

May 2, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
VIRGINIA ELECTRIC AND POWER CO.,)
dba DOMINION VIRGINIA POWER,)
and OLD DOMINION ELECTRIC) Docket No. 52-017-COL
COOPERATIVE)
)
(North Anna Power Station, Unit 3))

NRC STAFF ANSWER TO DOMINION'S MOTION FOR CLARIFICATION
AND RESPONSE TO LICENSING BOARD ORDER DATED APRIL 22, 2011

Pursuant to 10 C.F.R. § 2.323(c), the staff of the Nuclear Regulatory Commission (Staff) hereby answers "Dominion's Motion for Clarification of LBP-11-10" (Dominion Motion), which the Virginia Electric and Power Company, d/b/a Dominion Virginia Power (Dominion) and the Old Dominion Electric Cooperative (collectively Applicants) filed on April 18, 2011. In addition, the Atomic Safety and Licensing Board (Board) presiding over this proceeding requested, in its Order dated April 22, 2011, that the Staff provide additional explanation of certain issues in connection with the Dominion Motion, which the Staff provides here. See *Virginia Elec. and Power Co. dba Dominion Virginia Power, and Old Dominion Elec. Coop.* (North Anna Power Station, Unit 3), (April 22, 2011) (unpublished order) (ML111120196) (Regarding Dominion's Motion for Clarification of LBP-11-10) (April 22 Board Order).¹ As discussed below, the Staff supports the Dominion Motion.

I. BACKGROUND

The Board decision in LBP-11-10 fully describes the prior background of this proceeding, which need not be repeated here. See *Virginia Electric and Power Co.* (North Anna Power

¹ The April 22 Board Order extended the due date for responses to the Dominion Motion until ten (10) days from the date of the Order, which is May 2, 2011. April 22 Board Order at 2.

Station, Unit 3), LBP-11-10, 73 NRC ____, ____ (slip op. at 2-4) (Apr. 6, 2011). In LBP-11-10, this Board declined to admit two new contentions proposed by the Intervenor in this proceeding, the Blue Ridge Environmental Defense League (BREDL or Intervenor), which BREDL maintained were based on new information in a June 2, 2010, revision to Dominion's COL application. *Id.*, slip op. at 1, 5, 19. No contentions are currently admitted in this proceeding, nor are any contentions currently proposed for admission into this proceeding.²

Although the Board declined to admit the Intervenor's proposed new contentions, the Board ordered that any new contentions based on new information shall be filed within the time period specified in the Board's Scheduling Orders of September 10, 2008, and March 22, 2010. *Id.* at 36; see *Virginia Elec. and Power Co. dba Dominion Virginia Power, and Old Dominion Elec. Coop.* (North Anna Power Station, Unit 3), (Sept. 10, 2008) (unpublished order) (ML082540792) (Establishing Schedule to Govern Further Proceedings) at 2 (providing for late filing of contentions in compliance with applicable model milestones for hearings conducted under 10 C.F.R. Part 2, Subpart L); *Virginia Elec. and Power Co. dba Dominion Virginia Power, and Old Dominion Elec. Coop.* (North Anna Power Station, Unit 3), (March 22, 2010) (unpublished order) (ML100810364) (Updating Schedule Governing Proceeding) at 3 (referring to the Model Milestones of 10 C.F.R. Part 2, Appendix B, for filings not otherwise covered in the Order, which include proposed late-filed contentions). In this regard, the Board indicated that new information in the Staff's Safety Evaluation Report or Supplemental Environmental Impact Statement might provide a basis for new contentions. See LBP-11-10 at 36. Dominion then filed its Motion on April 18, 2011, in which it sought clarification that the contested portion of this proceeding was terminated by the issuance of LBP-11-10. Dominion Motion at 6.

² The Intervenor's filing of April 18, 2011, in which it requested suspension of this proceeding, does not propose any new contentions. See Emergency Petition to Suspend All Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident at 1-3 (April 18, 2011) (Emergency Petition).

In light of the Dominion Motion, the Board issued its April 22 Order, in which the Board requested additional explanation of five matters relating to the Dominion request. In essence, the Board has posed the following five questions to the parties: (1) Do applicable NRC regulations require termination of a proceeding in the circumstances present here?³ (2) Does 10 C.F.R. § 2.318(a) or any other relevant regulation or controlling Commission or Appeal Board decision mandate termination of a Licensing Board proceeding in the circumstances of this case? (3) If the Board's jurisdiction is not automatically terminated by any regulation or controlling decision, what factors should the Board consider in deciding whether termination is appropriate? (4) If the Board were to terminate the proceeding at this point, would the Intervenor have a right of appeal under 10 C.F.R. §§ 2.311, 2.341, or any other provision? (5) Does the Emergency Petition recently filed before the Commission in this proceeding have any relevance to the termination issue? April 22 Board Order at 2.

