

April 3, 2009

**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 New Contention

Pursuant to 10 C.F.R. § 2.309(h), Virginia Electric and Power Company, dba Dominion Virginia Power (“Dominion”), hereby answers and opposes “Intervenor’s New Contention Nine” (“Motion”), which the Blue Ridge Environmental Defense League’s (“BREDL”) filed on March 9, 2009. The Motion asks the Atomic Safety and Licensing Board (“Board”) to admit a “new” proposed Contention Nine, which is the fourth attempt by BREDL to introduce a contention collaterally attacking the Commission’s Waste Confidence rule (10 C.F.R. § 51.23). BREDL’s Motion should be denied because these same issues have been properly and repeatedly rejected by the Board as inadmissible. Moreover, BREDL’s Motion does not make the required demonstrations under 10 C.F.R. §§ 2.309(f)(2) and 2.309(c) for late-filed contentions, or meet the requirements of 10 C.F.R. § 2.309(f)(1) regarding admissibility.

I. PROCEDURAL BACKGROUND

On September 25, 2003, Dominion filed an application with the Nuclear Regulatory Commission (“NRC” or “Commission”) for an early site permit (“ESP”) under 10 C.F.R. Part 52, Subpart A, to establish the suitability of the North Anna Power Station as a site for additional nuclear power reactors. In response to the notice of hearing in the ESP proceeding, BREDL, the

Nuclear Information and Resource Service, and Public Citizen jointly petitioned to intervene,¹ and proposed inter alia two contentions related to the Waste Confidence Rule (identified as EC 3.2.1 and 3.2.2).² Proposed Contention EC 3.2.1 alleged that “[t]he ER for the North Anna ESP is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated (i.e., ‘spent’) fuel that will be generated by the proposed reactors if built and operated.” ESP Contentions at 15-26. Proposed Contention EC 3.2.2 requested that the Commission reconsider its Waste Confidence Decision (49 Fed. Reg. 34,658 (1984), as amended, 55 Fed. Reg. 38,474 (Sep. 18, 1990)), “in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, i.e., the increased threat of terrorist attacks against U.S. facilities.” ESP Contentions at 20.

The Board in the ESP proceeding concluded that both proposed contentions were inadmissible because they were attempts to challenge the Waste Confidence Rule, and thus barred by 10 C.F.R. § 2.335.³ In the ESP proceeding, BREDL presented its legal arguments on the admissibility of its proposed waste confidence contentions in its intervention petition, provided a reply to the opposing answers of Dominion and the NRC Staff, and had the opportunity to appeal the ESP Board’s determination that those proposed contentions were inadmissible. Thus, the issue of the admissibility of the proposed waste confidence rule contentions was litigated in the ESP proceeding to the full extent that any such legal determination is litigated in an NRC proceeding.

¹ Contentions of [Intervenors] Regarding the [ESP] for the Site of the North Anna Nuclear Power Plant (May 3, 2004) (“ESP Contentions”).

² See Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253 (2004).

³ See id. at 270-72, 276.

On May 9, 2008, BREDL filed a Petition for Intervention and Request for Hearing (“Petition”) in this proceeding that proposed a number of contentions. BREDL’s proposed Contention 7 alleged that “[t]he Environmental Report for the Dominion [COL Application (“COLA”)] is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated (i.e., 'spent') fuel that will be generated by the proposed reactors if built and operated.” Petition at 21. Proposed Contention 8 claimed 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 even if the Waste Confidence Rule applies to new reactors, “in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, i.e., the increased threat of terrorist attacks against U.S. facilities.” Petition at 27. Proposed Contentions 7 and 8 were essentially identical to proposed Contentions EC 3.2.1 and 3.2.2 in the ESP proceeding.

In 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”), the Board rejected BREDL’s proposed Contentions 7 and 8 on three separate bases:

- (1) the Board concluded that it was prohibited from considering Contentions 7 and 8 by 10 C.F.R. § 52.39, which provides that matters resolved in a proceeding on an ESP application are also resolved in a subsequent COL proceeding when the COL application references the ESP;⁴
- (2) the Board determined that the doctrine of collateral estoppel barred BREDL from relitigating contentions that had previously been ruled inadmissible; and

⁴ LBP-08-15 at 16.

