

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

September 2, 2010

MEMORANDUM AND ORDER

(Rulings on Motion to Dismiss Contention 10 and proposed new Contention 11)

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 are (1) Dominion's Motion to Dismiss Contention 10 as moot; and (2) the Motion of the Blue Ridge Environmental Defense League (BREDL) to admit proposed new Contention 11, which alleges that Dominion's revisions to its Application, and the NRC Staff's decision to evaluate the revised Application rather than to require Dominion to file a completely new application, violate federal law. We grant the Motion to Dismiss Contention 10 and decline to admit Contention 11.

BACKGROUND

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 (ESBWR) at its existing North Anna Power Station site.¹ On March 10, 2008, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene 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 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.⁴

BREDL's first contention alleged that Dominion should have explained its plan for the management of low-level radioactive waste (LLRW) given the lack of an offsite disposal facility.⁵ Dominion subsequently submitted such a plan, after which it moved to dismiss Contention One

¹ See Virginia Electric and Power Company, d/b/a Dominion Virginia Power, and Old Dominion Electric Cooperative; Correction to Notice of Hearing and Opportunity To Petition for Leave To Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 31,516, 31,516 (June 2, 2008); Notice of Receipt and Availability of Application for a Combined License Dominion Virginia Power—North Anna Unit 3, 72 Fed. Reg. 70,619, 70,619 (Dec. 12, 2007).

² Dominion Virginia Power; Notice of Hearing and Opportunity To Petition for Leave To Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 12,760, 12,761 (Mar. 10, 2008).

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

⁴ LBP-08-15, 68 NRC 294, 337-38 (2008).

⁵ Id. at 312-13.

as moot.⁶ In response, BREDL submitted a new contention (Contention 10) on June 26, 2009,⁷ alleging that Dominion's new plan was inadequate. Because the COLA had been amended to include a plan for the management of Class B and C wastes in the absence of an offsite disposal facility, we granted Dominion's Motion to Dismiss Contention One as moot.⁸ In a later Memorandum and Order, the Board admitted one aspect of Contention 10 and dismissed the remainder.⁹ The Board admitted Contention 10 only to the extent it challenged Dominion's claim that the new reactor will provide increased fuel efficiency, and therefore will generate less LLRW when compared to existing reactors.¹⁰

On June 1, 2010, the NRC Staff informed the parties that Dominion would revise its COLA to incorporate the U.S. Advanced Pressurized Water Reactor (US-APWR) design instead of the ESBWR.¹¹ On June 29, 2010, Dominion confirmed the NRC Staff's letter by filing a notice of its revision to its COLA.¹²

⁶ Dominion's Motion to Dismiss BREDL Contention 1 as Moot (June 1, 2009) at 1.

⁷ Intervenor's Amended Contention Ten (June 26, 2009) at 1. BREDL had previously filed a Motion to Submit New Contention on June 8, 2009. See Intervenor's Motion to Submit New Contention (June 8, 2009).

⁸ Licensing Board Order (Denying Contention 1 as Moot) (Aug. 19, 2009) at 3-4 (unpublished).

⁹ LBP-09-27, 70 NRC __, __ (slip op. at 34) (Nov. 25, 2009).

¹⁰ See Licensing Board Order (Denying Motion for Reconsideration of LBP-09-27) (Mar. 22, 2010) at 5-6 (unpublished).

¹¹ Letter from Robert M. Weisman, Counsel for the NRC Staff, to Atomic Safety and Licensing Board (June 1, 2010) at 1 (ADAMS Accession No. ML101520734).

¹² Letter from David R. Lewis, Counsel for Dominion, to Atomic Safety and Licensing Board (July 1, 2010) at 1 (ADAMS Accession No. ML101820626).

The COLA revision led to both of the matters presently pending before the Board. First, because the COLA revision does not include the claim of improved fuel efficiency that was the subject of Contention 10, Dominion moved to dismiss the Contention as moot.¹³ BREDL has not filed an opposition to Dominion's Motion to Dismiss.

BREDL did, however, submit a new contention (Contention 11) challenging the legality of Dominion's June 29, 2010 COLA revision.¹⁴ The NRC Staff¹⁵ and Dominion¹⁶ each filed responses opposing admission of Contention 11. BREDL did not file a reply in support of Contention 11.

