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 March 22, 2010

ORDER
(Denying Motion for Reconsideration of LBP-09-27)

Before the Board is the Motion for Reconsideration of LBP-09-27 and Request to Hold Disclosure in Abeyance, filed December 7, 2009, by Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion).[1] The NRC Staff filed an Answer on December 17, 2009, supporting the Motion.[2] The Blue Ridge Environmental Defense League (BREDL) filed an Answer on December 17, 2009, opposing the Motion.[3] On

[1] Dominion's Motion for Reconsideration of LBP-09-27 and Request to Hold Disclosure in Abeyance (Dec. 7, 2009) [hereinafter Dominion's Motion].

[2] NRC Staff Answer to "Dominion's Motion for Reconsideration of LBP-09-27 and Request to Hold Disclosures in Abeyance" (Dec. 17, 2009) [hereinafter NRC Staff's Answer].

[3] Intervenor's Answer to Dominion's Motion for Reconsideration of LBP-09-27 (Dec. 17, 2009) [hereinafter Intervenor's Answer].

December 18, 2009, the Board denied Dominion's request to hold disclosure requirements in abeyance.[4] The Board now denies Dominion's Motion for Reconsideration of LBP-09-27.

BACKGROUND

This proceeding concerns Dominion's Combined License Application (COLA) for a new nuclear reactor, North Anna Unit 3, to be located at the North Anna Power Station in Louisa County, Virginia.

On November 29, 2009, the Board issued LBP-09-27, which admitted new Contention 10 in part.[5] This contention challenges the adequacy of Dominion's plan for the onsite management of Low-Level Radioactive Waste (LLRW) if an offsite disposal facility is not available when Unit 3 begins operation (the Storage Plan). Dominion submitted the Storage Plan to the NRC on May 21, 2009 as an amendment to its COLA for North Anna Unit 3.[6] The Storage Plan includes, among other things, amendments to Section 11.4 of Dominion's Final Safety Analysis Report (FSAR) and to Dominion's Departures Report in Part 7 of the COLA (the Departures Report).[7]

The need for a plan to manage LLRW onsite arose because of the partial closure of the LLRW disposal facility in Barnwell, South Carolina. After June 2008, generators of LLRW, except those located in States that are part of the Atlantic Compact (South Carolina, Connecticut, and New Jersey), were no longer able to send Class B and C wastes to

[4] Licensing Board Order (Denying Request to Hold Disclosure in Abeyance) (Dec. 18, 2009) at 2.

[5] LBP-09-27, 70 NRC __ (slip op.) (Nov. 25, 2009). That Order explains the relevant procedural history of this proceeding, which we will not repeat here. See id. at 1-5.

[6] Id. at 3-4.

[7] Id. at 4.

Barnwell.[8] BREDL initially raised this issue in Contention 1 of its Petition to Intervene. BREDL alleged that Dominion failed to explain in its COLA how North Anna Unit 3 would comply with NRC regulations governing the management of LLRW in the absence of an offsite disposal facility.[9]

In admitting Contention One in part, we noted that Section 11.4 of the North Anna FSAR, entitled "Solid Waste Management System," incorporates Section 11.4 of the Design Control Document (DCD)[10] for the Economic Simplified Boiling Water Reactor (ESBWR), which describes the Solid Waste Management System for the ESBWR.[11] According to Section 11.4.1 of the DCD, that system provides storage capacity (in the "radwaste building") for only the

---

[8] See LBP-08-15, 68 NRC 294, 312-13 n.82 (2008).

[9] Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (May 9, 2008) at 5-7.

[10] The DCD is the document "furnished by GE-Hitachi Nuclear Energy Americas LLC . . . for the purpose of supporting [its] application to the United States Nuclear Regulatory Commission . . . for certification of the ESBWR nuclear plant design pursuant to" 10 C.F.R. Part 52. GE-Hitachi Nuclear Energy, ESBWR Standard Plant Design – Revision 6 to Design Control Document – Tier 1 (Aug. 2009) at ii (ADAMS Accession No. ML092680504) [hereinafter DCD, Rev. 6, Tier 1].

