LBP-09-27

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 November 25, 2009

MEMORANDUM AND ORDER
(Admitting Contention 10 in Part)

This proceeding concerns the Combined License (COL) Application filed by Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion or Applicant) for a nuclear reactor, North Anna Unit 3, to be located at the North Anna Power Station in Louisa County, Virginia. Before the Board is the Motion of the Blue Ridge Environmental Defense League (BREDL) to admit new Contention 10, which challenges the adequacy of the storage plan Dominion submitted concerning its management of Low-Level Radioactive Waste (LLRW).

On November 26, 2007, pursuant to Subpart C of 10 C.F.R. Part 52, Dominion filed a COL Application (COLA) to construct and operate an Economic Simplified Boiling Water Reactor at its existing North Anna Power Station site.[1] On March 10, 2008, the NRC published

[1] 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).

a notice of opportunity for hearing on the COLA, requiring that any contentions be filed within sixty days.[2] On May 9, 2008, BREDL submitted a Petition to Intervene and Request for Hearing, which included eight contentions.[3] The NRC Staff and Dominion each filed Answers opposing the Petition,[4] and BREDL replied.[5] 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.[6]

Contention 1 alleged that the Applicant should have explained its current plan for the management of LLRW given the lack of an offsite disposal facility.[7] We construed Contention 1 as a "'contention of omission, one that claims, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that "the application fails to contain information on a relevant matter as required by law … and the

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[2] Id.

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

[4] 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).

[5] 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).

[6] LBP-08-15, 68 NRC 294, 337-38 (2008).

[7] Id. at 312-13.

supporting reasons for the petitioner's belief."'"[8] We partially admitted the contention on that basis.[9]

On May 21, 2009, Dominion provided the NRC with "Submission 4 of the North Anna 3 Combined License Application."[10] The Submission contained changes to the COLA that Dominion stated "describe [its] plan for on-site management of Class B and C low-level radioactive waste in the event an offsite facility is not available to accept such waste."[11] This plan, which we shall refer to as Dominion's "Storage Plan," included a revised Section 11.4.1 of the Final Safety Analysis Report (FSAR) explaining that:

> The Radwaste Building provides storage space sized to hold the total combined volume of packaged Class A, B, and C low-level radioactive waste estimated to be generated during six months of plant operations. Such waste is normally promptly disposed of at licensed offsite processing and disposal facilities. In the event that an offsite facility is not available to accept Class B and C waste, the Radwaste Building waste storage space has been configured to accommodate at least 10 years of packaged Class B and C waste and approximately three months (up to three shipments) of packaged Class A waste, considering routine

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[8] Id. at 313-14 (quoting Pa'ina Hawaii, LLC (Material License Application), LBP-06-12, 63 NRC 403, 413 (2006), petition for reconsideration denied, CLI-06-25, 64 NRC 128 (2006) (dismissing applicant's appeal as untimely)).

[9] Id. at 314.

[10] Letter from Eugene S. Grecheck, Vice-President of Nuclear Dev., Dominion Energy, Inc., to U.S. Nuclear Regulatory Comm'n (May 21, 2009) at 1 (ADAMS Accession No. ML0915206360).

[11] Id. An NRC document explains:

> Per 10 CFR 61.55, LLRW is classified as Class A, B, or C. Class A waste makes up approximately 99 percent of the LLRW and has the lowest level of radioactivity. Class A waste usually consists of slightly contaminated paper products and clothing, rags, mops, equipment and tools, and filters with low levels of radioactivity. While Class B and C waste makes up approximately one percent of the LLRW, it has a higher level of radioactivity. Class B and C usually consist of materials such as filters, resins, and irradiated hardware.
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> NRC Regulatory Issue Summary 2008-32, Interim Low Level Radioactive Waste Storage at Reactor Sites (Dec. 30, 2008) at 1-2 (ADAMS Accession No. ML 082190768).

> operations and anticipated operational occurrences. This Class B and C waste storage capacity is based on a conservative estimate of the annual generation of low-level waste, without credit for potential waste minimization techniques and methods other than dewatering. In the event that an offsite facility is not available to accept Class B and C waste, a waste minimization plan will also be implemented. This plan will consider strategies to reduce generation of Class B and C waste, including reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point of generation segregation techniques. Good fuel performance will also reduce fission products in reactor and spent fuel pool water, and hence the volume of Class B and C waste generated. Implementation of these techniques could substantially extend the capacity of the Class B and C storage area in the Radwaste Building. If additional storage capacity for Class B and C waste is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A.[12]

The Storage Plan also included revisions to other sections of the FSAR, including the description of the Container Storage Subsystem[13] and the Departures Report.[14] After submitting this new information, Dominion moved to dismiss Contention 1 as moot.[15] In response, BREDL argued that Dominion "still lacks a realistic, specific low-level radioactive waste management plan in its Final Safety and Analysis Report" and asserted that it could file a new or amended contention concerning that issue.[16] BREDL informed the Board that it intended "to submit a new modified contention with supporting expert opinion regarding low-level radioactive waste management at the proposed North Anna Unit 3 before June 26, 2009."[17] BREDL submitted its new contention (Contention 10) on June 26, 2009.[18] In

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[12] FSAR, Rev. 2, § 11.4.1 at 11-7 to 11-8.

[13] FSAR, Rev. 2, § 11.4.2.2.4 at 11-9.

[14] FSAR, Rev. 2, Part 7 at 1-1 to 1-3.

[15] Dominion's Motion to Dismiss BREDL's Contention 1 as Moot (June 1, 2009) at 1.

[16] Intervenor's Reply to Motion to Dismiss (June 11, 2009) at 2.

[17] Id. at 2-3.

[18] BREDL had previously filed a Motion to Submit New Contention on June 8, 2009.

Contention 10, BREDL disputes the adequacy of Dominion's plan for the management of Class B and C wastes in the absence of an offsite disposal facility.

Because the COLA now includes a plan for the management of Class B and C wastes in the absence of an offsite disposal facility, we dismissed Contention 1 as moot.[19] We made clear, however, that the dismissal of Contention 1 would not terminate this case and thus expressly retained jurisdiction to decide whether to admit Contention 10.[20] We now resolve that issue by admitting one aspect of Contention 10 and dismissing the remainder.

ANALYSIS

In order to decide whether to admit Contention 10, we must first consider its timeliness, given that it was filed after the May 10, 2008 deadline for filing contentions.[21] If it was timely filed, we must decide whether Contention 10 meets the admissibility criteria of 10 C.F.R. § 2.309(f)(1).