ANALYSIS

I. CONTENTION 10

The Motion to Dismiss Contention 10 is unopposed and, in any event, it must be granted because the issue raised by the contention is clearly moot. The Application, as revised, no longer includes any statement indicating that improved fuel performance is part of Dominion's plan for management of Class B and Class C LLRW.¹⁷ "[W]here a contention is 'superseded by the subsequent issuance of licensing-related documents' . . . the contention must be disposed

¹³ Dominion's Motion to Dismiss BREDL's Contention 10 as Moot (July 12, 2010) at 3-4.

¹⁴ Intervenor's New Contention Eleven (June 17, 2010) at 1 [hereinafter New Contention 11].

¹⁵ NRC Staff Answer to the Blue Ridge Environmental Defense League's New Contention Eleven (July 2, 2010) at 1 [hereinafter NRC Staff Answer].

¹⁶ Dominion's Opposition to BREDL's New Contention 11 (July 12, 2010) at 1 [hereinafter Dominion Answer].

¹⁷ Compare North Anna Unit 3 Combined License Application, Rev. 2, Part 2: Final Safety Analysis Report § 11.4.1 at 11-7 through 11-8 (May 2009) (ADAMS Accession No. ML091540602) with North Anna Unit 3, Combined License Application, Rev. 3, Part 2: Final Safety Analysis Report § 11.4 at 11-65 through 11-68 (June 2010) (ADAMS Accession No. ML102040543).

of or modified.”¹⁸ Because the challenged reference to good fuel performance is no longer included in Dominion’s waste management plan, Contention 10 is dismissed as moot.

II. CONTENTION 11

Contention 11, as summarized by BREDL, maintains that

[t]he Applicant’s mid-stream change of nuclear reactor technology for North Anna Unit 3 subverts the letter and intent of federal regulations for the licensing of a new nuclear power plant under 10 CFR Part 52 and deprives the interested public of its rightful opportunity to review and comment on the proceedings conducted by the Nuclear Regulatory Commission. The Commission should require the Applicant to re-start its application process from the beginning by submitting a new application referencing a new design certification rule.¹⁹

We first evaluate the timeliness of Contention 11 under Section 2.309(f)(2), and then turn to its admissibility under Section 2.309(f)(1).

A. Timeliness

BREDL insists that Contention 11 is timely under 10 C.F.R. § 2.309(f)(2), and neither Dominion nor the NRC Staff challenges admission of Contention 11 on timeliness grounds.²⁰ Nevertheless, the Board is under an obligation to evaluate the timeliness of a proposed contention even if no party raises the issue.²¹

¹⁸ Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002)) (quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)).

¹⁹ New Contention 11 at 2.

²⁰ See, e.g., Dominion Answer at 3 n.2.

²¹ See, e.g., Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-08, 23 NRC 241, 250-51 (1986); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-416, 22 NRC 461, 466 (1985) (“Even if all of the parties are inclined to waive the tardiness, the board nevertheless is duty-bound to deny the petition on its own initiative unless it is persuaded that, on balance, the lateness factors point in the opposite direction.”). Even though these two cases dealt with “late-filed” petitions under what would now be Section 2.309(c)(1), the Commission, in adopting the rule for new contentions that eventually became Section 2.309(f)(2), explicitly stated that the amended rule was “not intended to alter the

We summarized the factors for admission of new or amended contentions under NRC regulations in our previous contention admissibility Memorandum and Order.²² However, we reiterate 10 C.F.R. § 2.309(f)(2)'s provision that a new contention such as Contention 11 may be filed after the initial docketing "with leave of the presiding officer upon a showing that--

- i. The information upon which the amended or new contention is based was not previously available;
- ii. The information upon which the amended or new contention is based is materially different than information previously available; and
- iii. The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.²³

BREDL asserts that Contention 11 is timely under Section 2.309(f)(2) because it arises out of a May 18, 2010 letter from Dominion to the NRC, the contents of which consisted of information that was previously unavailable and materially different from information that existed before, and the contention was timely filed after the NRC Staff's June 1, 2010 letter.²⁴

Under Section 2.309(f)(2)(i), we find that Contention 11 is based on information that was previously unavailable because, until the NRC Staff's June 1, 2010 letter to the Board, there was no formal notice to the Board and other parties regarding Dominion's decision to change its COLA to reference the US-APWR. Given that this reactor design has the effect of displacing much of the discussion of the ESBWR in Dominion's COLA, we also find that this information is materially different from the information that existed before to satisfy Section 2.309(f)(2)(ii).

standards in § 2.714(a) of its rules of practice as interpreted by NRC caselaw . . . respecting late-filed contentions." See Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989). Accordingly, we evaluate the timeliness of BREDL's newly filed contentions infra.