- (3) the Board determined that proposed Contentions 7 and 8 were inadmissible for the reasons given by the Licensing Board for the ESP proceeding.⁵

On August 26, 2008,⁶ BREDL filed a “Motion for Reconsideration in Part of Atomic Safety and Licensing Board’s Oder of August 15, 2008” (“Reconsideration Motion”) asking the Board to reconsider the portions of LBP-08-15 rejecting BREDL proposed Contentions 7 and 8 for not meeting the admissibility requirements of 10 C.F.R. § 2.309(f)(1). The Board denied BREDL’s Motion for Reconsideration,⁷ holding that (1) the preclusive effect of 10 C.F.R. § 52.39 requires only that the issue be resolved in the ESP proceeding (LBP-08-23 at 11); (2) BREDL had a full and fair opportunity to litigate its proposed contentions in the ESP proceeding, sufficient to preclude BREDL from litigating the admissibility of its proposed contentions a second time (*id.* at 12); (3) BREDL had not identified any changed circumstances or new information that would call into question the prior determinations in the ESP proceeding (*id.* at 13); and (4) proposed Contentions 7 and 8 were inadmissible, in their own right, for the same reasons the Board in the ESP proceeding determined that proposed Contentions 3.2.1 and 3.2.2 were inadmissible (*id.* at 14).

On March 9, 2009, BREDL filed the Motion now seeking a fourth “bite at the apple.” Its newly proposed contention, however, remains inadmissible for all of the same reasons previously given in denying its collateral attacks on the Waste Confidence Rule in both the North Anna ESP and this COL proceeding.

⁵ LBP-08-15 at 17.

⁶ BREDL filed its Motion at 12:01 a.m. on August 26, 2008.

⁷ LBP-08-23, 68 N.R.C. ____, slip op. (Nov. 7, 2008) (“LBP-08-23”).

II. ARGUMENT

A. Applicable Legal Standards

Three regulations address the admissibility of new contentions after an adjudicatory proceeding has been initiated: 10 C.F.R. § 2.309(f)(2); 10 C.F.R. § 2.309(c); and 10 C.F.R. § 2.309(f)(1).

Under 10 C.F.R. §§ 2.309(f)(2)(i)-(iii), a new contention may be filed after the initial filing only by leave of the presiding officer, upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Moreover, if a new contention does not meet the criteria in 10 C.F.R. § 2.309(f)(2),⁸ the proponent must also demonstrate that the eight-factor balancing test of 10 C.F.R. § 2.309(c) is met. These eight factors are:

- (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;

⁸ A number of Licensing Boards have held that the factors in 10 C.F.R. § 2.309(c)(2) apply only if a new contention does not meet the requirements of 10 C.F.R. § 2.309(f)(2). See, e.g., Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 N.R.C. 261 (2007). It is arguable that the eight factors in 10 C.F.R. § 2.309(c)(2) apply to all late contentions, with the standards in Section 2.309(f)(2) simply constituting the test for good cause under Section 2.309(c)(2). The Commission has not yet had the opportunity to speak to this issue. Since BREDL clearly does not satisfy the criteria in 10 C.F.R. § 2.309(f)(2), as discussed further in this brief, it is not necessary to address this issue here.

- (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.

In weighing these factors, whether good cause exists for failure to file on time is given the most weight. State of New Jersey (Department of Law and Public Safety), CLI-93-25, 83 N.R.C. 289, 296 (1993). If the petitioner cannot demonstrate good cause for lateness, petitioner's demonstration on the other factors must be particularly strong in order to justify the contention to be admitted. Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 N.R.C. 62, 73 (1992). The Commission has determined that the availability of other means to protect the petitioner's interest, and the ability of other parties to represent the petitioner's interest, are entitled to less weight than the other factors. See id. at 74.

Finally, even if a petitioner satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), it must also demonstrate that its new contention satisfies the standards for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vii). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 N.R.C. 355, 362-63 (1993).

As discussed below, BREDL's proposed new contention does not satisfy any of these tests.

B. Proposed Contention Nine Fails to Satisfy the Criteria of 10 C.F.R. § 2.309(f)(2)(i)-(iii)

Proposed Contention Nine rests on the assertion that BREDL can defeat the Commission's requirements that contentions be timely filed by creating its own document as the purported basis for a new contention, notwithstanding the fact that the information contained in the document existed months earlier. Such an interpretation of 10 C.F.R. § 2.309(f)(2) would render the regulation meaningless and allow any petitioner to create "timely" supplements to its pleadings simply by creating new documents that integrate previously available information. The Commission's regulations do not allow for such untimely filings and proposed Contention Nine fails to meet all three of the late filed admissibility criteria under 10 C.F.R. § 2.309(f)(2).