[11] LBP-08-15, 68 NRC at 318-19. On December 1, 2005, the NRC accepted and docketed for rulemaking GE-Hitachi's Application for Final Design Approval and Standard Design Certification of the ESBWR Standard Plant Design. 70 Fed. Reg. 73,311 (Dec. 9, 2005). A design certification application is an application submitted to the NRC for "an essentially complete nuclear power plant design . . . ." 10 C.F.R. § 52.41(b). The reactor design that is the subject of such an application may be referenced in individual COL applications, even if, as in the case of the ESBWR, the NRC has not yet completed the design certification rulemaking. 10 C.F.R. § 52.55(c). The COLA for North Anna Unit 3 references the GE-Hitachi design for the ESBWR. See 73 Fed. Reg. 21,162, 21,162-63 (Apr. 18, 2008). The NRC Staff currently anticipates issuing a proposed rule in the ESBWR design certification rulemaking in January 2011, and a final rule in September 2011. See U.S. Nuclear Regulatory Commission, ESBWR Application Review Schedule, http://www.nrc.gov/reactors/new-reactors/design-cert/esbwr/review-schedule.html (last visited Mar. 18, 2010).

LLRW that would be generated during six months of plant operation. DCD Section 11.4.1 further states that, if no offsite disposal facility is available, individual plants might need to construct additional waste storage capacity, develop an overall site waste management plan, or both.[12] We concluded that Dominion's COLA failed to explain the measures it would take to manage its LLRW in compliance with NRC regulations if no offsite disposal facility is available, and that, accordingly, the COLA omitted information that is material to the licensing decision.[13]

The Storage Plan attempts to remedy that problem in three ways. It first states that, if no offsite disposal facility for Class B and C wastes is available when North Anna Unit 3 begins operation, then Dominion will reconfigure the Radwaste Building for Unit 3 (the Radwaste Building) to increase the storage capacity for Class B and C waste. In addition, Dominion will implement a "waste minimization plan," which consists of "strategies" and "techniques" intended to minimize the production of Class B and C waste.[14] One of the techniques Dominion claimed would contribute to minimizing waste is "good fuel performance," which Dominion stated would "reduce fission products in reactor and spent fuel pool water, and the hence the volume of Class B and C waste generated."[15] Dominion further explained that "[i]mplementation of these techniques could substantially extend the capacity of the Class B and C storage area of the Radwaste building."[16] Finally, the Storage Plan states that "[i]f additional storage capacity for

---

[12] LBP-08-15, 68 NRC at 318-19 (quoting GE Hitachi Nuclear Energy, ESBWR Standard Plant Design – Revision 4 to Design Control Document – Tier 2, 11.4-2 (Sept. 28, 2007) (ADAMS Accession No. ML072910058) [hereinafter DCD, Rev. 4].

[13] Id. at 319-20.

[14] Final Safety Analysis Report (FSAR), Rev. 2, § 11.4.1, at 11-7 to 11-8.

[15] Id.

[16] Id.

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."[17]

BREDL's Contention 10 challenged the Storage Plan on several grounds. BREDL complained that, in order to provide additional storage capacity for Class B and C waste, Dominion reduced the available storage capacity for Class A waste from six to three months of waste.[18] BREDL also contested Dominion's claim that good fuel performance will decrease the volume of Class B and C waste and thereby extend the storage capacity of the Class B and C waste storage area in the Radwaste Building.[19] Finally, BREDL alleged that Dominion has provided storage capacity only for the estimated volume of Class B and C waste that would be generated during ten years of operation, while failing to explain how it will manage the waste during the remaining thirty years of licensed operation.[20]

The Board held that BREDL's new contention satisfied the timeliness requirements of 10 C.F.R. § 2.309(f)(2) for the filing of new or amended contentions, since it was based upon materially different information – Dominion's Storage Plan – that had only recently become available.[21] The Board then considered whether the new contention complied with the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).[22] The Board admitted the new contention only insofar as it challenges Dominion's claim that good fuel performance will decrease the volume

---

[17] Id. at 11-8.

[18] Intervenor's Amended Contention Ten (June 26, 2009) at 6-7 [hereinafter Intervenor's Amended Contention Ten].

[19] Id. at 7-9.

[20] Id. at 9.

[21] LBP-09-27, 70 NRC at __ (slip op. at 9-17).

[22] Id. at 16-33.

of Class B and C waste.[23] The Board held that BREDL's other challenges were inadmissible because they failed to demonstrate a genuine dispute of material fact with the COLA.[24]

In its contention admissibility analysis, the Board addressed Dominion's argument that "to the extent that BREDL may be challenging the estimated volume of Class B and C waste that will be generated, its claims are . . . beyond the scope of this proceeding."[25] According to Dominion, its "waste volume estimates are those provided in Table 11-4.2 of the ESBWR design certification document . . . ."[26] Table 11.4-2 of the DCD is GE-Hitachi's list of "Annual Shipped Waste Volumes" for the ESBWR design.[27] According to Dominion, North Anna Unit 3 will produce the same waste volumes as those listed in DCD Table 11.4-2, and therefore any challenge to Dominion's stated intention to use good fuel performance to reduce the volume of Class B and C waste is a challenge to "a design matter addressed in a design certification application [that] should be resolved in a design certification rulemaking, not the COL proceeding."[28]

---

[23] Future references to Contention 10 should be understood as referring to only the aspect of Contention 10 admitted by the Board.

