

September 4, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket No. 52-017-COL
Dominion Virginia Power, et al.)	
)	ASLBP No. 08-863-01-COL
North Anna Power Station, Unit 3)	

Dominion’s Answer Opposing BREDL’s Motion for Reconsideration

Pursuant to 10 C.F.R. § 2.323(e), Virginia Electric and Power Company, dba Dominion Virginia Power (“Dominion”), hereby answers and opposes the Blue Ridge Environmental Defense League’s (“BREDL” or “Petitioner”) “Motion for Reconsideration in Part of Atomic Safety and Licensing Board’s Oder of August 15, 2008” (“Motion”), filed on August 26, 2008.¹ The Motion asks the Atomic Safety and Licensing Board (“Board”) to reconsider portions of the Board’s Memorandum and Order (Ruling on Petitioner’s Standing and Contentions and NCUC’s Request to Participate as a Non-Party Interested State), LBP-08-15, 68 N.R.C. __ (August 15, 2008) (“LBP-08-15”), rejecting BREDL Contentions 7 and 8 for not meeting the admissibility requirements of 10 C.F.R. § 2.309(f)(1). BREDL’s Motion should be denied because it does not show compelling circumstances that would warrant the revisiting of the Board’s decision on Contentions 7 and 8.

¹ Contrary to 10 C.F.R. § 2.323(e), which requires that motions be filed within ten days of the action for which reconsideration is requested, and 10 C.F.R. § 2.306(c)(2), which requires that documents served by the E-filing system be served by 11:59 p.m. to be considered timely, BREDL filed its Motion at 12:01 a.m. on August 26, 2008.

I. Procedural Background

On May 9, 2008, BREDL filed a Petition for Intervention and Request for Hearing (“Petition”), which proposed a number of contentions in this proceeding. BREDL’s proposed Contention 7 alleged that Dominion’s combined construction permit and operating license application (“COLA”) for a new Unit 3 at the North Anna Power Station (“North Anna Unit 3”) is deficient because the Environmental Report fails to discuss the environmental implications of the lack of options for permanent disposal of spent fuel. Petition at 21. Proposed Contention 8 argued that the NRC’s Waste Confidence Decision (49 Fed. Reg. 34,658 (1984), as amended, 55 Fed. Reg. 38,474 (Sep. 18, 1990)) should be reconsidered because of the alleged increased threat of terrorist attack. Petition at 27. In its Memorandum and Order, the Board ruled that Contentions 7 and 8 are inadmissible. LBP-08-15, slip op. at 54. BREDL is asking the board to reconsider its dismissal of these contentions. Motion at 4-8.

II. Argument

A. Applicable Legal Standards

The Commission’s rules of practice provide:

Motions for reconsideration may not be filed except upon leave of the presiding officer or Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

10 C.F.R. § 2.323(e). The compelling circumstances standard for granting leave to file a motion for reconsideration “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.” 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). “[T]he movant must identify errors or deficiencies in the presiding officer’s determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical

factual information.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-38, 54 N.R.C. 490, 493 (2001) (citation omitted), citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 N.R.C. 69, 73-74 (1998).

B. There was No Error in the Board’s Dismissal of BREDL Contentions 7 and 8

The Board provides three reasons for denying admission of Contentions 7 and 8 in LBP-08-15. First, the Board determines that the issues in Contentions 7 and 8 were resolved in the earlier ESP proceeding and therefore 10 C.F.R. § 52.39 prohibits the Board from revisiting them in this proceeding. LBP-08-15 at 54. Second, the Board finds that the doctrine of collateral estoppel precludes them from allowing BREDL to relitigate the admissibility of these contentions, which were denied admissibility in the ESP proceeding. Id. Third, the Board holds that absent 10 C.F.R. §52.39 and collateral estoppel, Contentions 7 and 8 would still be inadmissible for the same reasons given by the Atomic Safety and Licensing Board in the ESP proceeding, namely that they raise an impermissible challenge to the NRC’s Waste Confidence Rule and are outside the scope of this proceeding. Id.; Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 269 (2004).