A. Timeliness

BREDL argues that Contention 10 is based upon new information materially different than information previously available, and that therefore it may be filed as a new contention under 10 C.F.R. § 2.309(f)(2).[22] The NRC Staff agrees that Contention 10 is timely insofar as it challenges the adequacy of the new LLRW storage plan, but the Applicant argues that

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[19] Licensing Board Order (Denying Contention 1 as Moot) (Aug. 19, 2009) at 3-4.

[20] Id. See 10 C.F.R. § 2.318(a).

[21] See 73 Fed. Reg. at 12,761.

[22] See Intervenor's Reply to Motion to Dismiss at 2.

Contention 10 is untimely under both § 2.309(f)(2) and § 2.309(c).[23] We agree with BREDL and the NRC Staff that Contention 10 is timely under § 2.309(f)(2) to the extent it challenges the adequacy of the new LLRW storage plan. We reject as untimely those aspects of Contention 10 that merely reargue issues already decided by the Board, without identifying any new information relevant to those issues.

1. Regulatory Background

Under 10 C.F.R. § 2.309(f)(2), a new contention such as Contention 10 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;
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> ii. The information upon which the amended or new contention is based is materially different than information previously available; and
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> iii. The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[24]

The Commission has explicitly stated that its requirements for filing both new and nontimely contentions are "stringent."[25] Nevertheless, several Licensing Boards have recognized a dichotomy between "new" contentions filed under § 2.309(f)(2) and "nontimely" contentions filed under 10 C.F.R. § 2.309(c), based on both the regulatory text and the apparent absurdity of requiring intervenors with contentions rooted in new material information ("new" contentions) to make the same showing as intervenors who have simply delayed filing their

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[23] NRC Staff's Answer to Intervenor's Amended Contention Ten (July 21, 2009) at 4-6 [hereinafter NRC Staff's Answer]; Dominion's Answer Opposing BREDL's Contention 10 (July 21, 2009) at 1 [hereinafter Dominion's Answer].

[24] 10 C.F.R. § 2.309(f)(2).

[25] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009) (citations omitted).

contentions until after expiration of the regulatory deadline ("nontimely" contentions).[26] Simply put, "[i]f a contention satisfies the timeliness requirement of 10 C.F.R. § 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. § 2.309(c) which specifically applies to 'nontimely filings.'"[27]

This proposition finds further support where the original contention is a contention of omission. The Commission has held that "[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot."[28] Thus, in these situations, "[i]ntervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding the new information."[29] Therefore,

> if . . . previously unavailable and material information, which raises for the first time a material new contention, becomes available, and an existing party asserts that new and material contention in a timely fashion, and the contention otherwise satisfies the requirements of 10 C.F.R. § 2.309(f)(1), then that contention is to be admitted, without being required to jump through the eight additional hoops for "nontimely" contentions under 10 C.F.R. § 2.309(c).[30]

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[26] See, e.g., Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007); Oyster Creek, LBP-06-11, 63 NRC 391, 396 n.3 (2006); Entergy Nuclear Vermont, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573-74 (2006); Entergy Nuclear Vermont, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 n.21 (2005).

[27] Vermont Yankee, LBP-06-14, 63 NRC at 573 n.14 (emphasis in original).

[28] Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

[29] Id. The McGuire/Catawba decision interpreted the pre-2004 precursor to the current 10 C.F.R. § 2.309, § 2.714. See Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,217 (Jan. 14, 2004).

[30] Vermont Yankee, LBP-06-14, 63 NRC at 574.

Indeed, at the contention admissibility stage of this case, we held that "[i]f the Applicant cures the omission, the contention will become moot. Then, [the Intervenor] must timely file a new or amended contention if it intends to challenge the sufficiency of the new information supplied by the Applicant."[31]

2. The Parties' Positions

BREDL claims that Contention 10 is a "new" contention under 10 C.F.R. § 2.309(f)(2). First, BREDL claims that Contention 10 is based on newly available information, namely Dominion's amended COLA.[32] As the factual basis for this new proposed contention, BREDL claims that: 1) Dominion has still not provided a viable LLRW disposal plan; 2) "Dominion's amended FSAR is ambiguous and in fact does not add any new information to refute BREDL's original contention"; and 3) "the evidence clearly shows that the Applicant's volume estimates for radioactive waste storage are in fact too small, and not at all the conservative estimates they attempt to portray."[33] Therefore, BREDL concludes, Contention 10 is based on the newly available information found in the amended COLA and thus fulfills 10 C.F.R. § 2.309(f)(2).[34]

Dominion argues that BREDL's Contention 10 is untimely because it was not filed within ten days of receipt of Dominion's amended COLA pursuant to 10 C.F.R. § 2.323(a).[35] Moreover, Dominion reasons, BREDL has not shown cause, justification, or precedent why BREDL should have needed a full month to file its new contention under 10 C.F.R. §

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[31] LBP-08-15, 68 NRC at 317-18 (2008).

[32] Intervenor's Amended Contention Ten (June 26, 2009) at 2, 10

[33] Id. at 2.

[34] Id. at 10.

[35] Dominion's Answer at 11.

2.309(f)(2)(iii).[36] Finally, according to Dominion, two out of three claims in BREDL's Contention 10 are "not based on any new information in the amended COLA" because Contention 10 "alleged the exact same issue, even using the same language, in Contention 1," and does not address any "new information, . . . nor . . . make any new claims" on the amended COLA.[37] Therefore, Dominion concludes, BREDL's Contention 10 does not satisfy 10 C.F.R. § 2.309(f)(2).[38]

The NRC Staff responds that BREDL's Contention 10 does meet 10 C.F.R. § 2.309(f)(2)'s requirements and is thus timely.[39]

3. Analysis

We begin with the requirement that "information upon which the amended or new contention is based . . . [must] not [have been] previously available."[40] Here, BREDL is responding to Dominion's recent revisions to the COLA that provide a new storage plan for the management of LLRW. BREDL asserts that the plan is inadequate in several respects.[41] The Board concludes that because the new information that forms the basis for BREDL's Contention

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[36] Id.

[37] Id.

[38] Id. at 11-12.

[39] NRC Staff's Answer at 4-6.

[40] 10 C.F.R. § 2.309(f)(2)(i).

[41] Intervenor's Amended Contention Ten at 1-3.

10 did not exist until shortly before BREDL filed the contention,[42] it clearly was "previously unavailable" to BREDL for the purposes of 10 C.F.R. § 2.309(f)(2)(i).