[24] LBP-09-27, 70 NRC at __ (slip op. at 33-34).

[25] Dominion's Answer Opposing BREDL's Contention 10 (July 21, 2009) at 10 [hereinafter Dominion's Answer].

[26] Id.

[27] GE Hitachi Nuclear Energy, ESBWR Design Control Document, Tier 2, Ch. 11: Radioactive Waste Management, Revision 5 (May 2008) at tbl. 11.4-2 (ADAMS Accession No. ML081820610) [hereinafter DCD Rev. 5].

[28] Dominion's Answer at 10 (citing Statement on Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008)).

The Board concluded that, contrary to Dominion's argument, Contention 10 challenges Dominion's waste minimization plan, not the waste volume estimates in the DCD.[29] The Board explained:

> 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.[30]

Dominion seeks reconsideration of that ruling.

STANDARD OF REVIEW

NRC Regulations permit motions for reconsideration only "upon leave of the presiding officer . . . , upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated."[31] Such motions are limited to ten pages.[32] As the Board noted in denying BREDL's earlier motion for

---

[29] LBP-09-27, 70 NRC at __ (slip op. at 28) (quoting Dominion's Answer at 10 (citing Statement of Policy on Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008))).

[30] Id.

[31] 10 C.F.R. § 2.323(e).

[32] Id. ("The motion and any responses to the motion are limited to ten (10) pages."). In this instance, Dominion's Motion is more than ten pages, even if we exclude its request to hold disclosures in abeyance. The Commission has deemed it appropriate in some circumstances, however, to evaluate the merits of motions for reconsideration that exceed the page limit instead of "forcing [p]etitioners to refile their petition." Consumers Energy Co., Nuclear Mgmt. Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-07-22, 65 NRC 525, 527 (2007). See also NRC Staff's Answer at 3 n.1. Because Dominion's Motion only slightly exceeds ten pages, we will follow that course here.

reconsideration in this proceeding,[33] the Commission's 2004 revisions to NRC hearing procedures impose rigorous criteria for evaluating motions for reconsideration:

> [This] standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.[34]

Thus, "[a] reconsideration motion, to be successful, cannot simply 'republish' prior arguments, but must give the Commission a good 'reason to change its mind.'"[35]

DISCUSSION

We conclude that Dominion has not satisfied the demanding standard for granting reconsideration.[36] Rather than identifying a clear and material error in LBP-09-27, Dominion's Motion in substance attempts to read out of its amended FSAR the claim that good fuel performance will reduce the volume of Class B and C waste generated by North Anna Unit 3, the claim that BREDL challenges. Because a motion for reconsideration is not an appropriate vehicle for withdrawing or modifying statements in the FSAR, we deny Dominion's Motion.

---

[33] See LBP-08-23, 68 NRC 679, 681 (2008).

[34] Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004).

[35] Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 n.13 (2004) (citing Ahmed v. Ashcroft, 388 F.3d 247, 249 (7th Cir. 2004)). Although that ruling concerned a motion for reconsideration filed with the Commission, the Commission's demanding standard for reconsideration is also relevant to a motion filed with a licensing board.

[36] 10 C.F.R. § 2.323(e). The regulation indicates, among other things, that motions for reconsideration "may not be filed except upon leave of the presiding officer or the Commission . . . ." This suggests a two-step process: a board would first decide whether the motion may be filed, and subsequently determine whether the motion should be granted. In this instance the Board did not expressly grant Dominion permission to file its Motion for Reconsideration, but no party has argued that we should not allow the filing. We will accordingly focus upon the question whether Dominion's Motion should be granted, not whether it may be filed.

According to Dominion, the Board erroneously assumed that Dominion departed from the waste volume estimates in DCD Table 11.4-2.[37] Dominion explains that the Departures Report refers only to the modification of the Radwaste Building to increase the storage capacity for Class B and C waste.[38] Dominion therefore maintains that it did not depart from the projected annual waste generation volumes for the ESBWR Standard Plant Design listed in DCD Table 11.4-2.[39] Dominion further argues that, because its estimated waste volumes for North Anna Unit 3 are no different from those listed in the DCD for the ESBWR Standard Plant Design, any contention that alleges it has underestimated the waste volumes that will be produced by North Anna Unit 3 is a challenge to the DCD itself, which Dominion maintains is permitted only in the design certification rulemaking.[40]

Contrary to Dominion's argument, the Board made no "supposition" that Dominion's Departures Report describes a departure from the waste volume estimates in DCD Table 11-4.2.[41] As Dominion points out, the Departures Report refers only to the reconfiguration of the Radwaste Building. It does not mention any of Dominion's waste minimization techniques, nor does it refer to Dominion's plan to build additional storage capacity for Class B and C waste if

---

[37] Dominion's Motion at 2.

