

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Richard F. Cole
Dr. Alice C. Mignerey

In the Matter of

VIRGINIA ELECTRIC and POWER COMPANY
d/b/a DOMINION VIRGINIA POWER and OLD
DOMINION ELECTRIC COOPERATIVE

(Combined License Application
for North Anna Unit 3)

Docket No. 52-017-COL

ASLBP No. 08-863-01-COL

June 2, 2009

ORDER

(Denying Motion to Admit Proposed Contention Nine)

This proceeding concerns the combined license application filed by Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion or Applicant) for North Anna Unit 3, to be located at the North Anna Power Station in Louisa County, Virginia. Before the Board is Intervenor's New Contention Nine.¹ For the reasons explained below, we do not admit Contention Nine.

BACKGROUND

On November 26, 2007, pursuant to Subpart C of 10 C.F.R. Part 52, Dominion filed a Combined License (COL) Application to construct and operate an Economic Simplified Boiling Water Reactor at its existing North Anna Power Station site.² On March 10, 2008, the NRC

¹ Intervenor's New Contention Nine (Mar. 9, 2009) [hereinafter Motion]. BREDL did not file a motion to admit the new contention, but rather simply filed "Intervenor's New Contention Nine." BREDL's filing, however, sets forth the basis upon which BREDL contends the new contention should be admitted. We will therefore construe it as a motion.

² See 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 (Mar. 10, 2008).

published a notice of opportunity for hearing on the Application, requiring that any contentions be filed within sixty days.³ On May 9, 2008, the Blue Ridge Environmental Defense League (BREDL) submitted a Petition to Intervene and Request for Hearing, which included eight contentions.⁴ The NRC Staff and Dominion each filed answers opposing the Petition,⁵ and BREDL replied.⁶ The Board conducted a prehearing teleconference on July 2, 2008, to hear legal argument on the admissibility of BREDL's contentions. The Board issued a Memorandum and Order on August 15, 2008, in which it found that BREDL has standing, admitted BREDL's first contention in part, determined that BREDL's remaining contentions were inadmissible, admitted BREDL as a party, and granted BREDL's request for a hearing.⁷

Proposed Contention 9 was filed on March 9, 2009, well after the deadline for filing contentions in this proceeding. The proposed new contention concerns the Commission's ongoing proceedings in which it is revisiting the question whether high-level radioactive waste produced by nuclear power plants can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available. In 1984 and again in 1990 and 1999, the Commission conducted so-called waste confidence proceedings.⁸ In those

³ Id.

⁴ Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (May 9, 2008) [hereinafter Petition].

⁵ NRC Staff Answer to "Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League" (June 3, 2008); Dominion's Answer Opposing Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (June 3, 2008).

⁶ Reply of the Blue Ridge Environmental Defense League to Dominion Virginia Power and NRC Staff Answers to Our Petition for Intervention and Request for Hearing (June 11, 2008).

⁷ LBP-08-15, 68 NRC 294, 338 (2008).

⁸ See Waste Confidence Decision Update, 73 Fed. Reg. 59,551, 59,552-53 (Oct. 9, 2008).

proceedings, the Commission made or updated several findings that were the basis for generic determinations embodied in the existing 10 C.F.R. § 51.23(a). The first of these generic determinations was that, for at least thirty years beyond the expiration of reactor operating licenses, no significant environmental impact would result from spent nuclear fuel (SNF) storage in reactor storage pools or independent spent fuel storage installations (ISFSIs) located at reactor or away-from-reactor sites.⁹ The second generic determination was the Commission's finding that "there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial [high-level waste and spent nuclear fuel] originating in such reactor and generated up to that time."¹⁰

Last fall, the Commission issued a proposed update to its 1999 Waste Confidence Decision,¹¹ and a related proposed rule.¹² Contention Nine anticipates that the Commission may issue the COL for North Anna Unit 3 based in part on these actions. BREDL argues that the NRC lacks an adequate technical basis upon which to take either of the proposed actions. BREDL further contends that "[u]nless and until the NRC remedies the deficiencies in the Waste Confidence Rule, Table S-3 [of 10 C.F.R. § 51.51], 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."¹³

⁹ See id.

¹⁰ Id. at 59,553.

¹¹ Id.

¹² Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008) [hereinafter Proposed Storage Rule].

¹³ Motion at 4.

ANALYSIS

In order to admit Contention Nine, we would have to resolve two issues in BREDL's favor. The first issue is the timeliness of Contention Nine. As noted, it was filed well after the May 10, 2008 deadline for filing contentions.¹⁴ To overcome this problem, BREDL argues that Contention Nine is based upon new information materially different than information previously available, and that it therefore may be filed as a new contention under 10 C.F.R. § 2.309(f)(2).¹⁵ The second issue that BREDL must address is whether Contention Nine meets the admissibility criteria of 10 C.F.R. § 2.309(f)(1). Because we are unable to resolve either of these issues in BREDL's favor, we will not admit Contention Nine.

New contentions may be filed after the initial docketing, with 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.¹⁶

The allegedly new information that BREDL relies upon is the comments that BREDL and other organizations filed on February 6, 2009 regarding the Proposed Waste Confidence Decision Update and the Proposed Storage Rule.¹⁷ BREDL also relies upon two attachments to

¹⁴ See 73 Fed. Reg. at 12,761.

¹⁵ See Motion at 9.

¹⁶ 10 C.F.R. § 2.309(f)(2).

