

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-COL
 COOPERATIVE)
)
(North Anna Power Station, Unit 3))

NRC STAFF ANSWER TO "INTERVENOR'S NEW CONTENTION NINE."

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NRC STAFF ANSWER TO “INTERVENOR’S NEW CONTENTION NINE.”

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC or Commission) hereby answers the “Intervenor’s New Contention Nine” (Proposed Contention), filed in the North Anna Power Station, Unit 3 (North Anna) combined license (COL) proceeding by the Blue Ridge Environmental Defense League (“Intervenors” or “the League”). For the reasons set forth below, the Staff opposes the admissibility of Intervenor’s Proposed Contention.

BACKGROUND

On November 26, 2007, the Virginia Electric and Power Company, 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) for North Anna Unit 3 with the NRC.¹ The application for a COL for North Anna Unit 3 (Application) references the application for certification of the Economic Simplified Boiling Water Reactor (ESBWR) design submitted on August 24, 2005 and the Early Site Permit (ESP) for the North Anna ESP Site, ESP-003, which the NRC issued on November 27, 2007.² Application, Rev. 0,

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 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 (Feb. 4, 2008).

² The Application states that “[t]his COL application also references Revision 9 of the Early Site Permit

Part 1 at 1. NUREG-1811, the final environmental impact statement (EIS) for the ESP application, documents, *inter alia*, the Staff's evaluation of many of the environmental effects of construction and operation of proposed Unit 3 at the North Anna ESP site. See NUREG-1811, "Environmental Impact Statement for an [ESP] at the North Anna ESP Site," Final Report (Dec. 2006)(NUREG-1811).

On March 10, 2008, the NRC published a notice of hearing on the Application which provided members of the public 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. 12,760, 12,760-61 (Mar. 10, 2008) (Notice of Hearing).³

On May 9, 2008, the Intervenor submitted a petition to intervene in response to the notice of hearing. On August 15, 2008, the Board issued a Memorandum and Order granting Intervenor's standing and admitting a portion of contention one. *Virginia Electric & Power Co.*

(ESP) application for the North Anna ESP site, and will reference that ESP upon issuance." Application, Part 1 at 1. Since the NRC issued ESP-003 on November 27, 2007, the Application should be deemed to reference ESP-003. The North Anna ESP application was submitted on September 25, 2003, and the NRC published a notice of hearing on the ESP application on November 25, 2003. See "Dominion Nuclear North Anna, LLC; Opportunity to Petition for Leave to Intervene" (Early Site Permit for the North Anna ESP Site), 68 Fed. Reg. 67,489 (Dec. 2, 2003). BREDL, together with other organizations, petitioned to intervene in the proceeding on the ESP application, and the ESP ASLB granted BREDL party status. See *Dominion Nuclear North Anna, LLC* (North Anna ESP Site), LBP-04-18, 60 NRC 253, 262 (2004). The Atomic Safety and Licensing Board presiding over the proceeding on the North Anna ESP application (ESP Board) admitted two contentions, one of which was settled, and the other dismissed on summary disposition. See *Dominion Nuclear North Anna, LLC* (North Anna ESP Site), LBP-07-09, 65 NRC 539, 550 (2007). The ESP Board also conducted a mandatory hearing on the uncontested portion of the ESP application. See *id.* at 552. The ESP Board determined that the ESP should be issued after conducting a thorough, probing inquiry into the facts and logic supporting the Staff's conclusions in the NRC Staff review documents on the ESP application, NUREG-1811, "Environmental Impact Statement for an [ESP] at the North Anna ESP Site," Final Report (Dec. 2006), NUREG-1835, "Safety Evaluation Report for an [ESP] at the North Anna ESP Site," Final Report (Sept. 2005), and Supplement 1 to NUREG-1835 (Nov. 2006). See *id.* at 552-54; 562-639 (Judge Karlin's dissenting opinion is at 631-639), *aff'd*, CLI-07-27, 66 NRC 215. The North Anna ESP is available in the Agencywide Document Management System (ADAMS) at accession number [ML073180440](#).

³ 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. 21,162 (Apr. 18, 2008).