[38] Id. at 8 nn.8-9.

[39] Id. at 8 (citations omitted). Table 11.4-2 of the DCD does not refer directly to Class B and C waste. Instead, it estimates the volumes of waste generated annually by waste type, such as "Condensate Purification System Spent Bead Resin." See DCD Rev. 5 at 11.4-12, tbl. 11.4-2. We will assume, however, that it is possible to determine from Table 11.4-2 the volume of Class B and C waste that will be generated annually by North Anna Unit 3.

[40] Id. at 8-9 (citations omitted). We note that this argument, as presented in Dominion's Answer Opposing BREDL's Contention 10, was limited to only one paragraph. Dominion's Answer at 10. Dominion's Motion for Reconsideration, in contrast, devotes eleven pages to the issue, and it is supported by an additional six pages of argument submitted by the NRC Staff.

[41] Dominion's Motion at 2.

necessary. But the fact that these plans are not mentioned in the Departures Report does not mean they do not exist. The Board's ruling was appropriately based on the plain language of amended FSAR Section 11.4.1, the part of the COLA that contains the claim that BREDL challenges.[42] In amended FSAR Section 11.4.1, Dominion did indeed state that "[g]ood fuel performance will . . . reduce fission products in reactor and spent fuel pool water, and hence the volume of Class B and C waste generated."[43] Dominion added that its waste minimization techniques, including good fuel performance, "could substantially extend the capacity of the Class B and C storage area of the Radwaste Building."[44] Thus, Dominion plans to use good fuel performance and other waste minimization techniques to reduce the impact of the partial closure of the Barnwell facility upon North Anna Unit 3. Dominion apparently hopes that, by reducing the volume of Class B and C waste generated at the plant, it will be able to store such waste in the expanded Class B and C waste storage area in the Radwaste Building for more than a decade, and thereby postpone the date by which new storage capacity must be constructed.

Even if Dominion's statements do not expressly mention a reduction in the waste volume estimates in DCD Table 11.4-2, they amount to the same thing. Dominion plainly did claim in FSAR Section 11.4.1 that North Anna Unit 3 will produce lower volumes of Class B and C waste

---

[42] See LBP-09-27, 70 NRC at __ (slip op. at 28); Intervenor's Amended Contention Ten at 6 (citations omitted).

[43] FSAR, Rev. 2, § 11.4.1 at 11-7.

[44] Id. at 11-7 to 11-8.

after implementation of its waste minimization techniques.[45] This obviously means that, if North Anna Unit 3 will produce the waste volumes listed in DCD Table 11.4-2 before implementation of the waste minimization techniques, it will produce lower waste volumes when the techniques are implemented. The reductions, moreover, will be achieved using waste minimization techniques that Dominion itself characterized as "departures and/or supplements" to Section 11.4 of the DCD.[46] Thus, if amended FSAR Section 11.4.1 means what it says, Dominion intends to use waste minimization techniques that either depart from or supplement the ESBWR Standard Plant Design to reduce the volume of Class B and C waste generated at North Anna Unit 3 below the volume that would otherwise be generated (i.e., below the estimates in DCD Table 11.4-2). Dominion is bound by the language of amended FSAR Section 11.4.1 and may not change the meaning of its own FSAR through a motion for reconsideration. If Dominion wishes to change the FSAR, it must amend the document. Until it does so, the claimed effectiveness of Dominion's waste minimization techniques is subject to challenge in this proceeding.

BREDL is not precluded from bringing such a challenge to this declaration by Dominion merely because Dominion failed to repeat in its Departures Report the claim it made in amended FSAR Section 11.4.1 that "[g]ood fuel performance will . . . reduce . . . the volume of Class B and C waste generated."[47] Dominion has at most pointed to a potential inconsistency between FSAR Section 11.4.1 and the Departures Report. It is not even clear that there is an

---

[45] Id. at 11-7 ("Good fuel performance will also reduce fission products in reactor and spent fuel pool water, and hence the volume of Class Band C waste generated").

[46] See id. at 11-7.