BREDL’s Motion argues that the Board’s conclusion that Contentions 7 and 8 were resolved in the ESP proceeding is “illogical” (Motion at 7), but it provides no support for this conclusory statement. BREDL does not address the Board’s reasoning, except to repeat it, and BREDL points to no authority to show any error by the Board, let alone one that could not have been reasonably anticipated. The Board’s reasoning in finding that Contentions 7 and 8 were

“resolved” within the meaning of 10 C.F.R. § 52.39 is clearly correct,² and BREDL presents no compelling circumstances that would warrant reconsideration.

BREDL’s Motion also argues that the Board erred in citing the doctrine of collateral estoppel, because BREDL has not had a full and fair opportunity to litigate the issues raised in Contentions 7 and 8. Motion at 7. Here BREDL misconstrues the Board’s ruling. The Board does not find that collateral estoppel bars the relitigation of the substantive issues in Contentions 7 and 8 but rather that the doctrine bars the relitigation of the issue of those contentions’ admissibility under 10 C.F.R. § 2.309(f)(1). The doctrine of collateral estoppel precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979). Collateral estoppel requires the presence of at least four elements in order to be given effect: (1) the issue sought to be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the prior judgment. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 N.R.C. 525, 536 (1986). In addition, the prior tribunal must have had jurisdiction to render the decision, and the party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the earlier litigation. Id.

The issue of whether Contentions 7 and 8 are admissible under 10 C.F.R. § 2.309(f)(1) is in essence a legal determination that was actually litigated in the ESP proceeding. In the ESP proceeding, BREDL presented its legal arguments on the admissibility of its waste confidence

² It should be noted that in promulgating the current Part 52 rules, the Commission stated, “For an early site permit, the NRC prepares an EIS that resolves numerous issues within certain bounding conditions.” 72 Fed. Reg. 49,352, 49,431 (2007) (emphasis added). Therefore, an issue clearly does not have to be litigated in an ESP proceeding in order to be considered resolved.

contentions in its intervention petition, provided a reply to the opposing answers of Dominion and the NRC Staff, and had the opportunity to appeal. Thus, the issue of the admissibility was litigated to the full extent any such legal determination is litigated in an NRC proceeding. As the Board notes, the Licensing Board in the ESP proceeding did not admit either contention and BREDL did not appeal that ruling. LBP-08-15, slip op. at 53-54, citing North Anna ESP Site, 60 N.R.C. at 269. Thus, the Board's finding that they were barred by collateral estoppel from revisiting this issue was correct, and BREDL has not shown any error in the Board's decision.³

Furthermore, even if BREDL's arguments regarding collateral estoppel presented any error by the Board (which they do not), BREDL has failed to show that such error would be material to the Board's decision. As explained above, the Board presented three reasons for denying admission of Contentions 7 and 8. LBP-08-15 at 54. Thus, BREDL's quarreling with the Board's reference to collateral estoppel provides no grounds for reversing the Board's rejection of these contentions. Because BREDL has not alleged a material error in the Board's decision, BREDL fails to show compelling circumstances and does not satisfy the requirements of 10 C.F.R. § 2.323(e).

³ BREDL's only support for its argument that collateral estoppel is not applicable is citation to a Pennsylvania Supreme Court case. Motion at 7 & n.10. The Pennsylvania Supreme Court does not provide controlling precedent here, but even if the Board applied the test cited by BREDL, they would still be correct in denying admissibility because the issue of Contentions 7 and 8's admissibility under 10 C.F.R. § 2.309(f)(1) also satisfies those requirements.

III. Conclusion

For all of the foregoing reasons, BREDL's Motion should be denied.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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CERTIFICATE OF SERVICE

I hereby certify that a copy the foregoing "Dominion's Answer Opposing BREDL'S Motion for Reconsideration," dated September 4, 2008, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 4th day of September 2008.

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