The second requirement is that "[t]he information upon which the amended or new contention is based . . . [be] materially different than information previously available."[43] We agree with the Staff that Contention Ten meets the standards of § 2.309(f)(2)(ii) to the extent that it addresses the adequacy of Dominion's new storage plan for Class B and C wastes.[44] The Board previously ruled that Dominion's plan for the storage of those wastes is material to the NRC's decision to issue the COL. We stated that "[i]f Dominion is unable to find a replacement for the Barnwell facility, Class B and C waste from Unit 3 will have to be stored at the site, and Dominion's plan for providing extended onsite storage will be material to the determinations the NRC Staff must make under [10 C.F.R.] Parts 20 and 30."[45] We also noted that 10 C.F.R. § 52.79(a)(3) requires the COLA to explain "'[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter."[46] The Commission has recently ruled that this regulation requires a COL applicant to explain how it "intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20.

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[42] Dominion's Amended COLA was filed on June 1, 2009, almost ten months after this Board admitted Contention 1 in August 2008 and more than one year after BREDL filed its initial petition in May 2008.

[43] 10 C.F.R. § 2.309(f)(2)(ii).

[44] See NRC Staff's Answer at 5-6.

[45] LBP-08-15, 68 NRC at 315.

[46] Id. at 315-16 (citing 10 C.F.R. § 52.79(a)(3)).

This includes, but is not limited to, low-level radioactive waste handling and storage."[47] In that decision, the Commission upheld another board's decision to admit a LLRW contention it described as "substantively identical" to the previously admitted LLRW contention in this case.[48] We therefore see no reason to depart from our previous conclusion that the adequacy of a COL applicant's plan for the storage and management of LLRW is a material issue in a COL proceeding.

Not only is the adequacy of Dominion's new plan a material issue, but the new plan adds information that is "different than information previously available."[49] Under the new plan, Dominion will provide at least ten years of onsite storage capacity for Class B and C wastes. Under the COLA prior to the recent amendment, however, Dominion assumed that Class B and C wastes would be sent to an offsite disposal facility, and it therefore intended to provide only six months of storage capacity.[50] Thus, BREDL's challenge to the new plan is based on new information that is material to the NRC's licensing decision, and the new contention accordingly satisfies § 2.309(f)(2)(ii).

We agree with the Staff, however, that several portions of Contention 10 "simply restate allegations that the Intervenor unsuccessfully advanced earlier in this proceeding."[51] BREDL's allegations that Dominion must obtain a permit under 10 C.F.R. Part 61 for the disposal of LLRW at the North Anna site are neither new nor based on new information. Rather, they

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[47] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 69 NRC ___, ___ (slip op. at 5-6) (July 31, 2009).

[48] Id. at 8.

[49] 10 C.F.R. § 2.309(f)(2)(ii).

[50] LBP-08-15, 68 NRC at 318-19.

[51] NRC Staff's Answer at 6 (citing Intervenor's Amended Contention Ten at 2, 5, 8-9).

restate allegations that the Board has already determined to be inadmissible.[52] We ruled that, "[e]ven assuming arguendo that Dominion might someday require a permit under Part 61 for a disposal facility, that issue is too speculative at present and is therefore not 'material to the findings the NRC must make to support the action that is involved in' the present proceeding."[53] No new facts have arisen to change the Board's original analysis of this portion of Contention 1. Moreover, the Commission recently affirmed another ruling dismissing this portion of an equivalent contention, stating that "Part 61 is inapplicable here because it applies only to land disposal facilities that receive waste from others, not to onsite facilities such as Bellefonte's where the licensee intends to store its own low-level radioactive waste."[54]

BREDL's allegation that Dominion lacks a viable plan for the management of Greater than Class C Waste is also neither new nor based upon new information.[55] In our earlier ruling, we noted that the disposal of Greater than Class C Waste is the responsibility of the federal government, and therefore disposal of such waste would not be directly affected by the partial closure of the Barnwell facility. We therefore focused upon BREDL's allegations concerning Class B and C Waste.[56] We admitted Contention 1 only on the basis that Dominion had failed to explain its plan for the management of Class B and C Waste in the absence of a disposal facility; we made no equivalent ruling concerning Greater than Class C Waste.[57] BREDL has

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[52] LBP-08-15, 68 NRC at 316-17; accord Bellefonte, LBP-08-16, 68 NRC at 414.

[53] LBP-08-15, 68 NRC at 317 (quoting 10 C.F.R. § 2.309(f)(1)(iv)).

[54] Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 73 (2009) (emphasis in original).

[55] See Intervenor's Amended Contention Ten at 2, 5, 8.

[56] LBP-08-15, 68 NRC at 313 n.86.

[57] Id. at 320-21.

not pointed to any new information in the amended COLA concerning the management of Greater than Class C Waste. Contention 10 is timely under § 2.309(f)(2)(i) and (ii) only to the extent it challenges the adequacy of Dominion's new plan for the onsite storage of Class A, B, and C wastes. Given that the new plan does not concern Dominion's management of Greater than Class C Waste, BREDL has provided no basis for revisiting that issue.

For those aspects of Contention 10 that do challenge the adequacy of Dominion's new plan, and which therefore satisfy the first two requirements of § 2.309(f)(2), the final requirement is that "[t]he amended or new contention . . . [must be] submitted in a timely fashion based on the availability of the subsequent information."[58] BREDL filed Contention 10 within thirty days of receiving Dominion's revisions to the FSAR.[59] The Board's scheduling order did not provide a specific due date for new contentions. Instead, it stated that for deadlines not specifically listed, "including the filing of any late-filed contentions, the Board will, absent compelling circumstances, expect compliance with applicable model milestones for hearings conducted under 10 C.F.R. Part 2, Subpart L."[60] The model milestones do not directly address the specific situation presented here, but they do provide that late-filed contentions based on the Safety Evaluation Report and any necessary National Environmental Policy Act document should be filed within thirty days of the issuance of those documents.[61] Moreover, although Dominion

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[58] 10 C.F.R. § 2.309(f)(2)(iii).

[59] BREDL states that it received Revision 2 to the FSAR on May 27, 2009. Intervenor's Motion to Submit New Contention (June 8, 2009) at 1. BREDL filed Contention 10 on June 26, 2009.

[60] Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) at 2.

[61] See 10 C.F.R. Part 2, App. B.

argues that we should apply the ten-day limitation on filing motions,[62] we concur with other Licensing Boards that have imposed a longer timeliness deadline due to the challenges involved in filing a new or amended contention.[63] Those Boards have concluded that thirty days is a reasonable limit for fulfilling the timing requirement of § 2.309(f)(2)(iii) because of "the significant effort involved in (a) identifying new information, (b) assembling the required expertise, and then (c) drafting a contention that satisfies 10 C.F.R. § 2.309(f)(1)."[64] Therefore, we find BREDL's Contention 10 timely under 10 C.F.R. § 2.309(f)(2)(iii).