[47] Id.

inconsistency.[48] In its Departures Report, Dominion stated that "[a] departure is a plant specific deviation from design information in a standard design certification rule."[49] The Departures Report not only does not mention a plan to reduce volumes of Class B and C waste, it also does not mention Dominion's plan to build additional temporary storage capacity for Class B and C waste if necessary.[50] Thus, Dominion appears to have concluded that the only aspect of its Storage Plan that constituted "a plant specific deviation from design information in a standard design certification rule," and which therefore had to be identified in the Departures Report, was the reconfiguration of the Radwaste Building. The fact that the Departures Report does not mention Dominion's plan to reduce the volume of Class B and C waste is therefore not necessarily inconsistent with Dominion's description of such a plan in amended FSAR Section 11.4.1.[51]

---

[48] According to Dominion's Motion, "[i]f the Amended FSAR had assumed waste volumes that deviated from those in DCD Table 11.4-2, Dominion would have been required to identify and evaluate that deviation as a departure in the Departures Report." Dominion's Motion at 8-9. Dominion, however, cites no NRC regulation or guidance mandating this result.

[49] North Anna Unit 3 COLA, Part 7: Departures Report, Rev. 2, at 1-1.

[50] Notably, Dominion's Motion confirms that it does indeed intend to build additional temporary storage capacity if necessary. Dominion's Motion at 10. In our ruling partially admitting Contention 10, we relied on that plan when we rejected BREDL's argument that Dominion had not adequately explained its plan for the long-term management of Class B and C waste. LBP-09-27, 70 NRC at __ (slip op. at 32-34). We discuss this issue further infra at 18.

[51] Amended FSAR Section 11.4.1 does not describe in detail the specific means by which Dominion plans to achieve good fuel performance. We do note, however, that Section 11.4.1 discusses good fuel performance in the context of "strategies" and "waste minimization techniques" intended to minimize the volume of waste generated at North Anna Unit 3. This suggests that Dominion intends to achieve good fuel performance through operational changes or improvements, rather than by changes to the ESBWR Standard Plant Design. This may also explain why Dominion did not mention good fuel performance – or any of its other waste minimization techniques – in its Departures Report.

But even if we assume arguendo that there is an inconsistency, this does not require that we reject Contention 10. BREDL is required to show only that Contention 10 satisfies the admissibility criteria, not that amended FSAR Section 11.4.1 is fully inconsistent with the Departures Report. The NRC regulations governing contention admissibility require that BREDL identify the specific portions of the COLA that it disputes, explain the reasons supporting the dispute, and show that the dispute is material to the licensing decision.[52] BREDL fulfilled those requirements by demonstrating a dispute of material fact with Dominion's claim in amended FSAR Section 11.4.1 that good fuel performance will reduce the volumes of Class B and C waste generated by North Anna Unit 3. That claim is subject to challenge even though Dominion did not include an equivalent statement in its Departures Report.

Dominion therefore errs in claiming that Contention 10 is a challenge to Table 11.4-2 of the DCD.[53] The waste volume estimates in DCD Table 11.4-2 represent the waste volumes that would be produced by the ESBWR Standard Plant Design without Dominion's plant-specific strategies and techniques to reduce the amount of waste generated. Contention 10 would be in conflict with DCD Table 11.4-2 if the contention alleged that the ESBWR Standard Plant Design would produce greater waste volumes than those listed in the Table. But that is not what the contention alleges. Indeed, it does not refer to DCD Table 11.4-2 at all. Instead, it contends that Dominion overestimated the efficacy of one of the waste minimization techniques identified in its waste minimization plan for North Anna Unit 3. BREDL's contention, if successfully proven on the merits, would mean that Dominion has overestimated the extent to which one of its waste minimization techniques will reduce the volume of Class B and C waste generated by North

---

[52] 10 C.F.R. § 2.309(f)(1)(vi).

[53] Similarly, the NRC Staff characterizes Contention 10 as a challenge to the waste volume estimates in the DCD for the ESBWR Standard Plant Design. See NRC Staff's Answer at 3-5.

Anna Unit 3. But it would not mean that GE-Hitachi underestimated the waste volumes that would be produced by the ESBWR Standard Plant Design. Thus, Contention 10, even if successful, would not require any change in DCD Table 11.4-2 or call into question the ESBWR Standard Plant Design.

Dominion is therefore also mistaken in claiming that Contention 10 conflicts with Commission policy that licensing boards should refer admissible challenges to a standard reactor design to the design certification rulemaking. Because BREDL is challenging an aspect of Dominion's Storage Plan for North Anna Unit 3, not the ESBWR Standard Plant Design, there is no such conflict.

