

May 12, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket No. 52-017-COL
Dominion Virginia Power, et al.)	
)	ASLBP No. 08-863-01-COL
North Anna Power Station, Unit 3)	

DOMINION’S REPLY TO LICENSING BOARD’S APRIL 22, 2011 ORDER

I. Introduction

Pursuant to the Licensing Board’s April 22, 2011 Order,¹ Virginia Electric and Power Company, dba Dominion Virginia Power (“Dominion”), hereby replies to the issues identified in that Order (Order at 2-3), which relate to Dominion’s Motion for Clarification of LBP-11-10 (April 18, 2011) (“Motion”). As discussed below, while the Commission’s regulations are silent on whether an adjudicatory proceeding terminates under present circumstances, controlling Commission precedent requires the termination of an adjudicatory proceeding upon resolution of the last issues of the sole remaining intervenor, which occurred in this proceeding on April 6, 2011 with the Board’s issuance of LBP-11-10.² The Board’s issuance of LBP-11-10 thus triggered the right of appeal provisions contained 10 C.F.R. § 2.341(b)(1). The Emergency Petition to Suspend All Pending Reactor Licensing Decisions And Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (“Emergency Petition”), which the Blue Ridge Environmental Defense League (“BREDL”) filed with the Commission on April 18, 2011, has no relevance to the termination of

¹ Order (Regarding Dominion’s Motion for Clarification of LBP-11-10) (Apr. 22, 2011) (“Order”).

² Memorandum and Order (Declining to Admit New Contentions 12 and 13), LBP-11-10, 73 N.R.C. ___, slip op. (Apr. 6, 2011).

this adjudicatory proceeding, because the Emergency Petition is before the Commission, was filed after this proceeding terminated, and raised no contentions or otherwise disputed the North Anna Unit 3 COL application.

II. Background

On April 6, 2011, the Board issued LBP-11-10, declining to admit the last proposed contentions of sole intervenor BREDL. On April 18, 2011, Dominion moved for clarification of LBP-11-10 because it appeared to suggest that the contested portion of this proceeding would remain open until sometime after the NRC Staff issues the North Anna Unit 3 Safety Evaluation Report and Supplemental Environmental Impact Statement. Motion at 1. On April 22, 2011, the Board issued an Order (1) requesting that five matters be addressed by the NRC Staff and BREDL in their answers to the Motion, (2) permitting Dominion to file a reply to address those same five matters, and (3) establishing a schedule for the NRC Staff's and BREDL's answers and Dominion's reply. Order at 2-3.

The five matters to be addressed are:

1. whether applicable NRC regulations require termination of a proceeding in the circumstances present here (suggesting that, under 10 C.F.R. § 2.318(a), the Board's jurisdiction would not appear to have terminated);
2. whether any other relevant regulation or controlling Commission or Appeal Board decision mandates termination of a licensing board proceeding in the circumstances of this case;
3. what factors the Board should consider in deciding whether termination is appropriate if the Board's jurisdiction is not automatically terminated by any regulation or controlling decision;

4. whether BREDL would have a right of appeal under 10 C.F.R. §§ 2.311 or 2.341 should the Board terminate the proceeding at this point; and
5. whether the Emergency Petition recently filed before the Commission in this and other proceedings has any relevance to the termination issue.

Order at 2.

On May 2, 2011, the NRC Staff filed its answer, in which it maintains that controlling precedent requires termination of the contested portion of the adjudicatory proceeding.³ On May 6, 2011, three days after the deadline set by the Board,⁴ BREDL filed its answer opposing termination, relying solely on its reading of 10 C.F.R. § 2.318(a).⁵ Dominion's responses to the five matters are provided in the discussion below.

III. Discussion

A. Although NRC Rules are Silent on Whether the Proceeding Should Be Terminated Under Present Circumstances, NRC Precedent Requires Termination

No Commission rule explicitly requires that a proceeding be terminated under present circumstances, i.e., where no admitted contention remains pending and the last proposed contentions of the sole intervenor have been rejected by the Board. However, as explained *infra*,

³ NRC Staff Answer to Dominion's Motion for Clarification and Response to Licensing Board Order Dated April 22, 2011 (May 2, 2011) ("NRC Staff Answer").