²² See LBP-09-27, 70 NRC at ___ (slip op. at 6-7).

²³ 10 C.F.R. § 2.309(f)(2)(i)-(iii).

²⁴ New Contention 11 at 7-8.

Finally, because BREDL filed Contention 11 on June 17, 2010, and the NRC Staff's letter to the Board was filed on June 1, 2010, we find that it was filed within thirty days of the information upon which it is based and has thus been timely filed under Section 2.309(f)(2)(iii).²⁵

B. Admissibility of Contention 11 under 10 C.F.R. § 2.309(f)(1)

We next review the admissibility of Contention 11 under 10 C.F.R. § 2.309(f)(1). We conclude that BREDL has failed to identify any statute or NRC regulation to support its theory that Dominion may not revise its Application to include a different reactor design. We therefore will not admit Contention 11.

Proposed Contention 11 is essentially a legal contention. It turns on the claim that Dominion's revised COLA, because it incorporates a new reactor design, violates statutory provisions and NRC regulations that allegedly require Dominion to file an entirely new application when it intends to make such a substantial change. The fact that the revised COLA references a different reactor design than the original COLA is undisputed. The primary issue

²⁵ Our Scheduling Order incorporated by reference the deadlines imposed by the Model Milestones of 10 C.F.R. Part 2, under which new contentions based on the Final Safety Evaluation Report (FSER) and any necessary National Environmental Policy Act (NEPA) document are considered timely if filed within thirty days of the issuance of those documents. See Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) at 2 (unpublished); 10 C.F.R. Part 2, App. B. Since Contention 11 is not based on either of those documents, the Model Milestones do not provide clear guidance on what length of time renders a submission "timely." Nevertheless, in this instance we follow the example of other licensing boards, which have held that a submission of a new contention within thirty days of the event giving rise to that contention is timely. See, e.g., Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC __, __ (slip op. at 9) (Aug. 27, 2009); Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006). Even if Contention 11 was entirely rooted in Dominion's May 18, 2010 letter to the NRC Staff, Contention 11's June 17, 2010 filing would have fallen within thirty days of the submission of that letter.

raised by Contention 11 is the legal consequence (if any) of that action.²⁶ The agency's procedural "rules permit contentions that raise issues of law as well as contentions that raise issues of fact."²⁷ In general, the same requirements apply to legal contentions as factual contentions, but the Commission has explained that "requiring a petitioner to allege 'facts' under section 2.309(f)(1)(v) or to provide an affidavit that sets out the 'factual and/or technical bases' under section 51.109(a)(2) in support of a legal contention — as opposed to a factual contention — is not necessary."²⁸ Therefore, our discussion will be limited to the other requirements of Section 2.309(f)(1).

The first applicable requirement is that Contention 11 include a sufficiently clear statement of the issue BREDL intends to litigate.²⁹ That issue is the legality of Dominion's changed reactor design referenced in its COLA and the NRC Staff's consent to Dominion's re-filing its Application to include the changed design. According to BREDL, the change violates federal statutes (NEPA and the Atomic Energy Act (AEA)) and NRC regulations.³⁰ BREDL

²⁶ Contention 11 raises some issues that are not entirely legal in nature. BREDL predicts that the revised COLA will be difficult for the public and the NRC Staff to understand. New Contention 11 at 5. As explained infra at 16-17, this speculation is not a reason to admit the contention. BREDL also quotes testimony that David A. Lochbaum submitted to a Congressional committee in March 2008, stating his concerns about the NRC's oversight of the nuclear industry. Id. at 5-6. BREDL has an obligation to explain why this testimony provides a basis for the contention. Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-03, 69 NRC 139, 153-54 (2009) (citing Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003)). BREDL has failed to do that. We therefore do not view either of these matters as a basis for admitting proposed Contention 11.