The Commission has explained its policy in the following terms:

> With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent 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 NRC 328, 345 (1999), quoting Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974). In accordance with these decisions, a licensing board should treat the NRC's docketing of a design certification application as the Commission's determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is

> otherwise admissible. Upon adoption of a final design certification rule, such a contention should be denied.[54]

Thus, the Commission's policy applies to contentions that challenge a "design matter addressed in the design certification application."[55] Under the Commission's policy, when a COLA references a docketed design certification application that the Commission has not yet approved, "an Atomic Safety and Licensing Board should hold any contentions on the design filed in the COLA adjudication in abeyance, pending the results of the rulemaking proceeding on the design certification."[56] However, "matters not treated as part of the design, such as operational programs, may remain unresolved for any particular application referencing a particular certified design. Further, site-specific design matters . . . will not be resolved during design certification."[57] Matters that will not be resolved in the design certification rulemaking need not be held in abeyance in individual licensing proceedings.

Contention 10 does not challenge the ESBWR Standard Plant Design. Instead, BREDL challenges the claimed effectiveness of one of Dominion's waste minimization techniques for

---

[54] Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). Dominion assumes that, if we agree that Contention 10 is a challenge to the DCD, it must be dismissed. See Dominion's Motion at 1-3. In fact, the Commission's policy is that an otherwise admissible contention that raises an issue on a design matter addressed in a design certification application should be admitted, held in abeyance, and referred to the NRC Staff for consideration in the design certification rulemaking. The contention should be dismissed only upon completion of the design certification rule. Id. Thus, even if we agreed with Dominion's argument that Contention 10 is a challenge to the DCD, we would not grant Dominion's request to dismiss the contention because we determined in LBP-09-27 that Contention 10 is otherwise admissible.

[55] Id.

[56] Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 84-85 (2009) (quoting 73 Fed. Reg. at 20,972-73).

[57] 73 Fed. Reg. at 20,970. Cf., e.g., Fermi Unit 3, 69 NRC at 85-86; Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 3-4 (2008); Texas Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-51, 14 NRC 896, 898-99 (1981).

North Anna Unit 3. The ESBWR Standard Plant Design does not attempt to resolve the problem that Dominion's Storage Plan addresses, namely the absence of an offsite disposal facility for Class B and C waste. The ESBWR's Radwaste Building includes only six months storage capacity for Class B and C waste, assumes (like Dominion's FSAR before the Storage Plan was added) that the waste will be shipped offsite for disposal, and indicates that if no disposal site is available additional measures may be necessary.[58] Because the absence of an offsite disposal facility for a particular plant such as North Anna Unit 3 is a problem that the DCD does not resolve, individual plant operators must address that issue on a plant-specific basis, as Dominion did when it amended Section 11.4.1 of the FSAR to include the Storage Plan. It includes both a plant-specific design change, the reconfiguration of the Radwaste Building, and various plant-specific operational changes – described by Dominion as "strategies" and "waste minimization techniques" – intended to minimize the volume of Class B and C waste generated at the plant. Thus, in challenging Dominion's claim that good fuel performance will help reduce the volume of Class B and C waste, BREDL is not challenging the ESBWR Standard Plant Design, but rather a departure from or supplement to that design. The departures and supplements described in amended FSAR Section 11.4.1 were intended to resolve a problem that the DCD indicates should be resolved on a plant-specific basis, and which, accordingly, will not be resolved in the design certification rulemaking. Thus, BREDL is not challenging "a design matter addressed in the design certification application."

Were the Board to accept Dominion's argument that BREDL may not bring its challenge to the Storage Plan, we might well create a conflict with Atomic Energy Act (AEA) Section

[58] See DCD Rev. 5 at 11.4.2 ("The inclusion of a temporary storage facility and an overall site management plan per NUREG--0800 Standard Review Plan 11.4 and BTP–ETSB 11-3 (Reference 11.4-1), Revision 3 March 2007, Appendix 11.4-A, may be required (COL 11.4-4-A)").

189(a)(1)(A), which grants a hearing in any licensing proceeding to "any person whose interest may be affected by the proceeding."[59] This provision has been interpreted to mean that the hearing "must encompass all material factors bearing on the licensing decision."[60] As we explained in our previous ruling, the adequacy of a COL applicant's plan for the storage and management of LLRW is a material issue in a COL proceeding.[61] Thus, a person whose interest might be affected by a proceeding may submit a contention challenging the adequacy of the applicant's plan for the management of LLRW in compliance with the relevant substantive radiation protection requirements in 10 C.F.R. Part 20, and the petitioner must be afforded a hearing on that issue if the contention meets the requirements of 10 C.F.R. § 2.309(f)(1). But under Dominion's theory, if the applicant's Departures Report took no departures from the estimated waste volumes in the relevant DCD, a licensing board could not consider the contention even if it was otherwise admissible under 10 C.F.R. § 2.309(f)(1). And only if the DCD itself contained the relevant plan for managing LLRW would the petitioner be able to raise its concerns in the rulemaking for the certified design.[62] In cases such as this, where the challenge is to a plant-specific plan for the management of LLRW, the petitioner would lack a remedy in the design certification rulemaking because the subject of the rulemaking would be the adequacy of the standard plant design, not a plant-specific waste management plan. Thus, under Dominion's theory, a person whose interest might be affected by an allegedly inadequate

---

[59] Atomic Energy Act of 1954 § 189(a), 42 U.S.C. § 2239(a)(1)(A) (2009).