Because the aspects of Contention 10 that challenge the adequacy of Dominion's new LLRW management plan fulfill each of the requirements of 10 C.F.R. § 2.309(f)(2), there is no need to analyze those aspects of the Contention under 10 C.F.R. § 2.309(c). However, the aspects of Contention 10 that attempt to reargue (1) the need for a disposal permit, and (2) that Dominion lacks a viable plan for the management of Greater than Class C Waste, are not based upon new information and therefore may not be admitted under § 2.309(f)(2). BREDL has not argued that those allegations satisfy the criteria of § 2.309(c). Accordingly, we will not consider those allegations further.

B. Admissibility of Contention 10 under 10 C.F.R. § 2.309(f)(1)

We next review those aspects of Contention 10 that challenge the adequacy of Dominion's new management plan for Class A, B, and C wastes to determine whether they satisfy the contention admissibility requirements of § 2.309(f)(1).

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[62] See Dominion's Answer at 11.

[63] See, e.g., Vermont Yankee, LBP-06-14, 63 NRC at 574.

[64] Vermont Yankee, LBP-06-14, 63 NRC at 574. See also Shaw AREVA MOX Services, LBP-07-14, 66 NRC at 210 n.95.

1. BREDL's allegations

We first summarize the allegations of Contention 10 that we understand to challenge the adequacy of Dominion's Storage Plan. BREDL alleges generally that Dominion

> fails to offer a viable plan for how to dispose of [Class B and C wastes] . . . generated in the course of operations, closure and post closure of North Anna Unit 3 and fails to address how NRC regulations for the disposal of so called "low level" radioactive waste will be met in the absence of a disposal facility.[65]

BREDL then identifies specific deficiencies in Dominion's plan. BREDL alleges that "while achieving so-called improvements in some aspects of storage duration, the Applicant has definitely reduced other storage durations from Unit 3's original design basis."[66] BREDL notes that, in order to provide additional storage capacity for Class B and C wastes, Dominion has reduced the available storage capacity for Class A waste from six to three months of waste.[67] BREDL and its expert Arnold Gundersen interpret this update to Dominion's FSAR as "[r]obbing Peter to pay Paul," since

> [i]n order to meet its goal to assure NRC that there is space to store Class B and C material for ten years, the Applicant has correspondingly reduced its design basis for storage of Class A material from 6 months to 3 months . . . [on] the assumption that a storage facility of some sort will quickly be made available for the Class A waste, all the while assuming that no such facility exists for both Class B and C waste.[68]

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[65] Intervenor's Amended Contention Ten at 2.

[66] Id.

[67] Id. at 5 (quoting Intervenor's Amended Contention Ten, Declaration of Arnold Gundersen Supporting Blue Ridge Environmental Defense League's Contentions (June 26, 2009) at 3 [hereinafter Gundersen Decl.]).

[68] Id. at 6 (quoting Gundersen Decl. at 3-4) (emphasis in original).

BREDL alleges this is inconsistent with the NRC's requirement that the COLA be based upon conservative assumptions.[69]

Second, according to BREDL, "reliable scientific data and [the] historical record . . . suggests that fuel failures in this new reactor design are more likely and that more radioactive material will be present in the reactor coolant and spent fuel pool, not less as the Applicant attempts to persuade."[70] Thus, BREDL maintains that a new reactor design such as North Anna Unit 3 is likely to generate more Class B and C wastes, not less, as Dominion claims in its Storage Plan.

Finally, BREDL alleges that the increased storage capacity Dominion has provided for Class B and Class C radioactive waste is still insufficient. BREDL says that Dominion has provided storage capacity for the estimated amount of such waste that would be generated during ten years of operation, but the reactor operating license for Unit 3 will be for forty years.[71] Thus, under BREDL's interpretation, the COLA still fails to explain how Dominion will provide for an additional thirty years of Class B and C radioactive waste if an offsite disposal facility remains unavailable during the license term.

2. Analysis under 10 C.F.R. § 2.309(f)(1)

a. 10 C.F.R. § 2.309(f)(1)(i) through (iv)

We find that the allegations summarized above satisfy the requirement that the contention provide a specific statement of the legal or factual issues to be raised.[72] BREDL has

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[69] Id. at 6-7 (quoting Gundersen Decl. at 4).

[70] Id. at 2.

[71] Id. at 9.

[72] 10 C.F.R. § 2.309(f)(1)(i).

also provided an adequate explanation of the legal and factual basis of its claims that Dominion's new LLRW management plan is inadequate.[73] The factual basis of the new contention is primarily set forth in the Declaration of Arnold Gundersen, which was incorporated at length in Contention 10. As to the legal basis, BREDL explains that the NRC's Part 52 regulations require Dominion to address "the kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter."[74] BREDL alleges that Dominion's plan fails to demonstrate compliance with the radiation protection standards of Part 20 and also the design objectives set forth in 10 C.F.R. Part 50, Appendix I.

We find that Contention 10 is within the scope of this proceeding, as required by § 2.309(f)(1)(iii), because it challenges the sufficiency of Dominion's Application under Part 52 for a COL for North Anna Unit 3.[75]

To satisfy § 2.309(f)(1)(iv), the petitioner must demonstrate that a contention asserts an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding,"[76] that is to say, the subject matter of the contention must impact the grant or denial of a pending license application.[77] "Materiality" requires the petitioner to show why the alleged error or omission is of possible significance to the result of the

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[73] Id. § 2.309(f)(1)(ii).

[74] Id. § 52.79(a)(3).

[75] See LBP-08-15, 68 NRC at 314-15.

[76] 10 C.F.R. § 2.309(f)(1)(iv).

[77] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, aff'd as to other matters, CLI-98-13, 48 NRC 26 (1998).

proceeding.[78] This means that there must be some significant link between the claimed deficiency and the agency's ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment.[79]

We have previously determined that Dominion's plan for LLRW storage at the North Anna site is "material to the findings the NRC must make to support the action that is involved in the proceeding."[80] And, as explained above, our previous holding is consistent with the Commission's recent decision concerning a LLRW contention in another COL case. We therefore conclude that Contention 10, to the extent it presents a genuine dispute with the adequacy of Dominion's Storage Plan, is material to the NRC's determination whether Dominion will adequately protect public health and safety and the environment.

b. 10 C.F.R. § 2.309(f)(1)(v)

Section 2.309(f)(1)(v) requires that BREDL provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support Contention 10 and upon which BREDL intends to rely at the hearing. Explaining the level of support necessary for an admissible contention, the Commission observed:

> Although [the contention admissibility rule] imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. . . . Nor does [the rule] require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need not proffer facts in "formal affidavit or evidentiary form," sufficient "to withstand a summary disposition motion." . . . On the other hand, a petitioner

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[78] Id. at 179.