Here, BREDL claims that its proposed Contention Nine is timely based on the comments that BREDL and other organizations filed with respect to a proposed update and revision to the Waste Confidence Decision,⁹ and related proposed amendment to the Waste Confidence Rule.¹⁰ However, the Proposed Waste Confidence Update and Proposed Rule were published in the Federal Register on October 9, 2008 – more than five months ago. Indeed, they were available well before BREDL filed its Reconsideration Motion. The comments submitted by BREDL on the Proposed Waste Confidence Update and Proposed Rule are simply a challenge to the sufficiency of these proposed actions by the Commission, and appear to be based, in all significant respects, on information that was available prior to these proposed actions. Although BREDL asserts that information was not available to BREDL in the form in which it is attached to the Motion,¹¹ this is not a sufficient basis for saying that the information contained in

⁹ Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008) ("Proposed Waste Confidence Update").

¹⁰ Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008) ("Proposed Rule").

¹¹ It "was not integrated into a single document" Motion at 9.

BREDL's written comments on the Proposed Waste Confidence Update and Proposed Rule were not available to BREDL before they were incorporated into BREDL's comments. BREDL has not provided any factual basis to support a finding that any portion of the information contained in the comments was not or could not be available to BREDL prior to the submission of the comments or that such information was not publicly available. Thus, proposed Contention Nine clearly does not satisfy 10 C.F.R. § 2.309(f)(2)(i).

The Commission has recently held, in denying an appeal from the denial of a late-filed contention, 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, 698 N.R.C. ___, slip op. at 15 (March 5, 2009) (emphasis in original). Here, there is no demonstration that the information integrated into the comments was not reasonably available to the public, much less BREDL, who are co-sponsors of those comments.

Proposed Contention Nine also fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii) because BREDL has not demonstrated that any information contained in the comments is materially different from the information they have already had available or previously included in support of previously proposed contentions as required by 10 C.F.R. § 2.309(f)(2)(ii). Again, the only basis BREDL asserts for the information being materially different is that "it was not integrated into a single document that presents a comprehensive and integrated analysis of the Waste Confidence Rule and the related Table S-3 and Proposed Temporary Storage Rule." Motion at 9.

This assertion states nothing about what is purported to be materially different about the allegedly new information.

Moreover, the NRC's publication of its Proposed Waste Confidence Update and Proposed Rule do not provide materially different new information. Indeed, the Commission, in the Supplemental Information published with the Proposed Rule, states that nothing has undermined its prior Waste Confidence findings:

Although the Commission concluded in 1999 that a detailed reevaluation of the Waste Confidence findings was unwarranted, it did state that it would consider undertaking a comprehensive reevaluation of the findings when the impending repository development and regulatory activities run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of those findings. *The Commission does not believe that these criteria have been met.*

Proposed Rule, 73 Fed. Reg. at 59,548 (emphasis added). As the Commission further explains, the proposed revision “strengthen[s] [the Commission’s] confidence in the safety and security of SNF storage” and “confirm[s] the Commission’s confidence that spent fuel storage is safe and secure over long periods of time.” *Id.* at 59,548-549.

Rather than undermining the Waste Confidence Rule, the Proposed Rule confirms the existing Waste Confidence Rule and broadens it. The proposed revision states that “the Commission no longer finds it useful to include this [30-year] time limitation in its generic determination that SNF can be stored safely and without significant environmental impacts after the end of a reactor’s licensed operation.” *Id.* at 59,549. The Proposed Rule further extends the generic determination that “a disposal facility can reasonably be expected to be available.” *Id.* at 59,551. These proposed actions would not alter the outcome of this COL proceeding or alter conclusions in the Final Environmental Impact Statement issued in the ESP proceeding.

Finally, proposed Contention Nine also fails to satisfy the third prong in 10 C.F.R. § 2.309(f)(2)(iii), which requires that all information in a late-filed contention be submitted in a timely fashion based upon the availability of new information. Even assuming that the Proposed Waste Confidence Update and Proposed Rule have any significance regarding the timeliness of proposed Contention Nine, those proposals were published in the Federal Register on October 9, 2008. Filing proposed Contention Nine on March 9, 2009, five months later, is inexcusably late.