(Combined License Application for North Anna, Unit 3), LBP-08-15, 67 NRC __ (Aug. 15, 2008) (slip op.). Subsequently, on August 25, 2008, the intervenors filed a “Motion for Leave to File for Reconsideration and Motion for Reconsideration in Part of Atomic Safety and Licensing Board’s Order of August 25, 2008.” The Board initially granted Intervenors leave to file for reconsideration without deciding whether reconsideration should be granted. See *Virginia Electric & Power Co.* (Combined License Application for North Anna, Unit 3), ADAMS Accession No. ML082410939 (LBP Aug. 15, 2008) (unpublished order). The Board later denied Intervenor’s Motion for Reconsideration. *Virginia Electric & Power Co.* (Combined License Application for North Anna, Unit 3), LBP-08-23, 67 NRC __ (Nov. 07, 2008) (slip op.). On March 9, 2009, the Intervenors filed “Intervenor’s New Contention Nine.”

DISCUSSION

A. Legal Standards for Admission of Late-Filed Contentions

Under Commission regulations, a late-filed contention may be admitted only upon the presiding officer’s determination, *inter alia*, that the contention should be admitted after balancing the eight factors listed in 10 C.F.R. § 2.309(c), all of which must be addressed in the petitioner’s filing.⁴ Petitioners seeking the admission of a late-filed contention bear the burden

⁴ Section § 2.309(c) requires a balancing of the following factors for late-filed contentions:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest;
- (v) The availability of other means whereby the requestor’s/petitioner’s interest will be protected;
- (vi) The extent to which the requestor’s/petitioner’s interests will be represented by existing parties;
- (vii) The extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c).

of showing that a balancing of these factors weighs in favor of admittance. See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 83 NRC 289, 296 (1993). Where no showing of good cause for lateness is tendered, a petitioner's demonstration on the other factors must be particularly strong. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner's interest, and the ability of other parties to represent the petitioner's interest, are less important than the other factors, and are therefore entitled to less weight. See *id.* at 74.

The Commission's regulations additionally provide that a proposed late-filed contention may be filed only with leave of the presiding officer, and must 1) be based upon new information that was not previously available, 2) show that the new information is materially different than what was previously available, and 3) show that the contention was filed timely once the new information became available. 10 C.F.R. § 2.309(f)(2). Lastly, a petitioner must also show that the late-filed contention meets the substantive contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). See *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993).⁵

⁵ 10 C.F.R. § 2.309(f)(1) requires a proposed contention to:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions

Failure to comply with any of the contention requirements may be grounds for dismissing a contention. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).⁶

B. Intervenors' New Contention

Intervenors' late-filed proposed contention reads:

PROPOSED CONTENTION 9:

Neither the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act. Therefore they fail to provide adequate support for the Applicant's Environmental Report or for an Environmental Impact Statement in this particular licensing case. The deficiencies in the Waste Confidence Rule also fatally undermine the

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- which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and
 - (vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

10 C.F.R. § 2.309(f)(1)(i)-(vii).

⁶ While revised relatively recently (see Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004)), § 2.309 incorporates the NRC's long-standing late-filed contention requirements. Compare 10 C.F.R. § 2.309(c) and (f)(2) with 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004).

adequacy of the NRC's findings in Table S-3 of 10 C.F.R. § 51.51 to satisfy NEPA. Unless and until the NRC remedies the deficiencies in the Waste Confidence Rule, Table S-3, and the Proposed Spent Fuel Storage Rule, the NRC has no lawful basis to issue a license for the proposed North Anna Unit 3 nuclear power plant.

Proposed Contention at 3-4.

In Proposed Contention 9, Intervenor's assert that the North Anna COL application is inadequate due to the NRC's proposed Waste Confidence Decision, 73 Fed. Reg. 59,551 (Oct. 9, 2008) ("Waste Confidence") and the proposed rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008) ("Temporary Storage"). Intervenor's Proposed Contention 9 "seeks to enforce, in this specific proceeding, the NRC's commitment that 'it would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.' . . . The contention also seeks to enforce the requirement of the National Environmental Policy Act ("NEPA") that generic determinations under NEPA must be applied to individual licensing decisions and must be adequate to justify those individual decisions." Proposed Contention at 2. Intervenor's further contend that the NRC must finalize decisions on the Waste Confidence Decision and the Temporary Storage rules before the Agency issues a COL to Dominion. On these issues, the Intervenor's state that "we do not seek to litigate them in this individual proceeding. Instead, the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding." *Id.* at 3.