[60] Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1443 (D.C. Cir. 1984).

[61] LBP-09-27, 70 NRC at __ (slip op. at 10-11).

[62] The NRC may require that generic safety concerns be raised a rulemaking petition rather than in a licensing proceeding for a specific plant. See Massachusetts v. United States, 522 F.3d 115, 129-30 (1st Cir. 2008).

LLRW management plan accompanying a COLA could be left without any opportunity to be heard, either before a licensing board or in the design certification rulemaking. Such a result would deny the right to a hearing on a material factor bearing on the licensing decision, in conflict with AEA Section 189(a). We do not believe this is the result the Commission's policy was intended to achieve.

Dominion also argues that the issue of fuel performance beyond the ten-year projected life of the Radwaste Building is of no consequence to the licensing decision "because Dominion's Storage Plan provides that 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."[63] Thus, Dominion would have it that, even if North Anna Unit 3 will generate more Class B and C waste than it anticipates, we should assume that this is of no relevance to the licensing decision given Dominion's commitment to build additional storage capacity when needed.

Even if this argument had merit, it is not properly before us because it was not clearly raised in Dominion's Answer to Contention 10.[64] Moreover, it ignores the requirement that the COLA 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."[65] The Commission has confirmed that the requirement to describe the kinds and quantities of radioactive materials applies to

---

[63] Dominion's Motion at 10.

[64] See 69 Fed. Reg. at 2,207 (The Commission's standard "is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.").

[65] LBP-09-27, 70 NRC at __ (slip op. at 10-11) (quoting 10 C.F.R. § 52.79(a)(3)).

LLRW produced during plant operations.[66] Thus, Dominion must provide accurate information concerning the volume of Class B and C waste that will be generated by North Anna Unit 3, in addition to explaining how it intends to store and otherwise manage LLRW to comply with Part 20 limits.[67] Because Dominion has claimed that good fuel performance and other waste minimization techniques will reduce the volume of Class B and C waste generated at North Anna Unit 3, DCD Table 11.4-2 is not a sufficient basis, standing alone, for determining the kinds and quantities of LLRW generated at the plant. The effect of Dominion's waste minimization plan must be evaluated to correctly determine the volume of Class B and C waste that will be generated by the new plant and that may have to be stored onsite for many years if no offsite disposal facility becomes available.

We recognized in LPB-09-27 that good fuel performance is only one element of Dominion's plan for managing LLRW onsite, and that Dominion might be able to show that, even without good fuel performance, it will be able to control and limit radioactive effluents and radiation exposures within the Part 20 limits.[68] But we also noted that such a question goes to the merits.[69] Our role at this stage of the proceeding is only to determine whether Contention 10 meets the admissibility criteria, not whether it will ultimately succeed. The question whether good fuel performance is in fact necessary for compliance must be made upon a more developed factual record than is presently before the Board.

---

[66] 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).

[67] Id.

[68] LBP-09-27 at __ (slip op. at 27-28).

[69] Id.

Thus, we are not persuaded by Dominion's Motion. We are also not persuaded by the NRC Staff's position, which largely echoes Dominion's. The NRC Staff states that "[t[he Applicants have always maintained that they do not rely upon ('credit') improved fuel performance in estimating or providing waste storage capacity."[70] But the only citation the NRC Staff provides for this statement is Dominion's Motion for Reconsideration.[71] As we have explained, amended FSAR Section 11.4.1 shows that Dominion relies upon improved fuel performance as one element of its Storage Plan, and that statement may not be retracted through a Motion for Reconsideration.