C. Proposed Contention Nine Does Not Satisfy the Late-Filed Contention Requirements of 10 C.F.R. § 2.309(c)

Under 10 C.F.R. § 2.309(c)(2), a petitioner is required to “address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.” BREDL fails to address the late-filed criteria contained in 10 C.F.R. § 2.309(c) and proposed Contention Nine should be rejected for this reason alone. “[T]his omission provides an independent and sufficient basis for not admitting . . . belated contentions.” AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 N.R.C. 391, 396 n.3 (2006) (citing Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 (1998)); see also Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 N.R.C. 325, 347 (1998) (stating that the Commission has summarily dismissed petitioners that failed to address the factors for a late-filed petition).

Moreover, proposed Contention Nine does not meet the requirements of 10 C.F.R. § 2.309(c)(1). BREDL cannot demonstrate good cause for the late-filing of proposed Contention Nine for the same reasons that BREDL fails to meet the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(ii), discussed in Section I.B. BREDL has not shown that the information contained in the comments was not reasonably available to the public, or itself as co-sponsor of

some of the comments, and cannot, therefore, claim that it has good cause for the late-filing of proposed Contention Nine. See Millstone, CLI-09-05, slip. op. at 15. Thus, BREDL fails to satisfy the most important of the factors in determining whether to admit a late-filed contention – good cause.

D. Proposed Contention Nine Does Not Meet Other Admissibility Standards for Contentions

Even if BREDL had demonstrated compliance with the standards in 10 C.F.R. §§ 2.309(c)(2) and 2.309(f)(2) – which it clearly has not done – proposed Contention Nine would still be inadmissible because it fails to meet the standards for contentions in 10 C.F.R. § 2.309(f)(1). Indeed, proposed Contention Nine is inadmissible for all of the same reasons for which BREDL’s three prior attempts to challenge the Waste Confidence Rule were rejected.

1. Proposed Contention Nine Is Inadmissible Because it Challenges Existing Commission Rules

Just as BREDL’s previous contentions were, proposed Contention Nine is a direct attack on the existing Waste Confidence Rule and Table S-3. Motion at 4-7. As such, it is impermissible to admit such a contention absent a waiver. See 10 C.F.R. § 2.335; Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Entergy Nuclear Generation Co., and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 17-18 & n.15 (2007); Dominion Nuclear Connecticut, Inc., (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 364 (2001). BREDL does not even assert that there is anything unique to this proceeding that would warrant a waiver. Motion at 3 (“The Intervenor recognizes that the issues raised by our Comments – and therefore by this contention – are generic in nature.”) Because BREDL has admitted that its issues are only generic, it would not be possible for BREDL to seek or be

granted a waiver of those rules in this proceeding. The Commission has held that a waiver may only be granted under circumstances that are “unique” to a 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 N.R.C. 551, 560 (2005) (quoting Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 N.R.C. 573, 597 (1988)).

2. Proposed Contention Nine Is Inadmissible Because It Involves the Subject of Ongoing, General Rulemakings

BREDL also concedes that proposed Contention Nine relates directly to two generic rulemakings that are currently underway. Motion at 3. Such proposed contentions challenging rulemakings are inadmissible for litigation in an individual combined license application proceeding. It is well established 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.” Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 345 (1999) (citing Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 N.R.C. 59, 86 (1985); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 179 (1998)).

Proposed Contention Nine not only seeks to raise issues that are subject to ongoing rulemaking, but also constitutes an allegation that the Commission will conduct the rulemaking in an unlawful manner. See Motion at 3 ((Statement of Issue) contending that “[n]either the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act.”) It is difficult to envision an allegation less

suitable for adjudication in an individual licensing proceeding, or further beyond a licensing board's jurisdiction, than a claim that an ongoing rulemaking is unlawful. As the Commission has held: "If Petitioners are dissatisfied with our generic approach to the problem, their remedy lies in the rulemaking process, not in this adjudication." See *Oconee*, CLI-99-11, 49 N.R.C. at 345. Moreover, BREDL states that because of the generic nature of the issues purported to be raised in [proposed] Contention Nine ". . . we do not seek to litigate them in this individual proceeding." Motion at 3. There is no regulatory basis for admitting generic contentions that will not be litigated in an individual license proceeding.¹² Accordingly, proposed Contention Nine must be rejected.