C. Staff Analysis of the Proposed New Contention

Proposed Contention 9 is inadmissible as it does not satisfy the late-filed contention requirements of 10 C.F.R. § 2.309(c)(2) or 10 C.F.R. § 2.309(f)(2). Further, even if Proposed Contention 9 had satisfied the late-filed contention requirements of 10 C.F.R. § 2.309(c) & (f)(2), Proposed Contention 9 would still be inadmissible as it concerns ongoing, general rulemakings, is outside the scope of this proceeding, fails to provide a concise statement of the alleged facts

or expert opinions which support the Intervenor's position on the issue, and likewise fails to show that a genuine dispute exists with respect to the application on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1).

1. The Proposed Contention Does Not Satisfy Late-Filed Contention Requirements

The Intervenor's do not satisfy the NRC's late-filed contention requirements and thus the proposed late-filed contention is inadmissible. Under 10 C.F.R. § 2.309(c)(2), a requester or petitioner is required to "address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing." In support of its late-filed contention, the Intervenor's recite each of the § 2.309(f)(2) criteria, and corresponding reasons that those criteria run in the Petitioner's favor. They do not, however, address § 2.309(c). Accordingly, the Contention does not comply with the Commission's late-filed contention rules.

As to the requirements of § 2.309(c)(1), the Intervenor's have not shown good cause as required by § 2.309(c)(1)(i). While the Contention asserts good cause because it is based upon information which was not previously available, it also claims that it is "based on comments that [the Intervenor's] submitted on February 6, 2009, regarding [the NRC's] proposed Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (October 9, 2008)." Proposed Contention at 1. The Proposed Contention goes on to state that it aims to "plac[e] *the exact same concerns* raised in our [February 6, 2009] [c]omments before the ASLB in this contention . . ." Proposed Contention at 3 (emphasis added). Most importantly, the Proposed Contention claims that it responds to the October 9, 2008 proposed rule, and that it is based upon the National Environmental Policy Act of 1969, as amended (42 U.S.C. § 4321, *et seq.*), the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011, *et seq.*), and Table S-3 to 10 C.F.R. § 51.51.

Intervenor's claim that this information is new for the purposes of the Proposed Contention because "the information on which the contention is based, *i.e.*, the legal and technical analyses of the Proposed Confidence Decision and the Proposed Temporary Storage rule, were not available to Petitioner's until February 6, 2009, when the Comments were

finalized, presented to Joint Intervenors for concurrence, and submitted to the NRC.” Proposed Contention at 9. This position is inconsistent with Commission precedent on new information. In a recent case, the Commission, in denying an appeal from the denial of a late-filed contention, stated that “[the Petitioner] did not justify its untimely attempt to raise these new issues. To show good cause, a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it . . . [The Petitioner has] failed to demonstrate good cause, as the information it relied upon was available earlier, and is not new information merely because [the Petitioner] was not aware of it earlier.” *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3) CLI-09-05, 68 NRC ___ (March 5, 2009) (slip op. at 15) (emphasis in original).

Here, the Contention, by its own terms, is based upon the NRC’s October 9, 2008 notice of proposed rulemaking. None of the information contained either in the Petitioners’ February 6, 2009 comments on the proposed rule or the Proposed Contention are alleged to be based upon information that was not previously publicly available. Instead, the Intervenors claim that the Proposed Contention is based upon analyses performed for the Intervenors that were not available prior to the day the Intervenors filed their comments. However, the Intervenors do not claim that those analyses are themselves based upon information that was not previously publicly available, or how they otherwise constitute new information. Therefore, the Intervenors have not shown good cause as required by 10 C.F.R. § 2.309(c)(1)(i). Thus, the most important of the late-filed contention factors in § 2.309(c) balancing weighs against consideration of the contention. As discussed below, for similar reasons, the Intervenors also fail to satisfy the late-filed contention requirements of 10 C.F.R. § 2.309(f)(2)(i) and (ii).

The next balancing factor, found in § 2.309(c)(1)(ii), concerns a petitioner’s right to be made a party to the proceeding. In its answer to the petition to intervene, the Staff does not object to Petitioners’ standing to intervene in this proceeding. Therefore, this factor balances in Intervenors’ favor. As to § 2.309(c)(iii), (iv), (v) and (vi), concerning the Intervenors’ interests in

this proceeding, as described in their petition to intervene, balancing likewise would seem to run in their favor.

Concerning § 2.309(c)(vii), admission of Proposed Contention 9 could cause a substantial delay. Thus this factor does not weigh in favor of the Intervenors. Lastly, as to § 2.309(c)(viii), the Intervenors' participation would not assist in developing a sound record, as the subject of the Proposed Contention is an ongoing rulemaking where the Intervenors have already filed their comments with the Commission. The record is not developed further by reprising the same issue in this adjudication. The Intervenors have not shown good cause for their late-filed contention, nor will this contention assist in the development of a sound record. As such, the Intervenors have not satisfied 10 C.F.R. § 2.309(c), as a balancing of its factors does not weigh in favor of consideration of the Contention. Therefore, the Proposed Contention is inadmissible.