²⁷ U.S. Dep't of Energy (High Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009).

²⁸ Id.

²⁹ 10 C.F.R. § 2.309(f)(1)(i).

³⁰ New Contention 11 at 6-7.

requests the Board to order Dominion to re-file its Application completely, the NRC Staff to re-notice the Application “under federal administrative procedures,” and the NRC to conduct its review of the North Anna Unit 3 Application only after the referenced US-APWR design certification is complete.³¹ This is a sufficiently clear statement of the issue BREDL wants to litigate.

We also find that BREDL has satisfied Section 2.309(f)(1)(ii) by providing a sufficient explanation of the basis of the contention. BREDL asserts that the basis “of Contention 11 is Dominion’s statement which indicates the applicant is seeking a fundamental change in its license application, one neither anticipated by nor provided for in Commission statutes and implementing regulations.”³² BREDL reasons that Dominion’s COLA revisions muddle the regulatory record such that the NRC Staff will not be able to render its decision effectively in conformity with the AEA, 10 C.F.R. Part 52, and NEPA, and that the revisions shut the public out of the involvement they are entitled to under these laws.³³ Moreover, BREDL challenges Dominion’s change in reactor design under NRC regulations, alleging that the design criteria of a COLA may be filed no later than six months after the submission the Environmental Report (ER), financial qualifications, and FSAR (Final Safety Analysis Report). Therefore, BREDL reasons, given that Dominion’s Application was filed in December 2008, and the revision was filed in May 2010, Dominion has missed the mandatory deadline outlined in 10 C.F.R.

³¹ New Contention 11 at 7.

³² Id. at 4.

³³ Id. at 4-5.

§ 2.101(a-1)(2).³⁴ Thus, BREDL has adequately alerted the Board and the other parties of the basis of its claim that Dominion's revised Application is unlawful.

The next issue is whether BREDL's challenge to the lawfulness of the revised Application is within the scope of this proceeding.³⁵ Contentions raising legal issues, like fact-based contentions, must fall within the allowable scope of the proceeding to be admissible.³⁶ The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.³⁷ Any contention that falls outside the specified scope of the proceeding is inadmissible.³⁸ The Notice of Hearing and Opportunity to Petition for Leave to Intervene for this proceeding explained that the Licensing Board would consider Dominion's Application under Part 52 for a COL for North Anna Unit 3.³⁹ Thus, Contention 11 is within the scope of the proceeding to the extent it challenges the sufficiency of the Application, including the June 29, 2010 revision.

Dominion argues that Contention 11 is outside the scope of this proceeding because it is really a challenge to NRC regulations that permit a COLA to reference pending design certification applications, and cites NRC caselaw denying requests to hold a contention in

³⁴ Id. at 5 (citing 10 C.F.R. § 2.101(a-1)(2)).

³⁵ 10 C.F.R. § 2.309(f)(1)(iii).

³⁶ Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-06, 53 NRC 138, 154 (2001).

³⁷ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

³⁸ See Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

³⁹ 73 Fed. Reg. at 12,760-61.

abeyance until completion of a design certification.⁴⁰ In addition, Dominion states that “[t]he manner in which the Staff conducts its review is outside the scope of this proceeding.”⁴¹ The NRC Staff agrees with this argument, stating that “the decision to docket, and the subsequent handling of an application, is within the discretion of the Staff.”⁴² BREDL claims that, because Contention 11 concerns deficiencies in Dominion’s Application under NRC regulations and the AEA, it is material to the NRC’s responsibility to provide reasonable assurance of the plant’s construction in conformity with the law, and therefore it is within the scope of this proceeding.⁴³

We agree with Dominion and the NRC Staff that some parts of Contention 11 are outside the scope of this proceeding. BREDL argues that the Commission should complete the US-APWR rulemaking before proceeding with the review of the COLA for North Anna Unit 3.⁴⁴ Dominion correctly responds that 10 C.F.R. § 52.55(c) permits an applicant, at its own risk, to reference a pending design certification application, and that the Staff need not complete the US-APWR design certification rulemaking before proceeding to evaluate Dominion’s revised COLA.⁴⁵ The Commission has held that “[t]he design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an

⁴⁰ Dominion Answer at 7 (citing inter alia 10 C.F.R. §§ 2.335(a), 52.55(c)).