[79] Id. at 179-80.

[80] LBP-08-15, 68 NRC at 315 (quoting 10 C.F.R. § 2.309(f)(1)(iv)).

> "must present sufficient information to show a genuine dispute" and reasonably "indicating that a further inquiry is appropriate."[81]

BREDL has provided the required concise statement and supporting references.[82] The first of BREDL's specific issues criticizes Dominion's plan to reduce the storage space for Class A waste in order to provide storage for up to ten years of Class B and C wastes, if an offsite disposal facility for Class B and C wastes is not available when North Anna Unit 3 begins operation. That Dominion intends to take such action is not in dispute. Section 11.4.1 of the FSAR, as revised in the Storage Plan, explains that Dominion will reconfigure its LLRW storage facility in the manner BREDL alleges if an offsite disposal facility is not available for Class B and C wastes. The issue in dispute is not what Dominion intends to do, but the safety consequences, if any, of that action. We address that issue below.

BREDL has also provided support for its attack upon Dominion's claim that the new reactor will provide increased fuel efficiency, and therefore generate less LLRW when compared to existing reactors. In support of this aspect of Contention 10, BREDL relies upon the declaration of Arnold Gundersen, who states that in his "35-years of engineering experience in the nuclear industry the history of new reactor designs has indicated that new fuel designs are less reliable and will leak more than current designs upon which the Applicant is attempting to make its storage volume assumptions."[83] Mr. Gundersen also cites statements from a report

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[81] Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citations omitted); see also Gulf States Util. Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

[82] 10 C.F.R. § 2.309(f)(1)(v).

[83] Intervenor's Amended Contention Ten at 7 (quoting Gundersen Decl. at 4-5).

prepared by the International Atomic Energy Agency (IAEA Report)[84] to support his position that "new fuel designs initially leak more than, not less than, the fuel for which the applicant has based its volume assumptions."[85] BREDL has provided a concise statement of the expert opinion on which it relies and has thus satisfied 10 C.F.R. § 2.309(f)(1)(v).

The Staff nonetheless argues that the Gundersen declaration is insufficient to satisfy § 2.309(f)(1)(v). According to the Staff, Mr. Gundersen and BREDL incorrectly assume that Dominion has relied upon good fuel performance when Dominion claims that, using conservative estimates, the reconfigured Radwaste Building will accommodate ten years of Class B and C wastes. The Staff contends that "the material that the Intervenor provides does not, when read in its entirety and in context, support the propositions for which the Intervenor cites it."[86] The Staff notes that the Storage Plan actually states that the "Class B and C waste storage capacity is based on a conservative estimate of the annual generation of low-level waste, without credit for potential waste minimization techniques and methods other than dewatering."[87] Thus, Dominion did not in fact rely upon good fuel performance or other waste minimization techniques in claiming that the reconfigured Radwaste Building will accommodate ten years of Class B and C wastes. The Staff emphasizes that "[t]he Intervenor's inaccurate

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[84] Int'l Atomic Energy Comm'n, Review of Fuel Failures in Water Cooled Reactors, IAEA Technical Report Series No. 388 (1998).

[85] Intervenor's Amended Contention Ten at 7 (quoting Gundersen Decl. at 5).

[86] NRC Staff's Answer at 15.

[87] Id. at 16 (citing FSAR, Rev. 2, § 11.4.1 at 11-7).

reading and presentation of the Applicant's Storage Plan cannot serve as a litigable basis for a contention."[88]

We agree with the Staff that, read in its entirety, Dominion's Storage Plan does not rely on improved fuel efficiency to support the claim that, using conservative estimates, the reconfigured Radwaste Building will accommodate ten years of Class B and C wastes. But, unlike the Staff, we do not understand Contention 10 to challenge only the Applicant's claim that it made conservative assumptions in estimating the waste volumes that can be stored in the reconfigured Radwaste Building. Dominion's Storage Plan contains three elements. The first is the reconfiguration of the Radwaste Building to increase the storage capacity for Class B and C wastes. The Storage Plan also describes various waste minimization techniques, including good fuel performance, and states that "[i]mplementation of these techniques could substantially extend the capacity of the Class B and C storage area of the Radwaste building."[89] The Storage Plan further states that "[i]f additional storage capacity for Class B and C waste is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A."[90] Thus, viewed as a whole, the Storage Plan explains how Dominion will manage Class B and C wastes onsite if no offsite disposal facility is available during the forty-year license term.

Because Dominion's proposed waste minimization techniques, including good fuel performance, are part of its plan for managing Class B and C wastes in compliance with NRC

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[88] Id. at 16 (citing Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300 (1995); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996)).

[89] FSAR, Rev. 2, § 11.4.1 at 11-7 to 11-8.

[90] Id. at 11-8.

regulations during the license term, the validity of Dominion's claim that those techniques will in fact reduce the volume of Class B and C wastes is a material issue. And we understand Mr. Gundersen and BREDL to challenge directly Dominion's claim that improved fuel performance will reduce the volumes of Class B and C waste during the license term of North Anna Unit 3. BREDL's expert and Dominion clearly have a factual dispute concerning that question, and this aspect of Contention 10 may be admitted because it is material to the findings the NRC must make to grant the license.

The Staff also contends that BREDL has cited the IAEA Report in ways that are "selective and at times misleading."[91] The Staff notes that "[a] document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, both for what it does and does not show."[92] The IAEA Report, however, was not merely quoted in Contention 10. Rather, it is also one of the sources relied upon by Mr. Gundersen in his declaration to support his conclusion that "new fuel designs are less reliable and will leak more than current designs upon which the Applicant is attempting to make its storage volume assumptions."[93] We agree with the Staff that the Gundersen Declaration, by selectively quoting the IAEA Report, makes the Report appear more supportive of Mr. Gundersen's opinion than it really is. For example, as noted by the Staff:

> [T]he Intervenor quotes the IAEA Report as follows: "Failures or problems caused by the introduction of new or modified fuel designs and materials . . . did occur with partly high local failure rates or other severe consequences." Petition at 8. However, the actual sentence from the report reads "Failures or problems caused by the introduction of new or modified fuel designs and materials <u>have been infrequent but</u> did occur with partly high local failure rates (<u>e.g., by grid-rod</u>

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[91] NRC Staff's Answer at 17.

[92] <u>Id.</u> (quoting <u>Yankee Atomic Elec. Co.</u>, LBP-96-2, 43 NRC at 90).