The Proposed Contention is also inadmissible because it does not satisfy 10 C.F.R. § 2.309(f)(2). As discussed above concerning § 2.309(c)(1)(i)'s good cause requirement, the Proposed Contention is not based upon information that was not previously available (as required by 10 C.F.R. §2.309(f)(2)(i)), as the Intervenors have alleged neither the Proposed Contention nor their February 6, 2009 comments to be based upon any information that was not publicly available following the Commission's October 9, 2008 notice of proposed rulemaking.

The Proposed Contention is not based upon information that is materially different than information previously available. The Intervenors allege that they satisfy this requirement because "[w]hile some of the information presented in this contention may have been publicly available, it was not integrated into a single document that presented a comprehensive and integrated analysis of the Waste Confidence Rule and related Table S-3 and Proposed Temporary Storage Rule. The reason for this is that the NRC has not offered an opportunity to comment on the Waste Confidence rule or its Finding of No Significant Impact regarding temporary spent fuel storage in approximately ten years." Proposed Contention at 9. Nothing in

the above description explains how the already publicly available information might combine to form new information that is materially different from that already available. Therefore, the Intervenor has not satisfied 10 C.F.R. § 2.309(f)(2)(ii), making the Proposed Contention inadmissible.

Lastly, 10 C.F.R. § 2.309(f)(2)(iii) requires that all information in a late-filed contention be submitted in a timely fashion based upon the availability of new information. The Intervenor has identified no new information as the basis of the Proposed Contention. Thus, they have not satisfied this requirement.

Therefore, the Proposed Contention does not satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i), (ii) or (iii), and is inadmissible.

2. The Proposed Contention is Inadmissible Because it Concerns Ongoing, General Rulemakings

The Commission has stated that “[i]t has long been agency policy that Licensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.” *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)) (alteration in original). In *Oconee*, the Commission also stated that “a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies.” *Id.* at 334. Here, Intervenor makes an argument concerning issues subject to ongoing, general rulemaking proceedings. Intervenor even acknowledges that their contention raises generic issues. Proposed Contention at 3. Thus, if Intervenor wishes to take issue with the Commission’s Waste Confidence and Temporary Storage positions, the proper venue is the rulemaking process and not the adjudicatory process. See 10 C.F.R. § 2.335; see also *Oconee*, CLI-99-11, 49 NRC at 345.

In addition, Intervenor note that on February 6, 2009, they submitted comments to the Commission on the proposed Waste Confidence and Temporary Storage rules. See Proposed Contention at 3, 7 & 9. If Intervenor wish to voice additional comments about the Commission's proposed rules, the proper forum for such comments is through the rulemaking process and not before the Board in this licensing proceeding. See 10 C.F.R. § 2.335. This Board has already rejected a similar contention in which the intervenors attacked the adequacy of the Waste Confidence rule. See *North Anna COL*, LBP-08-15, 67 NRC __ (slip op.). In that Order, the Board noted that the contentions were virtually identical to the rejected contentions from the ESP. See *Id.* at 53. Intervenor moved for reconsideration on this same waste confidence contention, and the Board again rejected it noting that "licensing boards may not consider challenges to the Commission's regulations." See *North Anna COL*, LBP-08-23, 67 NRC at __ (slip op. at 14).

Further, under § 2.335, an NRC regulation may not be attacked in an adjudicatory proceeding unless the petitioner meets the following standards for a waiver of, or exception to, the regulation:

The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.

10 C.F.R. § 2.335(b). In explaining these standards in the *Millstone* license renewal proceeding, the Commission held, among other things, that a waiver or exception could only be appropriate if the alleged special circumstances were "'unique' to the facility rather than 'common to a large class of facilities.'" *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005) (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988),

reconsid'n denied, CLI-89-3, 29 NRC 234 & CLI-89-7, 29 NRC 395 (1989)) (internal footnote omitted). Here, Intervenor's do not address the § 2.335 standards, and the issues raised by Intervenor's are not unique to the North Anna COL application but, instead, represent a generic attack on the current regulations. Proposed Contention 9, therefore, must be rejected.