⁴¹ Id. at 6 (citing AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station, CLI-08-23, 68 NRC 461, 476-77, 481-82, 486 (2008); Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 66 (2003)).

⁴² NRC Staff Answer at 9 (citing U.S. Dep’t of Energy (High-Level Waste Repository), CLI-08-20, 68 NRC 272, 274-75 (2008)).

⁴³ New Contention 11 at 6-7.

⁴⁴ Id. at 7.

⁴⁵ Dominion Answer at 7.

adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution.”⁴⁶ We also recognize that “[b]oards do not direct the staff in [the] performance of [its] administrative functions.”⁴⁷ We therefore may not order the Staff to cease review of Dominion’s revised COLA or direct it to require Dominion to submit a new application.

Nevertheless, Contention 11 is not limited to matters outside the scope of this proceeding. BREDL expressly challenges the “the application by Dominion-Virginia Power to build and operate a new nuclear power plant on the North Anna site,”⁴⁸ which is the subject of this proceeding. BREDL alleges that the revised Application violates federal law by substituting one reactor design for another, citing the AEA, NEPA, and NRC regulations in support of its theory that such a significant modification of the Application is unlawful.⁴⁹ According to BREDL, the substitution of a new reactor design requires an entirely new license application. This argument falls within the scope of this proceeding because it alleges, in substance, that the revised Application is unlawful and therefore may not serve as the basis for granting a license. And, even though the NRC Staff evidently interpreted the law differently than BREDL when it decided to accept the revised Application for review, this does not place BREDL’s challenge to the revised Application outside the scope of this proceeding. The Staff’s view of the law, while certainly entitled to consideration, is not binding upon the Board. Another licensing board

⁴⁶ Shearon Harris, CLI-09-08, 69 NRC at 329.

⁴⁷ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-80-12, 11 NRC 514, 516 (1980). See also U.S. Dep’t of Energy, CLI-08-20, 68 NRC at 274-75; New England Power Co. (NEP, Units 1 & 2), LBP-78-09, 7 NRC 271, 278-79 (1978).

⁴⁸ New Contention 11 at 1.

⁴⁹ Id. at 4-5.

recently rejected the argument that the sufficiency of an application is a matter committed solely to the NRC Staff's discretion and is entirely outside the scope of an adjudicatory proceeding.⁵⁰

As the board in that case explained,

Certainly, the NRC Staff may make an initial assessment as to whether or not the Applicant has provided sufficient information to satisfy 10 C.F.R. § 52.79(a). If the Staff thinks that the COLA is insufficient, then the Staff might decline to docket the application, request additional information, and even deny the application. But, while the Staff's role in initially assessing the sufficiency of the application is important, it does not foreclose the possibility of adjudication. To the contrary, Intervenor may always challenge the sufficiency of the COLA and the fact that the Staff (which is simply another party to the litigation) is of the opinion that the COLA is sufficient, is merely a fact to be considered by the Board. If contentions are to be denied automatically every time the Staff agrees with the Applicant, then virtually no contentions would ever be admitted.⁵¹

We agree.

The last two applicable requirements present a more significant problem for BREDL. Under Section 2.309(f)(1)(iv), BREDL must show that Contention 11 asserts an issue of law that is "material to the findings the NRC must make to support the action that is involved in the proceeding," that is, the subject matter of the contention must impact the grant or denial of the pending license application.⁵² Thus, BREDL must show that the action it challenges -- Dominion's submission of a revised application that incorporates a new reactor design rather than an entirely new application -- is relevant to the agency's decision to grant or to deny the license. To satisfy Section 2.309(f)(1)(vi), BREDL must show that a genuine dispute exists

⁵⁰ Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), Licensing Board Order (Ruling on Joint Intervenor's Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 14-15 (unpublished).

⁵¹ Id. (emphasis in original).

⁵² Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-07, 47 NRC 142, 179-80 (1998), aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

concerning a material issue of law, including references to specific portions of Dominion's COLA that BREDL disputes.

Contention 11 is material to the licensing decision if, but only if, at least one of the statutes or regulations BREDL relies upon can plausibly be read to require that Dominion submit a new license application when it decided to reference a different reactor design in the COLA. Similarly, in order to find a genuine dispute of law, we must find some statutory or regulatory foundation for BREDL's argument that Dominion was obligated to submit a new COLA. BREDL need not convince us at the contention admissibility stage that its legal arguments will ultimately prevail, but it must at least persuade us that Contention 11 has a sufficient foundation in law that it should be admitted in this proceeding.