[93] Gundersen Decl. at 4-5.

> fretting) or other severe consequences (e.g., degradation). IAEA Report at 163 (emphasis added where key phrases are missing). The Intervenor's quotation leaves out important elements of the IAEA Report's content, most significantly the statement that the fuel failures in question occur infrequently. Id.[94]

However, we think the Staff's argument goes to the weight to be given to Mr. Gundersen's opinion on the merits of the contention, not to whether BREDL has satisfied the requirements of § 2.309(f)(1)(v). In this instance, the "document put forth by an intervenor as supporting the basis for [the] contention," and which is therefore "subject to scrutiny, both for what it does and does not show,"[95] is Mr. Gundersen's Declaration. On its face, Mr. Gundersen's Declaration supports BREDL's contention that Dominion has incorrectly claimed that new fuel designs will reduce Class B and C waste. The Staff does not argue otherwise. But the Staff would have us go beyond that level of scrutiny and examine in detail one of the sources relied upon by Mr. Gundersen to determine whether his opinion is fully consistent with that source. We think such an attack upon one of the bases for an expert's opinion belongs at the merits stage of the proceeding. As previously noted, the proponent of a contention is not required to prove its case on the merits at the contention admissibility stage. BREDL has "'present[ed] sufficient information to show a genuine dispute' and reasonably 'indicating that a further inquiry is appropriate.'"[96]

To be sure, if Mr. Gundersen had relied on only one source and that source flatly contradicted his opinion or provided no support whatsoever, we might well find his Declaration insufficient to support Contention 10. However, while the IAEA Report does not support Mr.

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[94] NRC Staff's Answer at 18.

[95] Id. at 17 (quoting Yankee Atomic Elec. Co., LBP-96-2, 43 NRC at 90).

[96] Yankee Atomic Elec. Co., CLI-96-7, 43 NRC 235, 249 (1996) (citations omitted); see also Gulf States Util. Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

Gundersen's opinion as fully as his Declaration suggests, the Report provides some support for his views, and it certainly does not contradict his claim that new fuel designs are less reliable and will lead to leaks more than current designs do. Also, Mr. Gundersen has cited other bases for his opinion, including his own extensive professional experience. We therefore conclude that BREDL has provided an expert opinion that is sufficient, at this stage of the proceeding, to support its attack upon Dominion's claim of increased fuel efficiency.[97]

The last aspect of Contention 10 we must examine for compliance with § 2.309(f)(1)(v) is BREDL's claim that, while Dominion's Radwaste Building will be configured to accommodate "at least 10 years" of Class B and C wastes, the license for North Anna Unit 3 will be for forty years.[98] There is no dispute that Dominion will if necessary reconfigure the Radwaste Building to accommodate ten years of Class B and C wastes, not forty years of such waste. The question presented by this aspect of Contention 10 is the safety significance, if any, of that decision, a question we address below.

We therefore conclude that BREDL's allegations satisfy the § 2.309(f)(1)(v) requirements.

c. 10 C.F.R. § 2.309(f)(1)(vi)

The final regulatory requirement is that BREDL provide sufficient information to show that it has a genuine dispute with Dominion concerning a material issue of law or fact, including "references to specific portions of the application . . . that the Petitioner disputes," or, in the case

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[97] Our ruling on this point is consistent with the recent decision in Tennessee Valley Authority (Watts Bar Unit 2), LBP-09-26, 70 NRC __ , __ (slip op. at 63) (Nov. 19, 2009) ("While Dr. Young may be misinterpreting the data submitted by TVA, at this stage of the proceeding we are deciding only contention admissibility. The purpose of the hearing will be to take testimony from experts presented by both sides, weigh the evidence, and thereby ensure that an informed decision is made.").

[98] Intervenor's Amended Contention Ten at 6, 9.

when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[99] We have stated above that, as a general matter, the adequacy of Dominion's new plan for the management of LLRW is material to the licensing decision. Section 2.309(f)(1)(vi) "is not a second hurdle of materiality [an Intervenor] must meet,"[100] but rather requires that the Intervenor identify the specific parts of the COLA it disputes and show that resolution of those disputes is material to the licensing decision.

We find that BREDL's allegation concerning reduced space for Class A waste fails this test. BREDL has merely observed that, if an offsite facility is not available to accept Class B and C waste when North Anna Unit 3 begins operation, Dominion plans to reduce the storage space in its Radwaste Building for Class A waste to make additional space for Class B and C waste. BREDL characterizes this as "Robbing Peter to pay Paul."[101] This is not enough to generate a genuine dispute with the Application on a material issue. BREDL fails to show how reducing the storage space for Class A waste would cause Dominion to run afoul of any applicable NRC regulation. The partial closure of the Barnwell facility deprived Dominion of an off-site disposal facility for its Class B and C waste, but BREDL has not claimed previously, nor does it contend now, that Dominion lacks an offsite disposal facility for Class A waste. According to revised FSAR Section 11.4.1, Dominion's Radwaste Building, even after reconfiguration, will provide storage space for up to three shipments of packaged Class A waste. Although the new plan reduces the storage capacity for Class A waste, substantial storage capacity remains, and BREDL has not alleged that this change will prevent Dominion

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[99] 10 C.F.R. § 2.309(f)(1)(vi).

[100] South Texas Project Nuclear Operating Co. (South Texas Project Units 3 and 4), LBP-09-25, 70 NRC __ , __ (slip op. at 29-30) (Sept. 29, 2009).

[101] Intervenor's Contention Ten at 6 (quoting Gundersen Decl. at 3-4).

from "controlling and limiting radioactive effluents and radiation exposures [from Class A waste] within the limits set forth in [10 C.F.R. Part 20]."[102]

This deficiency is not remedied by BREDL's reference to the general NRC policy that the license application should be based upon conservative assumptions. In its recent ruling concerning contention admissibility in the High Level Waste Repository proceeding, the Commission concluded that the Board correctly rejected a contention alleging that the Safety Analysis Report contained an "unsubstantiated claim of conservatism." This allegation, as well as other claims, "amount[ed] merely to [a] generalized assertion[], without specific ties to NRC regulatory requirements, or to safety in general. Such assertions do not provide adequate support demonstrating the existence of a genuine dispute of fact or law with respect to the construction authorization application."[103] Here, we also have a general allegation that the FSAR is insufficiently conservative concerning Class A waste, without any tie to either a specific regulatory requirement or to safety in general. We therefore will not admit this aspect of Contention 10.