3. Proposed Contention Nine Is Not Admissible Because Contentions Related to the Waste Confidence Rule Were Litigated in the ESP Proceeding

In addition to being inadmissible because it impermissibly challenges both the existing Waste Confidence Rule and the related ongoing rulemaking proceedings, proposed Contention Nine is also inadmissible because it once more seeks to litigate an environmental issue that was resolved in the ESP proceeding. BREDL, for the fourth time, seeks to litigate the same issues regarding the Waste Confidence rule that were litigated and rejected by the Board in the ESP proceeding and already twice rejected by the Board in this proceeding. BREDL asserts that the "NRC has no technical basis for finding reasonable confidence that spent fuel can and will be

¹² BREDL suggests that proposed Contention Nine should be admitted "to ensure, as required by NEPA and *Baltimore Gas and Electric Co.*, that whatever decisions the NRC reaches in response to our Comments on the Proposed Waste Confidence Decision and Proposed Temporary Storage Rule will be applied in a timely way to the licensing decision for the proposed North Anna Unit 3 nuclear power plant, *i.e.*, before that plant is licensed." Motion at 3. This argument ignores the fact that there is an existing Waste Confidence Rule that was relied upon in the Final Environmental Impact Statement issued in the ESP proceeding. It also ignores the fact that neither the Proposed Rule nor the Proposed Waste Confidence Update would alter the NRC's confidence that spent fuel storage is safe and secure over long periods of time (73 Fed. Reg. at 59,548-549), or the determination that "a disposal facility can reasonably be expected to be available" (*id.* at 59,551). Thus, there is no apparent basis for BREDL's suggestion that the Commission must apply its decisions in the Proposed Rule and Proposed Waste Confidence Update rulemaking proceedings in this proceeding before the Commission may issue a combined construction permit and operating license for North Anna Unit 3.

safely disposed of at some time in the future.” Motion at 4. BREDL’s proposed Contention Nine uses language similar to that in proposed Contention 7 in this proceeding, which was essentially identical to the language of proposed Contention EC 3.2.1 in the ESP proceeding. The Board has clearly held that the inadmissibility of this issue was resolved in the ESP proceeding and that BREDL is, therefore, collaterally estopped from asserting it again. This ruling is law of the case and there is no basis for revisiting it.

Further, as the Board has previously explained, an environmental issue resolved in an ESP proceeding may not be accepted as a contention in a COL proceeding unless new and significant information has been identified. LBP-08-15 at 14-15. As the Board stated:

[W]e are prohibited by 10 C.F.R. § 52.39 from revisiting matters resolved in an earlier ESP proceeding. BREDL has not identified an exception to that general rule that would apply here and allow us to revisit contentions that were not admitted in the ESP proceeding.

LBP-08-15 at 54. Even if there were some basis for ignoring the law of the case and allowing BREDL a third opportunity in this proceeding to raise waste confidence as an issue (which there is not), BREDL still makes no showing that new and significant information exists.

As explained earlier in this Answer, the Proposed Rule does not undermine the Commission’s Waste Confidence findings:

Although the Commission concluded in 1999 that a detailed reevaluation of the Waste Confidence findings was unwarranted, it did state that it would consider undertaking a comprehensive reevaluation of the findings when the impending repository development and regulatory activities run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of those findings. *The Commission does not believe that these criteria have been met.*

Proposed Rule, 73 Fed. Reg. at 59,548 (emphasis added). Rather, the Proposed Rule “strengthen[s] [the Commission’s] confidence in the safety and security of SNF storage” and

“confirm[s] the Commission’s confidence that spent fuel storage is safe and secure over long periods of time.” *Id.* at 59,548-549. While “the Commission no longer finds it useful to include [the 30-year] time limitation in its generic determination that SNF can be stored safely and without significant environmental impacts after the end of a reactor’s licensed operation” (*id.* at 59,549), the Commission still finds that “a disposal facility can reasonably be expected to be available.” *Id.* at 59,551. Thus, the Proposed Rule confirms the existing Waste Confidence Rule and broadens it. Thus, the Proposed Rule cannot constitute new and significant information that would allow the issues that were resolved in the ESP proceeding to be revisited. “For new information to be ‘significant,’ it must be material to the issue being considered.” 72 Fed. Reg. at 49,431 (emphasis added). Since the Proposed Rule would only strengthen and broaden the finding on which the Final Environmental Impact Statement in the ESP proceeding was based, it could not alter the determinations that were made in that proceeding.