Moreover, the NRC Staff seems to ignore Dominion's amended response to the NRC Staff's Request for Additional Information 11.04-3 (the RAI). In the RAI, issued after our ruling admitting Contention 1, the NRC Staff observed that the ESBWR DCD provides the capacity to store only the amount of LLRW that could be generated during six months of operation. The NRC Staff therefore requested that Dominion "describe the facilities planned for long-term storage of low-level radioactive wastes projected to be generated during the operation of North Anna Unit 3, and the operational program addressing the long-term management and storage of such wastes . . . ."[72] When Dominion amended the FSAR to include the Storage Plan, it simultaneously submitted a revised response to the RAI that was identical to amended FSAR Section 11.4.1. Dominion reiterated its claim that "[g]ood fuel performance will . . . reduce fission products in reactor and spent fuel pool water, and hence the volume of Class B and C

---

[70] NRC Staff's Answer at 5 (citing Dominion's Motion at 10).

[71] See id.

[72] Request for Additional Information North Anna, Unit 3 No. 020, Question 11.04-3 (July 27, 2008) at 2 (ADAMS Accession No. ML082100346) [hereinafter North Anna Unit 3 RAI No. 20, Question 11.04-3].

waste generated," and that good fuel performance, together with implementation of Dominion's other waste minimization techniques, "could substantially extend the capacity of the Class B and C storage area in the Radwaste Building."[73] Thus, contrary to the NRC Staff's position, Dominion did in fact rely upon improved fuel performance in estimating its waste storage capacity, both in amended FSAR Section 11.4.1 and in its amended response to the RAI.

The NRC Staff also argues that whether good fuel performance will reduce the volume of Class B and C waste generated is not material to its licensing decision for North Anna Unit 3.[74] The NRC Staff relies upon 10 C.F.R. § 52.63(a)(5), which provides that "[e]xcept as provided in 10 CFR 2.335, in making the findings required for issuance of a [COL] . . . , the Commission shall treat as resolved those matters resolved in connection with the issuance . . . of a design certification rule."[75] We understand the NRC Staff to mean that it expects the design certification rulemaking to determine the types and volumes of LLRW generated by the ESBWR Standard Plant Design, and that will be all the information the NRC Staff requires about the kinds and quantities of LLRW generated by North Anna Unit 3. But, as we have explained, the design certification rulemaking will determine only the adequacy of the waste management system for the ESBWR Standard Plant Design. Because of the partial closure of the Barnwell facility, North Anna Unit 3 faces a waste management problem not resolved in the standard plant design, and Dominion has accordingly departed from and supplemented the design to help manage that problem. Those plant-specific departures and supplements will not be considered in the design certification rulemaking, and, accordingly, the adequacy of Dominion's Storage

[73] Revised Response to NRC RAI Letter No. 020, Question 11.04-3 (May 21, 2009) at 2 (ADAMS Accession No. ML091540526).

[74] NRC Staff's Answer at 5.

[75] Id. (citations omitted).

Plan will not be "resolved in connection with the issuance . . . of a design certification rule."[76] Therefore, Section 52.63(a)(5) does not foreclose consideration of the Storage Plan – or any of its components – in the licensing decision for North Anna Unit 3. And the adequacy of the Storage Plan is material to the licensing decision, for reasons we explained in our earlier ruling partially admitting Contention 10.[77]

Again, we find the NRC Staff's argument inconsistent with its RAI. In order to issue the RAI, according to its own procedures, the NRC Staff had to first determine that the need for the requested information in order to reach a regulatory determination was clear and unambiguous.[78] The RAI requested, among other things, information concerning Dominion's "operational program addressing the long-term management and storage of" LLRW generated during the operation of North Anna Unit 3.[79] Thus, the NRC Staff must have realized that information concerning Dominion's operational program for the long-term management and storage of LLRW is material to the licensing decision. Dominion responded to the NRC Staff's request by describing its waste minimization strategies and techniques, including good fuel performance. Now the NRC Staff argues that the information Dominion provided in response to the RAI is immaterial to the NRC Staff's regulatory determination. The NRC Staff must have concluded otherwise when it issued the RAI, however, and we agree with the NRC Staff's initial conclusion rather than the position it has argued in response to the instant Motion.

---

[76] 10 C.F.R. § 52.63(a)(5).

[77] LBP-09-27, 70 NRC at __ (slip op. at 10-11).

[78] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC __, __ (slip op. at 8 & n.26) (July 31, 2009).

[79] North Anna Unit 3 RAI No. 20, Question 11.04-3 at 2.

We accordingly conclude, having considered both Dominion's Motion and the supporting arguments of the NRC Staff, that the demanding standard for granting reconsideration has not been met.[80]

CONCLUSION

For the foregoing reasons, Dominion's Motion is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/ A. J. Baratta for

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/ A. J. Baratta for

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 22, 2010

[80] See 10 C.F.R. § 2.323(e).

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 ORDER (DENYING MOTION FOR RECONSIDERATION OF 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

Dated at Rockville, Maryland
this 22nd day of March 2010