Examining BREDL's legal arguments for this limited purpose, we conclude that BREDL has failed to establish a statutory or regulatory foundation for the legal arguments that underlie Contention 11. Far from prohibiting amendments to a license application, the agency's regulations expressly contemplate such amendments.⁵³ The application may be modified or improved during the NRC review process.⁵⁴ Amendments are not limited to minor details, but may include significant changes to the application.

In the Board's view, an amendment of an application, even a substantial amendment, is not only permissible but in fact is often a necessary consequence of the review process conducted by the Staff. It would not be appropriate for the Applicant to be subject to dismissal of the application in each instance where the review process undercovers a substantial area requiring design modification. Such a result would have the effect of virtually eliminating the review by making it a menial, detail seeking scrutiny with no substantive impact.⁵⁵

⁵³ See 10 C.F.R. § 52.3(b)(2).

⁵⁴ See Curators of the Univ. of Missouri, CLI-95-08, 41 NRC 386, 395 (1995).

⁵⁵ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879 (1974).

As Dominion correctly argues, “BREDL does not identify a single statutory provision, regulation, or precedent that prohibits an applicant from amending a COL application to reflect changes in the selected reactor design.”⁵⁶ Section 189(a) of the AEA, cited by BREDL, does not prohibit license amendments or limit their scope. Instead, it provides for a hearing in a licensing proceeding “upon the request of any person whose interest may be affected by the proceeding.”⁵⁷ BREDL’s only attempt to explain the connection between Section 189(a) and proposed Contention 11 is its statement that, in this proceeding, “[m]ost of the Commission’s reviews and most of the opportunities for the Intervenor and the affected public to participate have passed. A diminishing number of occasions for review and comment on the prospective North Anna APWR remain.”⁵⁸ Thus, we understand the argument to be that the revised COLA indirectly deprives BREDL of its rights under Section 189(a) because the opportunity for public participation had passed by the time the revision was filed.

NRC regulations, however, preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information.⁵⁹ Thus, an intervenor may request a hearing on issues arising from a revision that adds material new information to the original application. To be sure, an intervenor must

⁵⁶ Dominion Answer at 4.

⁵⁷ Atomic Energy Act of 1954 § 189(a), 42 U.S.C. § 2239(a)(1)(A) (2010).

⁵⁸ New Contention 11 at 3.

⁵⁹ 10 C.F.R. § 2.309(f)(2). See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-03, 60 NRC 749, 754 (2004) (citing 10 C.F.R. § 2.309(c) and (f)(2)) (Board rejected claim that petitioner’s rights would be prejudiced by supplements to the application because “a participant in a proceeding has the ability to file new, amended, or late-filed contentions when additional documentation becomes available.”).

comply with procedural requirements for the filing of new or amended contentions, including the requirement that new or amended contentions be “submitted in a timely fashion based on the availability of the subsequent information.”⁶⁰ And a new or amended contention, like any other, must comply with the admissibility requirements of 10 C.F.R. § 2.309(f)(1). There is no necessary conflict, however, between these requirements and the right to a hearing provided in AEA Section 189(a). In general, licensing boards have the authority to control the schedule for a proceeding to ensure that intervenors have adequate time to prepare new or amended contentions in response to new information.⁶¹ The Board has done that in this proceeding. BREDL requested, and the Board allowed, sixty days for the filing of new contentions based on new information in Dominion’s revised Application.⁶² Given that licensing boards have the authority to establish reasonable schedules for the filing of new or amended contentions based on changes to a license application, we see no inherent conflict between Section 189(a)’s right to a hearing and the filing of a revised license application that incorporates a different reactor design.

BREDL’s prediction that Dominion’s revised COLA will be difficult for the public and the NRC Staff to follow⁶³ adds nothing to its argument. As Dominion points out, the revised COLA delineates where it deviates from earlier submissions, and in any event no regulation requires a

⁶⁰ 10 C.F.R. § 2.309(f)(2)(iii).

⁶¹ See 10 C.F.R. § 2.319(k).