III. PROPOSED CONTENTION NINE DOES NOT SATISFY THE PLEADING REQUIREMENTS OF 10 C.F.R. § 2.309(f)(1)

BREDL also fails to satisfy other aspects of the Commission’s pleading requirements. Although BREDL asserts that proposed Contention Nine is based, in part, on the 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”),” Motion at 7-8, BREDL does not assert that these opinions dispute any specific aspect of the COLA. BREDL also fails to state how those opinions support their assertions that the Waste Confidence and Proposed Rule rules are inadequate with respect to this proceeding. The perfunctory statement of the basis for proposed Contention Nine merely references more than 200 pages of comments without providing any explanation of how they relate to proposed Contention Nine or why proposed Contention Nine should be admitted in this

proceeding. A petitioner is not permitted to incorporate massive documents by reference as the basis for, or a statement of, his contentions. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 N.R.C. 209, 216 (1976). Likewise, the conclusory assertion that a material dispute exists does not support a determination that any material dispute does exist. There is no concise statement of the alleged facts or expert opinions that support BREDL's position on the issue and BREDL fails to demonstrate that a genuine dispute exists. Thus, proposed Contention Nine fails to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(1)(v) and (vi) and is, therefore, inadmissible.

IV. AN INADMISSIBLE CONTENTION CANNOT BE HELD IN ABEYANCE

BREDL requests that proposed Contention Nine, which is otherwise inadmissible and which they have no intention of litigating in this proceeding, be nonetheless "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." Motion at 3. However, there is no basis for holding proposed Contention Nine in abeyance. Table S-3 remains in effect and an Environmental Impact Statement regarding the effects of spent nuclear fuel has already been prepared for the North Anna ESP Site. See Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site, NUREG-1811 (Dec. 2006). Thus, the issue of the impacts has already been determined and evaluated. Moreover, there is no basis for admitting an otherwise inadmissible contention in order to hold it in abeyance and proposed Contention Nine should be rejected.

V. BREDL’S REQUEST TO REFER PROPOSED CONTENTION NINE TO THE COMMISSION SHOULD BE DENIED

The Licensing Board should also deny BREDL’s request to refer proposed Contention Nine to the Commission “[i]f the ASLB does not determine that it has the authority to admit the contention because it presents a challenge to a generic rule. . . .” Motion at 3. BREDL’s request does not meet the standard for interlocutory review in 10 C.F.R. § 2.341(f)(1), which provides that the Commission will review an issue referred to it only “if the referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.” The issues raised by BREDL are neither significant nor novel, but rather simply matters currently addressed by the Waste Confidence Rule, which the Commission intends to strengthen.

VI. CONCLUSION

For the foregoing reasons, BREDL’s Motion should be denied.

Respectfully Submitted,

_____/s/_____
David R. Lewis
Blake J. Nelson
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8474

Lillian M. Cuoco
Senior Counsel
Dominion Resources Services, Inc.
120 Tredegar Street, RS-2
Richmond, VA 23219
(804) 819-2684

Counsel for Dominion

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CERTIFICATE OF SERVICE

I hereby certify that a copy the foregoing “Dominion’s Answer Opposing BREDL’s New Contention,” dated April 3, 2009, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 3rd day of April 2009.

Ronald M. Spritzer, Esq, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rms4@nrc.gov

Dr. Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rfc1@nrc.gov

Dr. Alice C. Mignerey
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: acm3@nrc.gov

Alan S. Rosenthal, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rsnthl@comcast.net

Secretary
Att’n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: secy@nrc.gov ; hearingdocket@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
E-mail: BREDL@skybest.com

North Carolina Utilities Commission
Louis S. Watson, Jr.
Senior Staff Attorney
4325 Mail Service Center
Raleigh, NC 27699-4325
E-mail: swatson@ncuc.net

Sarah B. Kirkwood, Esq.
Jody C. Martin, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Sara.Kirkwood@nrc.gov ;
Jody.Martin@nrc.gov

James Patrick Guy II, Esq.
LeClairRyan
4201 Dominion Boulevard, Suite 200
Glen Allen, VA 23060
E-mail: James.Guy@leclairryan.com

_____/s/_____
David R. Lewis