is also concerned about the extent to which demand and generating capacity justify the siting of a plant in Seabrook, New Hampshire, considering the New England powergrid.

Massachusetts Request at 3.

of concern to the State in the Exxon proceeding without prejudging them (i.e. formulating contentions on them). *Id.*

In dissent, Dr. Johnson indicated that previously, states had been allowed to participate under § 2.715(c) only if the interest of the state was directly pertinent to the issues being adjudicated in the proceeding. *Id.* at 880. Dr. Johnson equated these issues to those identified in the notice of hearing. *Id.* Dr. Johnson expressed the view that the CERCDC only had an interest in the outcome of the *Exxon* proceeding and not the issues that were to be addressed in it. *Id.* at 881. Accordingly, Dr. Johnson viewed the decision to admit the CERCDC as an interested state as reading the word “interested” out of the regulation, as this interest in spent fuel reprocessing and storage is held in common by all who participate in the utilization and regulation of nuclear power. *See id.* at 881 and n.3. Dr. Johnson concluded that the CERCDC’s interest was too far removed from the proceeding to permit CERCDC’s participation as an interested state. *Id.* at 881.

B. NCUC Request:

North Carolina is approximately 100 miles distant from proposed North Anna Unit 3, and the NCUC does not assert an interest in this proceeding by virtue of proximity, *e.g.*, through an interest in such matters as emergency planning or water quality. Rather, NCUC identifies its interests in this proceeding as follows: “The cost of service for Dominion’s North Carolina retail customers will be affected by the Commission’s decision with respect to Dominion’s application.” Request at 2. NCUC, however, does not explain in what respect a Commission decision on the Application could affect the “cost of service” in North Carolina, nor is any connection between such cost and the matters in issue in this proceeding obvious. While the cost of service in North Carolina may ultimately be affected in some fashion as a result of the Applicants’ placing the proposed North Anna Unit 3 into service (or not), this effect would not appear to flow directly from the NRC decision. Rather, an NRC decision on the Application will be based upon whether the application complies with Commission requirements and certain

aspects of the environmental impact of the Applicants' requested action. While NCUC may be able to explain a connection between its cost of service concerns and this proceeding, it has not done so here. With respect to cost of service, the NCUC request is too terse for the Staff to conclude that NCUC has established an interest sufficient to allow NCUC to participate in this proceeding under § 2.315(c).

In addition, NCUC states that “[i]n the State of North Carolina, Dominion is a vertically-integrated utility engaged in the business of generating, transmitting, distributing, and selling electric power to the public pursuant to an exclusive franchise granted under State law.” Request at 2. Further, NCUC states that it, “has jurisdiction over the . . . terms and conditions of service provided by Dominion to retail customers in North Carolina” beyond its jurisdiction over rates. *Id.* NCUC, however, does not explain how its exercise of its jurisdiction over Dominion’s “exclusive franchise” may be affected by an NRC decision on the Application. NCUC simply does not offer any information connecting its jurisdiction over these other matters to this proceeding. NCUC may be able to establish that it has the right to participate as an interested governmental entity if it further explains those matters.

The regulation in 10 C.F.R. § 2.315(c) does not prescribe a time limit for an interested state to file a request to participate in a hearing. See *Yankee Atomic*, CLI-98-21, 48 NRC at 202 n.5. Accordingly, if the Board grants the petition of the Blue Ridge Environmental Defense League such that there is a contested hearing before the Board, and NCUC believes that it has sufficient interest to participate in this proceeding pursuant to § 2.315(c) based on consideration of the relevant facts as in *Exxon*, the Staff would not object to NCUC’s refiling its request to so participate.⁹ The Staff further notes that it will add NCUC to its service list for the proceeding in accordance with the NCUC request.

⁹ An interested governmental entity “[cannot] participate absent the [Licensing] Board’s approval (continued. . .)

CONCLUSION

In view of the foregoing, the Staff submits that NCUC's request should be denied at this time.

Respectfully submitted,

/signed (electronically) by/

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Dated at Rockville, Maryland
this 3rd day of June, 2008

(. . .continued)

of an independent, valid petition for review and request for hearing that [was] filed pursuant to 10 C.F.R. [§ 2.309]." See *Yankee Atomic*, CLI-98-21, 48 NRC at 202 n.5.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF ANSWER TO "REQUEST OF THE NORTH CAROLINA UTILITIES COMMISSION FOR AN OPPORTUNITY TO PARTICIPATE IN ANY HEARING AND TO BE ADDED TO THE OFFICIAL SERVICE LIST" has been served upon the following persons by Electronic Information Exchange this 3rd day of June, 2008:

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