On the other hand, BREDL's challenge to Dominion's claim of improved fuel efficiency is not limited to a general claim of lack of conservatism, but rather disputes the accuracy of a specific part of Dominion's plan for the onsite management of Class B and C waste. BREDL has identified the part of Dominion's FSAR in dispute and has provided the reasons supporting the dispute, as required by § 2.309(f)(1)(vi). Moreover, Dominion's claim of improved fuel efficiency is part of Dominion's attempt to show that, in the absence of an offsite disposal facility for Class B and C waste, it will manage those wastes onsite in compliance with NRC

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[102] 10 C.F.R. § 52.79(a)(3).

[103] U.S. Dep't of Energy (High Level Waste Repository), CLI-09-14, 69 NRC _ , _ (slip op. at 9) (June 30, 2009).

regulations. As BREDL points out, 10 C.F.R. § 52.79(a)(3) requires that Dominion explain "the kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter."[104] To comply with this regulation, the applicant's explanation of the "kinds and quantities of radioactive materials expected to be produced in the operation" must of course be accurate. If BREDL is correct that Dominion has underestimated the amounts of Class B and C waste that will be produced because it has incorrectly assumed that increased fuel efficiency will reduce the volume of such waste, then BREDL might be able to show lack of compliance with the requirement that Dominion accurately explain the "quantities of radioactive materials expected to be produced in the operation" of North Anna Unit 3.[105] Furthermore, if Dominion has underestimated waste volumes, this raises the question whether Dominion will "control[] and limit[] radioactive effluents and radiation exposures within the limits set forth in [10 C.F.R. Part 20]."[106] Higher volumes of Class B and C waste than Dominion anticipates might lead to higher levels of radioactive effluents and associated radiation exposure. BREDL's specific dispute with the COLA is therefore material to determining whether the COLA complies with NRC regulations.

To be sure, Dominion might be able to show that, even without improved fuel performance, it will be able to control and limit radioactive effluents and radiation exposures within the Part 20 limits. That question, however, goes to the merits. The possibility that

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[104] 10 C.F.R. § 52.79(a)(3) (emphasis added).

[105] Id.

[106] Id.

Dominion will be able to make such a showing at a later stage of the proceeding does not preclude us from admitting this aspect of Contention 10.

Dominion argues that its "waste volume estimates are those provided in Table 11.4-2 of the ESBWR design certification document ('DCD')," and that therefore BREDL's claim that it has underestimated waste volumes is in reality a challenge to the DCD.[107] We recognize that "any contention seeking to raise an issue on a design matter addressed in a design certification application should be resolved in the design certification rulemaking, not [in a] . . . COL proceeding."[108] But we disagree with Dominion's claim that BREDL is challenging the waste volume estimates in the DCD. On the contrary, Dominion's claim that "[g]ood fuel performance will . . . reduce . . . the volume of Class B and C waste generated" appears in revised FSAR Section 11.4, which begins by stating that "[t]his section of the referenced DCD is incorporated by reference with the following departures and/or supplements." (Emphasis added). Dominion then explains its plan for managing Class B and C waste in the absence of an offsite disposal facility, including the waste minimization plan that refers to good fuel performance and other waste minimization techniques. Thus, the waste minimization plan is either a departure from or supplement to the DCD, and challenges to that plan or any of its elements may properly be considered in a COL proceeding.

BREDL's final claim is that, because the reactor's proposed operating license is for forty years but the period of waste generation that Dominion takes into account is only ten years, "the length of time is inadequate for storage of Class B and Class C radioactive waste."[109] Dominion

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[107] Dominion's Answer at 10.

[108] Id. (citing Statement of Policy on Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008)).

[109] Intervenor's Amended Contention Ten at 9.

argues that this assertion "fails to raise any genuine material issue," given that BREDL fails to cite any NRC regulation that requires a storage plan for the life of the operating license.[110] Moreover, Dominion refers to the Commission's decision in Bellefonte, which rejected a similar contention and "specifically noted that [the reactor in that case] would have two years of Class B and C storage space - an observation that belies any requirement for 40-year capacity."[111] Dominion finds further support in Commission Guidance documents and Regulatory Issue Summaries that "contemplated five years of storage capacity" in order to "discourage longer term storage which might remove the incentive for development of new offsite facilities," although Dominion does note that this five-year limit was eventually removed.[112] Finally, Dominion claims that BREDL's amended contention is inadequate because it does not address any of the specifics in Dominion's plan that call for building additional capacity for waste storage if needed.[113]

The NRC Staff also notes that "BREDL does not point to any NRC regulation that requires any specific duration for planning long-term storage."[114] NRC Staff maintains that because "Petitioners in NRC proceedings may not challenge the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations," BREDL is precluded from suggesting extra obligations on top of what the regulations already mandate for

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[110] Dominion's Answer at 8.

[111] Id.

[112] Id. at 8 n.5.

[113] Dominion's Answer at 8-9.

[114] NRC Staff's Answer at 12.

duration of storage.[115] The NRC Staff, like Dominion, notes that in Bellefonte the Commission rejected a LLRW contention challenging an applicant's two-year plan for storing Class B and Class C waste.[116]

A proposed contention must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[117] As another Licensing Board has held, a proposed "contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue" is subject to dismissal.[118] Thus, it is this Licensing Board's duty to determine whether BREDL's allegation of insufficient storage capacity successfully and directly controverts Dominion's application and/or correctly asserts that the application insufficiently addresses a relevant issue.

As we have explained, 10 C.F.R. § 52.79(a)(3) requires an application for a combined license to include in its final safety analysis report information on "[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." The Commission has recently held that this regulation "sets no quantity or time restrictions relative to onsite storage of . . . [low level radioactive] waste."[119] Rather, the

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[115] Id. (citations omitted).

[116] NRC Staff's Answer at 12 (citing Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 73-74 n.24 (2009)).

[117] 10 C.F.R. § 2.309(f)(1)(vi).

[118] Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004).

[119] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 69 NRC __ , __ (slip op. at 5) (2009).

information required in this part of the application is largely dependent on the individual applicant's plans.[120]

Dominion and NRC Staff are correct in pointing out that the Commission in Bellefonte rejected a contention based on inadequate storage plans for LLRW and that the plant in question had a storage capacity of two years' worth of LLRW.[121] However, the Commission, while mentioning the two-year waste storage capacity, did not hold that a two-year waste storage capacity should necessarily be deemed sufficient in future cases. Instead, the Commission merely cited the transcript of the oral argument in a footnote to demonstrate the inapplicability of this Licensing Board's contention admissibility decision in this case to the LLRW contention in Bellefonte.[122]

Moreover, in Vogtle the Commission recently upheld the admission of a LLRW contention despite a similar argument from the applicant based on Bellefonte.[123] The Commission explained that there is no regulatory maximum or minimum storage period for

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[120] Id. at 6.