⁶² Licensing Board Order (Setting Deadline for Filing New Contentions Based on New Information in the Applicant’s June 29, 2010 Revision to the License Application) (Aug. 11, 2010) at 2-3 (unpublished) [hereinafter Aug. 11, 2010 Licensing Board Order].

⁶³ New Contention 11 at 5.

COLA to be completely re-submitted because someone might find it difficult to understand.⁶⁴ Such concerns can be addressed, as they were here, through a request for modification of the Board's scheduling order.

BREDL also mentions the NRC's obligation under NEPA to evaluate the environmental impact of North Anna Unit 3,⁶⁵ but it does not develop any specific argument based on NEPA. We will not invent arguments for BREDL that it has failed to make for itself. Moreover, we see nothing about a revised license application that would necessarily create a conflict with agency's obligations under NEPA. BREDL may have in mind the possibility that, after an environmental impact statement has been prepared for a proposed action, a revised application could be submitted that alters the action's predicted environmental consequences. The agency's NEPA-implementing regulations anticipate the possibility of "substantial changes in the proposed action that are relevant to environmental concerns," and provide that when this happens "the NRC staff will prepare a supplement to a final environmental impact statement."⁶⁶ The filing of a revised application thus does not prevent the NRC from complying with its obligations under NEPA. It simply means that, in some instances, the NRC Staff may have to prepare a supplement to the environmental impact statement.

BREDL's reliance on 10 C.F.R. § 2.101(a-1)(2) is also misplaced.⁶⁷ That provision pertains to early consideration of site suitability issues, allows a COL applicant requesting such consideration to submit its application in parts, and provides a schedule for submitting those

⁶⁴ Dominion Answer at 6.

⁶⁵ New Contention 11 at 7.

⁶⁶ 10 C.F.R. § 51.92(a)(1).

⁶⁷ BREDL incorrectly cites "10 CFR § 2.101 (2)." See New Contention 11 at 5.

parts of the application to the agency.⁶⁸ Dominion, however, did not request such early consideration of site suitability issues.⁶⁹ Thus, this provision does not apply to Dominion's COLA.⁷⁰

We therefore conclude that BREDL lacks a credible legal foundation for its argument that Dominion was obligated to file a new license application when it decided to adopt the US-APWR in place of the ESBWR. Accordingly, Contention 11 is not material to the NRC's licensing decision under 10 C.F.R. § 2.309(f)(1)(iv), and fails to identify a genuine dispute of law with the revised Application under 10 C.F.R. § 2.309(f)(1)(vi).⁷¹

⁶⁸ 10 C.F.R. § 2.101(a-1)(2).

⁶⁹ NRC Staff Answer at 11.

⁷⁰ BREDL also makes a general claim that Dominion's revised Application violates 10 C.F.R. Part 52. New Contention 11 at 3. BREDL fails, however, to cite any specific provision of Part 52, much less one that prohibits Dominion's revised Application. In fact, as we have explained, Part 52 contemplates amendments to applications. 10 C.F.R. § 52.3(b)(2). Thus, we find no merit in BREDL's claim.

⁷¹ 10 C.F.R. § 2.309(f)(1)(iv), (vi).

CONCLUSION

For the foregoing reasons, we dismiss Contention 10 as moot and do not admit Contention 11. These rulings, however, do not terminate this case. Dominion's revised Application, although not in violation of any statute or regulation cited by BREDL, may include changes that could form the basis for new contentions. Under the Board's supplemental scheduling order of August 11, 2010, BREDL has until October 4, 2010, to file new contentions based on the June 29, 2010 COLA revision.⁷² We retain jurisdiction to decide whether to admit any new contentions BREDL might file pursuant to that order.⁷³

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

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ADMINISTRATIVE JUDGE

/RA/ G. Paul Bollwerk for ERH

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/ G. Paul Bollwerk for ERH

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 2, 2010

⁷² Aug. 11, 2010 Licensing Board Order at 7.

⁷³ See 10 C.F.R. § 2.318(a).

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 (RULINGS ON MOTION TO DISMISS CONTENTION 10 AND PROPOSED NEW CONTENTION 11) have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. 52-017-COL
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[Original signed by Christine M. Pierpoint]
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Dated at Rockville, Maryland
this 2nd day of September 2010