¹⁷ See Motion app. A (Comments by Texans for a Sound Energy Policy, Alliance for Nuclear Responsibility, Beyond Nuclear, [BREDL], C-10 Research and Education Foundation, Don't Waste Michigan, Environmental Coalition on Nuclear Power, Friends of the Earth, Friends of the Coast Opposing Nuclear Pollution, Grandmothers, Mothers and More for Energy Safety, New England Coalition, Nuclear Information and Resource Service, Nuclear Free Vermont by

those comments: the Declaration by Dr. Arjun Makhijani filed March 9, 2009, and the attached comments from the Institute for Energy and Environment Research (IEER); and the Declaration of Dr. Gordon R. Thompson and the attached critique from the Institute for Resource and Security Studies (IRSS).

Another licensing board recently held that a contention virtually identical to Contention Nine was not based upon information previously unavailable and therefore failed to satisfy the criteria of Section 2.309(f)(2).¹⁸ Notably, the alleged new information in that case included the same comments, declarations, and reports that BREDL relies upon here. We agree with the Bellefonte Board that the comments and the attached declarations and reports do not constitute new or previously unavailable information. Although the comments themselves may be new, BREDL has not shown that the information contained in the comments was previously unavailable. The comments are a 19-page single spaced brief that reviews the legal and factual history and background of the NRC's Waste Confidence Decision, and the NRC's handling of and decisions concerning the environmental impacts of the temporary storage of spent fuel under NEPA, including 10 C.F.R. § 51.51, Table S-3. The comments cite many cases, statutory provisions, and regulations, and present various arguments concerning NRC's proposed rulemaking. BREDL has not provided any factual basis to support a finding that the information contained in the comments was unavailable to BREDL prior to the submission of the comments. Similarly, BREDL has not provided any basis for such a finding regarding the Declaration of Dr. Makhijani and the attached IEER comments, or the Declaration of Dr. Thompson and the

2012, Nuclear Watch South, Pilgrim Watch, Public Citizen, San Luis Obispo Mothers for Peace, the Snake River Alliance, Southern Alliance for Clean Energy, and the Sustainable Energy and [Economic] Development Coalition Regarding NRC's Proposed Waste Confidence Decision Update And Proposed Rule Regarding Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operations (Feb. 6, 2009)).

¹⁸ See Licensing Board Memorandum and Order (Tennessee Valley Auth. (Bellefonte Nuclear Power Plant Units 3 and 4)) (Apr. 29, 2009) (unpublished).

attached IRSS critique.

Thus, BREDL has not shown that proposed Contention Nine satisfies 10 C.F.R. § 2.309(f)(2)(i). That is not necessarily the end of the matter, since a new contention that fails the test of section 2.309(f)(2) might still be admissible under the multi-factor test of 10 C.F.R. § 2.309(c), which governs “nontimely filings.” But BREDL has not argued that Contention Nine is admissible under section 2.309(c), and we are unwilling to manufacture arguments for the Intervenor that it has not made itself. Accordingly, we conclude that Contention Nine may not be admitted because it was filed after the deadline and BREDL has failed to provide a legally sufficient justification for the delay.

Even assuming arguendo that Contention Nine was timely filed under section 2.309(f)(2), as BREDL alleges, it would not be admissible in this proceeding because it is an attack upon an ongoing agency policy review and rulemaking. As the Bellefonte Board explained:

a contention that attacks a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. By the same token, a challenge footed in the petitioner's views about what regulatory policy should be does not present a litigable issue. Given that the proposed update to the Commission's waste confidence decision and the proposed revision of the waste confidence rule are the subjects of an ongoing Commission policy review and an associated rulemaking, we find that [the proposed new contention] does not present a matter appropriate for adjudication before this Licensing Board.¹⁹

The proposed new contention in this case is a challenge to the same ongoing agency rulemaking and policy review, and is therefore inadmissible for the reasons stated by the Bellefonte Board. “If Petitioners are dissatisfied with [the Commission's] generic approach to

¹⁹ Id. at 12.

the problem, their remedy lies in the rulemaking process, not in this adjudication.”²⁰ We would therefore refuse to admit Contention Nine even if it were timely filed.

Finally, BREDL asks that Contention Nine 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.”²¹ The reasoning underlying BREDL’s concern that it might be required to file a premature judicial appeal is unclear, but in any event we know of no legal basis upon which to admit an otherwise inadmissible contention in order to avoid an intervenor’s perceived need to file such an appeal. We also do not accept BREDL’s request that, if we determine that we lack the authority to admit Contention Nine because it presents a challenge to a generic rule, we should refer the issue to the Commission.²² The standard for such a referral is not met because our ruling on this matter does not raise “significant and novel legal or policy issues,” the resolution of which “would materially advance the orderly disposition of the proceeding.”²³ On the contrary, we have simply implemented the Commission’s prohibition on admitting contentions that challenge ongoing agency rulemakings.

²⁰ Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

²¹ Motion at 3.

²² See id.

²³ 10 C.F.R. § 2.341(f)(1).

CONCLUSION

Contention Nine is not admitted.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

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Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 2, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Virginia Electric and Power Company d/b/a)
Dominion Virginia Power (DVP or Dominion)) Docket No. 52-017-COL
and Old Dominion Electric Cooperative (ODEC))
)
(North Anna Nuclear Power Station, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (Denying Motion to Admit Proposed Contention Nine) have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. 52-017-COL
LB ORDER (Denying Motion to Admit Proposed Contention Nine)

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of June 2009