[121] Bellefonte, CLI-09-3, 69 NRC at 73-74 n.24. Dominion concedes that the five year limit it cites on LLRW storage is no longer mandated. Dominion's Answer at 8 n.5.

[122] Bellefonte, CLI-09-3, 69 NRC at 73-74 n.24 (referencing LBP-08-15, 68 NRC at 318-19). The basis for the Commission's rejection of the LLRW contention in Bellefonte was that the contention there served as an impermissible collateral attack on NRC regulations in Table S-3. Bellefonte, CLI-09-3, 69 NRC at 75.

[123] Vogtle, CLI-09-16, 69 NRC at __ , __ (slip op. at 6-9). The Commission in Vogtle found that the Licensing Board did not commit reversible error by admitting the contention based on LLRW storage duration since the NRC Staff itself had issued a Request for Additional Information on this very issue and thus this "conflict[s] with . . . [NRC Staff's] argument that the issue is immaterial to the findings that must be made on the application." Id. at 7-8. See also Calvert Cliffs Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC (Combined License Application for Calvert Cliffs Unit 3), CLI 09-20, 70 NRC __, ___ (slip op. at 15) (Oct. 13, 2009) (also rejecting the argument that Bellefonte precluded admission of LLRW contention).

LLRW in a COLA.[124] Rather, "the required information is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures."[125] Thus, the Commission has neither enjoined petitioners from raising contentions based on insufficient storage capacity for LLRW nor identified any specific duration of storage capacity as sufficient in all cases.

We agree with Dominion, however, that BREDL's allegation of insufficient storage capacity is inadmissible because it does not controvert Dominion's plan to implement waste minimization techniques and build additional Class B and C waste storage capacity, if necessary, so that adequate storage capacity for those wastes will be available throughout the license term. The situation here is much like that in Bell Bend. As the Board in that case explained:

> [T]he Bell Bend Application discusses the LLRW issue in detail and specifically states what "additional waste minimization measures" will be implemented "[i]n the event no offsite disposal facility is available to accept Class B and C waste from BBNPP when it commences operation." Further, PPL provides that if additional storage were necessary, it would build an additional storage facility in accordance with NRC guidelines. Such a facility, PPL states, would have "minimal" impacts and "would provide appropriate protection against releases, maintain exposures to workers and the public below applicable limits, and result in no significant environmental impact." We fail to see any omission in the Application on the LLRW issue, nor have [Petitioners] shown that this plan is inadequate.[126]

Like the applicant in Bell Bend, Dominion states that, if necessary, "further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4,

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[124] Vogtle, CLI-09-16, 69 NRC at ___ (slip op. at 5).

[125] Id. at __ (slip op. at 6).

[126] PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC _ , _ (slip op. at 27) (Aug. 10, 2009) (citations omitted).

Appendix 11.4-A."[127] Thus, Dominion plans to provide additional waste storage capacity if the additional storage capacity provided in the Radwaste Building is exhausted.[128] BREDL's Contention 10 does not acknowledge, much less identify, any deficiency in Dominion's plan to provide additional capacity consistent with NRC requirements should that be necessary, nor does BREDL point to any unresolved safety question concerning such additional capacity.

We therefore hold that this aspect of Contention 10 is inadmissible because BREDL has failed to establish a genuine dispute of material fact with the COLA. As Dominion argues, this

[127] Revised FSAR, § 11.4.1 at 11-8.

[128] Dominion's Storage Plan does not expressly state, as did the application in the Bell Bend, that there will be no significant environmental impact from the construction of new waste storage facilities. That distinction is immaterial, however, because we have previously ruled that the Final Environmental Impact Statement for Early Site Permit for the North Anna Unit 3 Site resolved the issue of the impact of the partial closure of the Barnwell facility upon the Site. Accordingly, the NEPA question may not be raised again in this COL proceeding. LBP-08-15, 68 NRC at 321-25.

aspect of Contention 10 should be dismissed for "not directly controvert[ing] a position taken by the applicant in the license application."[129]

CONCLUSION

We admit Contention 10 insofar as it challenges Dominion's claim that good fuel performance will reduce the volume of Class B and C waste. In all other respects, we do not admit Contention 10.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/ E. R. Hawkens for

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 25, 2009

[129] Dominion's Answer at 8 n.4 (citing PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 24 (2007); USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 462 (2006); Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993); Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992)).

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 MEMORANDUM AND ORDER (ADMITTING CONTENTION 10 IN PART) (LBP-09-27) have been served upon the following persons by Electronic Information Exchange.

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

Administrative Judge
Ronald Spritzer, 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

Administrative Judge
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

Administrative Judge
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

Administrative Judge
Alan S. Rosenthal
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

Josh Kirstein, Law Clerk, ASLBP
E-mail: josh.kirstein@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15 D21
Washington, DC 20555-0001
Marian Zobler, Esq.
Sara Kirkwood, Esq.
Jody C. Martin, Esq
Marcia Carpentier, Esq.
Joseph Gillman, Paralegal
E-mail: mlz@nrc.gov; sara.kirkwood@nrc.gov; jody.martin@nrc.gov; mxc7@nrc.gov; jsg1@nrc.gov

Dominion Resources Services, Inc.
120 Tredgar Street, RS-2
Richmond, VA 23219
Lillian M. Cuoco, Senior Counsel
E-mail: Lillian.Cuoco@dom.com

North Carolina Utilities Commission
Louis S. Watson, Jr., Senior Staff Attorney
Kim Jones, Analyst
4325 Mail Service Center
Raleigh, NC 27699-4325
swatson@ncuc.net
kjones@ncuc.net

Old Dominion Electric Cooperative (ODEC)
4201 Dominion Boulevard, Suite 200
Glen Allen, Virginia 23060
James Patrick Guy II, Esq.
E-mail: james.guy@leclairryan.com

Morgan, Lewis & Bockius, LLP
1111 Pennsylvania, Ave. N.W.
Washington, D.C. 20004
Stephen J. Burdick, Esq.
E-mail: sburdick@morganlewis.com

Pillsbury Winthrop Shaw Pittman, LLP
2300 N. Street, N.W.
Washington, DC 20037-1128
David R. Lewis, Esq., Counsel for Dominion
Robert B. Haemer, Esq.
Jason B. Parker, Esq.
Stefanie M. Nelson, Esq.
Maria Webb, Paralegal
E-mail: David.Lewis@pillsbury.com;
jason.parker@pillsburylaw.com
robert.haemer@pillsburylaw.com;
stefanie.nelson@pillsburylaw.com
Maria.webb@pillsburylaw.com

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

[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

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