As set forth below, in answer to Questions 1 and 2, the Staff submits that the Commission decisions in *Turkey Point* and *Fort St. Vrain* are controlling precedent in the circumstances of this proceeding, and require the Board to terminate this proceeding. See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185 (1991) (attaching *Public Service Co. of Colorado* (Fort St. Vrain Independent Spent Fuel Storage Installation), 34 NRC 190 (1991)). Although no further answer to Question 3 would appear necessary given this answer to Questions 1 and 2, the Staff suggests that a factor the Board may wish to consider is whether failure to terminate the proceeding might delay the Intervenor's right to appeal, which the Staff believes should accrue now under 10 C.F.R. § 2.341. The Staff will therefore answer Questions 3 and 4 together below. Finally, as explained more fully below, the Staff believes that the Emergency Petition is irrelevant to any aspect of the termination issue.

³ The Board noted that under 10 C.F.R. § 2.318(a), the Board's jurisdiction would not appear to terminate given the current circumstances of this proceeding. April 22 Board Order at 2.

II. DISCUSSION

A. Legal Standards:

Although no regulation explicitly controls here, Commission and Appeal Board decisions require the termination of a proceeding upon resolution of the last contention pending in the proceeding, as explained in detail below, with two exceptions: 1) The last admitted contention is one of omission and is dismissed as moot based on new information, and the Licensing Board provides the intervenor with an opportunity to raise contentions regarding the new information; or 2) the Commission explicitly delegates an additional particular matter to a Licensing Board for decision. See *Turkey Point*, CLI-91-13, 34 NRC at 188; *Fort St. Vrain*, 34 NRC at 190, citing *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985); *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-796, 21 NRC 4, 5 (1985); *Consolidated Edison Co. of New York, Inc.* (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190-191; see, e.g., *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-10-17, 72 NRC ____, ____ (slip op. at 1, 4-5, 19) (Sept. 2, 2010) citing *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), (Aug. 11, 2010) (unpublished order) (ML102230333) (Dismissing contention as moot; unpublished order set deadline for filing new contentions based on new information in Dominion's June 29, 2010, revision to the Application).

Specifically, in an amendment proceeding where a Licensing Board has raised no significant safety or environmental issues on its own motion, as in an operating license proceeding, the only issues to be decided by the Licensing Board are those contested by the parties. *Trojan*, ALAB-796, 21 NRC at 5. Once those issues are no longer in dispute, whether before or after the hearing, the proceeding should be dismissed. *Id.* In addition, a Licensing Board does not have the authority to raise an issue *sua sponte* with respect to an application for an operating license or operating license amendment when there is no proceeding before the

Board relating to the application. *Turkey Point*, CLI-91-13, 34 NRC at 188. This rule applies, for example, where a single intervenor left in a proceeding “voluntarily or involuntarily has withdrawn from the proceeding.”⁴ *Id.* “Where there is only a single intervenor in a proceeding, the withdrawal of the intervenor brings the proceeding to a close.” *Id.* n.1, citing *Fort St. Vrain*, 34 NRC at 190. Where there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. *South Texas*, ALAB-799, 21 NRC at 382.

Action in accordance with the foregoing principles has been denoted in different terms. The Commission declared that one proceeding “is closed” (*Fort St. Vrain*, 34 NRC at 191), while the Appeal Board stated that a proceeding should be “dismissed” (*Trojan*, ALAB-796, 21 NRC at 5); one Licensing Board stated that “the proceeding is terminated” (*South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-10-06, 71 NRC ___ (slip op. at 37) (Mar. 17, 2010)), and another declared that the contested portion of the proceeding had been “conclude[d]” (*Southern Nuclear Operating Co.* (Vogle Elec. Generating Plant, Units 3 and 4), LBP-10-18, 71 NRC ___ (slip op. at 18) (May 19, 2010)). Nonetheless, if a Licensing Board decision resolves all contested issues in a proceeding and states that the proceeding is closed, terminated, dismissed or concluded, the Licensing Board retains jurisdiction to consider timely motions for reconsideration and the like. See *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 646-47. A statement in an initial decision that the