Intervenor's also state that they do not seek to litigate this contention in this proceeding, but request that "the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal." Proposed Contention at 3. Intervenor's fail to provide any legal support for the proposition that an otherwise inadmissible contention should be admitted and held in abeyance. Intervenor's suggestion that the contention be held in abeyance does not serve to make this inadmissible contention admissible.

3. Proposed Contention 9 is Inadmissible as it is Outside the Scope of This Proceeding

Intervenor's also state that Proposed Contention 9 "seeks to enforce the requirement of the National Environmental Policy Act ("NEPA") that generic determinations under NEPA must be applied to individual licensing decisions and must be adequate to justify those individual decisions." Proposed Contention at 2. As such, Intervenor's request that the Commission finalize the Waste Confidence and Temporary Storage rules so these rules will be applied to the North Anna COL licensing decision. *Id.* at 3. Essentially, by claiming that NEPA requires the Commission wait for these rules to be finalized before issuing a North Anna COL licensing decision, Intervenor's take issue with an ongoing, general rulemaking. The Board has repeatedly stated that the adjudicatory process is not the proper forum in which to attack the rulemaking process. See 10 C.F.R. § 2.335; see also *Pub. Serv. Co. of New Hampshire*, (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Peach Bottom*, ALAB-216, 8 AEC at 20-21).

Further, Intervenor's cite little case law to support their argument that generic determinations under NEPA must be applied to individual licensing decisions. However,

Intervenors do cite to the Supreme Court decision of *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87 (1983). Contrary to what Intervenors argue, this case does not stand for the proposition that the NRC will violate NEPA if it issues a licensing decision on the North Anna COL prior to issuance of final Waste Confidence and Temporary Storage rules.

See Proposed Contention at 2-3. The Court's decision states that

[a]s *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure. Here, the agency has chosen to evaluate generically the environmental impact of the fuel cycle and inform individual licensing boards, through the Table S-3 rule, of its evaluation. The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA.

Baltimore Gas and Elec. Co., 462 U.S. at 100-101. Here, the Commission has chosen to address this issue through a general rulemaking. More fundamentally, however, the Intervenors' position fails to recognize that licenses can be issued based on the conclusions in the current waste confidence regulation in 10 C.F.R. § 51.23 until any new regulation is finalized. Thus, the contention is outside the scope of the immediate proceeding and is therefore inadmissible. See 10 C.F.R. § 2.309(f)(1)(iii).

4. Proposed Contention 9 is Inadmissible as it Fails to Provide a Concise Statement of Alleged Facts or Expert Opinions Which Support the Intervenors' Position on the Issue and Fails to Provide Sufficient Information to Show That a Genuine Dispute Exists With Respect to the Application

In addition, Intervenors claim that Proposed Contention 9 is based in part on expert opinions of "Dr. Arjun Makhijani, President of the Institute for Energy and Environmental Research ("IEER")" and "Dr. Gordon R. Thompson, Executive Director of the Institute for Resource and Security Studies ("IRSS")." Proposed Contention at 8. However, Intervenors do not rely upon these expert opinions to dispute any specific aspect of the North Anna COL application. Nor do Intervenors state how these expert opinions support Intervenors' assertions that the Waste Confidence and Temporary Storage rules are inadequate. *Id.* at 7. Intervenors merely cite the existence of these expert declarations, but fail to show how these opinions

bolster their argument. For instance, page 9 of the Proposed Contention states, “[I]n support of this contention, Intervenor rely on the facts, expert opinion, and documentary resources set forth in the attached IEER Comments and Thompson Report. The IEER Comments and Thompson Report contain sufficient information to show that Intervenor have a genuine dispute with the Applicant and with the NRC.” *Id.* at 9 (alteration in original). However, Proposed Contention 9 does not provide a concise statement of the alleged facts or expert opinions which support the Intervenor’s position on the issue. Nor does Proposed Contention 9 provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Therefore, Proposed Contention 9 is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v) & (vi).

CONCLUSION

In view of the foregoing, the Proposed Contention should be denied because, pursuant to the requirements of 10 C.F.R. § 2.309(c), 10 C.F.R. § 2.309(f)(2), and 10 C.F.R. § 2.309(f)(1), Intervenors have failed to satisfy the requirements for late-filed contentions and have not submitted an admissible contention.

Respectfully Submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 27th day of March, 2009

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-COL
COOPERATIVE)
)
(North Anna Power Station, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO "INTERVENOR'S NEW CONTENTION NINE" has been served upon the following persons by Electronic Information Exchange this 27th day of March, 2009:

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