September 4, 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,	)	Docket No. 52-017-COL
and OLD DOMINION ELECTRIC	)	
COOPERATIVE	)	
	)	
(North Anna Power Station, Unit 3)	)	

NRC STAFF'S RESPONSE IN OPPOSITION TO THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S MOTION FOR RECONSIDERATION

Pursuant to 10 C.F.R. § 2.323(e) and the Atomic Safety and Licensing Board's (Board) August 28, 2008 Order, the staff of the Nuclear Regulatory Commission (NRC or Commission) answers the Blue Ridge Environmental Defense League's (Intervenors) August 25, 2008 "Motion for Leave to File for Reconsideration and Motion for Reconsideration in Part of Atomic Safety and Licensing Board's Order of August 15, 2008" (Motion). The Intervenors' Motion should be denied because it does not show any compelling circumstance, such as the existence of a clear and material error in the decision, that renders the Board's decision invalid.

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 license (COL) with the NRC.[1] The NRC docketed

[1] 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).

the application on January 28, 2008.[2] On March 10, 2008, the NRC published a notice of hearing.[3] On May 9, 2008, BREDL submitted a Petition to Intervene and Request for Hearing. The NRC Staff and the Applicants each filed answers on June 3, 2008, and the Intervenors replied on June 11, 2008. After a pre-hearing conference on July 2, 2008, the Board issued a Memorandum and Order on August 15, 2008, (Order)[4] admitting one contention and admitting Intervenors as a party. Intervenors subsequently timely filed their Motion.

DISCUSSION

Intervenors seek reconsideration of the Board's Order arguing that the Board erred in its definition of the term "resolved" as it is used in section 52.39(a)(2), and that collateral estoppel should not apply to their contentions.[5] Intervenors' Motion should be denied because the Board's rulings were correct and Intervenors have not shown any compelling circumstances that render the decision invalid. Further, even if the Board erred in regard to the two points raised in the Intervenors' Motion, the Motion should still be denied because the Intervenors' contentions were also rejected on the basis that they impermissibly attack the Commission's regulations.

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[2] Dominion Virginia Power; Acceptance for Docketing of an Application for Combined License for North Anna Unit 3, 73 Fed. Reg. 6,528 (Feb. 4, 2008).

[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 (March 10, 2008).

[4] LBP-08-15, 67 NRC __.

[5] Because the Order correctly decided the scope of section 52.39(a)(2), and because the Order also recognized that Intervenors' contentions impermissibly challenge the Commission's regulations, the Staff does not reach Intervenors' collateral estoppel argument. The Staff also does not address the Intervenors' arguments regarding the pre-hearing conference. The Intervenors do not appear to be seeking any relief from this Board and, to the extent Intervenors are seeking Commission action, this is not something this Board could grant.

I. LEGAL STANDARD

A motion for reconsideration may not be filed except with leave of the Licensing Board, "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid."[6] When revising its hearing procedures in 2004, the Commission strengthened the standard for reconsideration motions, stating that:

> This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.[7]

In ruling on a petition for reconsideration filed under section 2.345[8], the Commission stressed that it does "not lightly revisit our own already-issued and well-considered decisions."[9] Instead, it "do[es] so only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point."[10]

II. INTERVENORS' MOTION DOES NOT MEET THE RECONSIDERATION STANDARD

Intervenors' Motion does not meet the high standard for a motion for reconsideration. In fact, it does not even address the standard. Intervenors have not shown any compelling circumstances, such as a clear or material error, why the Board's Order should be reconsidered.

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[6] 10 C.F.R. § 2.323(e).

[7] Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004).

[8] The standard for a petition for reconsideration filed under section 2.345 is the same as the standard for motions for reconsideration filed under section 2.323(e). *Id*. at 2,207, 2,224.

[9] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC, 619, 622 (2004).

[10] *Id*.

Further, even if the Board misinterpreted section 52.39(a)(2), or incorrectly applied the collateral estoppel doctrine, the Order should not be reconsidered because, as the Board also observed, the contentions are an improper challenge to the Commission's regulations, and are thus inadmissible.

A. The Board Correctly Interpreted Section 52.39(a)(2).

First, Intervenors challenge the Board's interpretation of the word "resolved" in section 52.39(a)(2). Intervenors call the Board's conclusion "illogical," citing Webster's Dictionary.[11] This conclusory statement, however, is not sufficient to show compelling circumstances, such as clear or material error, to cause the Board to reconsider its Order.[12] The Board cited a similar dictionary definition of the word "resolved," and explained that this definition "does not explain who must resolve the issue or the circumstances under which the resolution must take place."[13] The Board completed its definition by looking at "what meaning would be most consistent with the regulatory scheme as a whole and best fulfill the Commission's intent in adopting Part 52.[14] Far from being "illogical," the Board provided a thorough explanation of the basis for its ruling on this issue[15] and Intervenors have not shown that this analysis was in error.

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[11] Motion at 7.

[12] 10 C.F.R. § 2.323(e).

[13] Order at 10-11. The Staff and Applicant also provided thorough discussions of the interpretation of section 52.39(a)(2) in their Answers to the Intervenors' Petition to Intervene and Request for Hearing. Staff Answer at 10-16; Applicant Answer at 6-7. Pursuant to the Board's August 28, 2008 Order, the Staff does not repeat that discussion here.

[14] Order at 12.

[15] Order at 10-18. In order to clarify the record, the Staff would like to address one point made in the Board's discussion. On page 15, the Board cited the Statement of Consideration for a 1988 rulemaking for the proposition that "'only an environmental assessment need be prepared in connection with the application for a combined license' that references an ESP or certified standard design." The Commission has since changed this rule, and now "[t]he NRC has determined that a combined license is (continued. . .)

B. Contentions Seven and Eight are Inadmissible.

Even if the Board incorrectly interpreted section 52.39(a)(2) and incorrectly applied the doctrine of collateral estoppel, the Motion should still be denied because contentions seven and eight are inadmissible on another independent basis. The Board ruled that "even if we were not barred from considering Contentions Seven and Eight by the earlier litigation, we would not admit them for the same reasons given by the Licensing Board in the ESP proceeding, which we believe to be clearly correct."[16] The Licensing Board in the ESP proceeding found these contentions inadmissible because they impermissibly challenged a Commission regulatory requirement.[17] Intervenors did not challenge this portion of the Order, and that basis for the Board's decision is sufficient grounds – by itself – to deny the Motion.

(. . .continued)

a major Federal action significantly affecting the quality of the human environment and, in accordance with 10 C.F.R. 51.20, the NRC must prepare an EIS for that action. If there is no new and significant information for matters resolved at the ESP stage, then the staff will rely upon ("tier off") the ESP EIS at the combined license stage and disclose the NRC conclusion for matters covered in the early site permit review." Final Rule: Licenses, Certifications and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,431-32 (August 28, 2007).

[16] Order at 54.

[17] Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 269-70 (2004); *see also* NRC Staff Answer to Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League" at 36, 37.

CONCLUSION

Because Intervenors have not shown a compelling reason, such as a clear and material error, why the Order should be reconsidered, their Motion should be denied.

Respectfully submitted,

/signed (electronically) by/
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Dated at Rockville, Maryland
this 4th day of September, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE IN OPPOSITION TO THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S MOTION FOR RECONSIDERATION" have been served upon the following persons by Electronic Information Exchange this 4th day of September, 2008:

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