⁴ A summary of these principles (before the Commission limited Licensing Board consideration of *sua sponte* issues) is set forth in the Appeal Board’s *Indian Point* decision. See *Indian Point*, ALAB-319, 3 NRC at 189-190. The regulation the Appeal Board applied in reaching its decisions in *Indian Point* and *Trojan* (ALAB-796, 21 NRC 4), 10 C.F.R. § 2.760a, is identical to the corresponding regulation extant today, except that a Licensing Board must now request Commission authorization to consider a *sua sponte* issue. Compare 10 C.F.R. § 2.760a (1976) with 10 C.F.R. §§ 2.340(a) and (b) (2011) for applications pursuant to 10 C.F.R. Parts 50 and 52, respectively. The Appeal Board in *Indian Point* also drew a distinction between a Licensing Board’s role in a construction permit proceeding, in which the Licensing Board also presided over the mandatory hearing, and a Licensing Board’s more limited role in an operating license (OL) proceeding. *Id.* Licensing Boards no longer have jurisdiction to conduct the mandatory hearing in a COL proceeding, as the Commission will conduct them. See Memorandum from Annette L. Vietti-Cook, Secretary to Luis A. Reyes, Executive Director for Operations, Staff Requirements – COMDEK-07-0001/COMJSM-07-0001 – Report of the Combined License Review Task Force at 1 (June 22, 2007 (ML071760116)). Accordingly, a COL proceeding should be treated like an OL proceeding under the applicable decisions.

proceeding is “terminated” does not relinquish the Licensing Board’s jurisdiction for such purposes. *Id.* at 646 n.2.

One exception to the rule calling for dismissal or termination of a proceeding upon resolution of the last contention pending before a Licensing Board is in the case of a contention of omission mooted by new information, in which the Licensing Board affords an intervenor the opportunity to propose a new contention to challenge the new information. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002). Licensing Boards have commonly implemented this principle. *See, e.g., North Anna*, LBP-10-17, 72 NRC ____ (slip op. at 4-5, 19) (dismissing contention as moot in view of revision to application and affording intervenor an opportunity to challenge revision in accordance with earlier Board order). A second exception is the circumstance in which the Commission has delegated an additional matter to a Board for decision. *See, e.g., Indian Point*, ALAB-319, 3 NRC at 191-93 (Commission designated Appeal Board as a special board to rule on certain seismic issues).

B. Staff Answers to Board Questions

QUESTIONS 1 and 2: Do applicable NRC regulations require termination of a proceeding in the circumstances present here? Does 10 C.F.R. § 2.318(a) or any other relevant regulation or controlling Commission or Appeal Board decision mandate termination of a Licensing Board proceeding in the circumstances of this case?

Staff Answer: The Staff submits that applicable Commission and Appeal Board decisions in the *Turkey Point* and *Trojan* proceedings are controlling precedent under the circumstances of this proceeding, which requires the Board to terminate this proceeding. *See Turkey Point*, CLI-91-13, 34 NRC at 188; *Trojan*, ALAB-796, 21 NRC at 4-5. The rationale supporting these decisions appears to be the following: Former 10 C.F.R. § 2.760a (current §§ 2.340(a) and (b)) only authorizes a Licensing Board to “make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding,” *sua sponte* issues (*i.e.*, those not put into controversy by the parties but determined by the presiding officer to be a “serious

safety, environmental, or common defense and security matter”), and any other matter designated by the Commission. 10 C.F.R. §§ 2.340(a) and (b). Once all such issues are resolved, there is no longer a “proceeding” pending before a Licensing Board. See *Turkey Point*, CLI-91-13, 34 NRC at 188. As the Commission stated in *Turkey Point* in the context of the consideration of *sua sponte* issues:

When there is no proceeding before a board, it is deprived of the ability to gain the perspective on issues that is acquired by receiving the input of parties to a proceeding. In such circumstances, the Board loses its reason for being—to serve as a forum for hearing parties with differing viewpoints. Absent that function, we believe that it is more appropriate to apply the expertise of the agency’s staff and the informal staff review process to the issues. . . . [A] licensing board does not have the authority to raise a *sua sponte* issue relating to an application for an operating license or amendments to an operating license when there is no proceeding before the board relating to the application. This rule applies, for example, *where a single intervenor left in a proceeding voluntarily or involuntarily has withdrawn from the proceeding.*

Id. (emphasis added). The Staff submits that the Commission equated the “voluntary or involuntary withdrawal” of the last intervenor in a proceeding with the ending of the proceeding. Since the Board has dismissed as moot the only remaining contention admitted into this proceeding (see LBP-10-17), has rejected the last proposed contention based on the new information that rendered the admitted contention moot (see LBP-11-10), and the Commission has not delegated any other specific matter to the Board for decision, the Board should terminate this proceeding.

The requirements of 10 C.F.R. § 2.318(a) are not to the contrary. Section 2.318(a) provides for termination of a Licensing Board’s jurisdiction upon expiration of the time within which the Commission may direct that the record be certified to it for final decision, upon Commission issuance of a final decision, or when the presiding officer withdraws from the case by reason of disqualification. Any of these circumstances represents the *ultimate* termination of a Licensing Board’s jurisdiction over a proceeding. The “termination” (or “closing” or “dismissal”

or “conclusion”) of this proceeding urged in the Dominion Motion, however, is the *penultimate* step in the proceeding as far the Licensing Board is concerned—it does not terminate the Board’s jurisdiction (see *Midland*, ALAB-235, 8 AEC at 646 n.2) but rather closes the record (see *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120-121 (2009)), which may lead to the ultimate termination of the Board’s jurisdiction over this proceeding in accordance with § 2.318(a).

QUESTIONS 3 and 4: If the Board’s jurisdiction is not automatically terminated by any regulation or controlling decision, what factors should the Board consider in deciding whether termination is appropriate? If the Board were to terminate the proceeding at this point, would the Intervenor have a right of appeal under 10 C.F.R. §§ 2.311, 2.341, or any other provision?

Staff Answer: The Staff submits further that the “termination” of this proceeding sought by Dominion is the appropriate point at which the Board should initiate the process by which BREDL may seek Commission review of the Board decisions in this proceeding, which may or may not result in additional proceedings. Since all matters in controversy between the parties have been resolved, it appears to the Staff that the Intervenor should now have the opportunity to request review of all the Board decisions rejecting proposed contentions or denying admitted contentions on the merits (through decisions on motions for summary disposition) pursuant to 10 C.F.R. § 2.341(b).⁵ The Staff believes this is the correct procedural posture of this proceeding.

The Staff submits further that the Board should also consider the effect on the Intervenor’s right to seek review pursuant to § 2.341(b). Should the Board decide not to terminate the proceeding at this juncture, it is unclear when the time would begin to run for the Intervenor to seek Commission review. Further, the Intervenor may or may not identify new issues on which it wishes to propose additional contentions for admission into this proceeding. Accordingly, it is possible that there will be no need for the Board to rule on additional proposed contentions, and the Board may not have another clear opportunity to terminate the proceeding.

⁵ The Staff does not here offer any view on whether such a request would be well-taken or not.

A Board decision to deny the Dominion Motion may simply delay the Intervenor's opportunity to seek Commission review of LBP-11-10, LBP-10-17, and the Board's other decisions in this proceeding. Conversely, the granting of the Dominion Motion would clarify the time at which the Intervenor must seek such review.

QUESTION 5: Does the Emergency Petition recently filed before the Commission in this proceeding have any relevance to the termination issue?

Staff Answer. The Staff today is filing an "NRC Staff Answer To [The Emergency Petition]" (Staff Answer) before the Commission in this proceeding. As explained in the Staff Answer, suspension of licensing proceedings held pursuant to 10 C.F.R. Part 52 is not warranted in response to the Emergency Petition. See Staff Answer at 28-30. Inasmuch as the Emergency Petition does not propose any issue for contention in this proceeding or present any argument as to why this proceeding should not be terminated, it is irrelevant to the Dominion Motion.

III. CONCLUSION

For the reasons set forth above, the Board should grant the Dominion Motion, terminate this proceeding, and set the time within which the Intervenor may seek Commission review pursuant to 10 C.F.R. § 2.341(b), should it decide to do so.

Respectfully Submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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VIRGINIA ELECTRIC AND POWER CO.,)
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COOPERATIVE)
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(North Anna Power Station, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO DOMINION'S MOTION FOR CLARIFICATION AND RESPONSE TO LICENSING BOARD ORDER DATED APRIL 22, 2011" has been served upon the following persons by Electronic Information Exchange this 2nd day of May, 2011:

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