⁴ BREDL sought no extension of the deadline from the Board, and made no attempt to contact other parties to request consent to a late-filing. Nor is there any indication that BREDL complied with the Board's September 10, 2008 Order (Establishing Schedule to Govern Further Proceedings), which requested that "[a]ny motion for an extension or enlargement of time should be filed at the earliest opportunity, as soon as the party learns of the facts and circumstances establishing the need for an extension." Further, it is unclear how BREDL's vague reference to a "family illness" might provide good cause for the late filing, as BREDL is represented in this proceeding by both John Runkle and Louis Zeller. For all of these reasons, BREDL's late answer is objectionable.

⁵ Intervenor's Reply Regarding Dominion's Motion for Clarification of LBP-11-10 (May 5, 2011). BREDL also asserts that Dominion's exemption request addressed in Contention 13 "remains subject to litigation." *Id.* at 2. Because the Board clearly rejected Contention 13 as inadmissible (LBP-11-10, slip op. at 35-36), BREDL's assertion is obviously incorrect.

controlling Commission precedent requires that the Board terminate the proceeding under these circumstances.

The Board suggests that, under 10 C.F.R. § 2.318(a), its jurisdiction in this proceeding may not have terminated under current conditions. Order at 2. In relevant part, that regulation provides:

The presiding officer's jurisdiction in each proceeding terminates when the period within which the Commission may direct that the record be certified to it for final decision expires, when the Commission renders a final decision, or when the presiding officer withdraws from the case upon considering himself or herself disqualified, whichever is earliest.

10 C.F.R. § 2.318(a). However, as explained below, Dominion respectfully submits that this portion of Section 2.318(a) does not apply to present circumstances where there are no longer any admitted contentions that may result in a hearing, record, and decision.

The regulatory history of 10 C.F.R. § 2.318(a) shows that the language concerning termination of the presiding officer's jurisdiction is intended to address cases where the Presiding Officer has issued an initial decision.⁶ The language in § 2.318(a) derives from the former 10 C.F.R. § 2.717(a), which as originally promulgated in 1962 provided:

Unless otherwise ordered by the Commission, the presiding officer designated to conduct a hearing has jurisdiction over the proceeding, including motions and procedural matters, from the time when the proceeding commences until the initial decision is rendered. If no presiding officer has been designated, the Chief Hearing Examiner has such jurisdiction or, if he is unavailable, another hearing examiner has such jurisdiction. A proceeding is deemed to commence when a notice of hearing is issued or, in the case of a contract appeal subject to Subpart D, when a notice of appeal is filed. When a notice of hearing provides that the presiding officer is to be a hearing examiner, the Chief Hearing Examiner will designate by order the hearing examiner who is to preside.

⁶ An initial decision is a decision issued after hearing which contains findings of fact and conclusions of law on material issues admitted as contentions. See 10 C.F.R. § 2.1210(a), (c).

Revision of Rules, Part 2 – Rules of Practice, *et al.*, 27 Fed. Reg. 377, 384 (Jan. 13, 1962)

(emphasis added). The former Section 2.717(a) was amended in 1966 to provide:

Unless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If no presiding officer has been designated, the Chief Hearing Examiner has such jurisdiction or, if he is unavailable, another hearing examiner has such jurisdiction. A proceeding is deemed to commence when a notice of hearing is issued. When a notice of hearing provides that the presiding officer is to be a hearing examiner, the Chief Hearing Examiner will designate by order the hearing examiner who is to preside. The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision, or when the presiding officer shall have withdrawn himself from the case upon considering himself disqualified, whichever is earliest.

Miscellaneous Amendments, Part 2 – Rules of Practice, *et al.*, 31 Fed. Reg. 12,774, 12,776

(Sept. 30, 1966) (emphasis added). Although the 1966 amended version of Section 2.717(a) no longer explicitly referred to the presiding officer's initial decision, the Statement of Considerations⁷ accompanying the 1966 amendment made clear that:

The amendment of § 2.717(a) set out below provides that the jurisdiction of presiding officers in adjudicatory proceedings shall terminate when the initial decision becomes the final action of the Commission in the absence of review, or when the Commission, after review, renders a final decision, or when the presiding officer withdraws from the case upon considering himself disqualified, whichever is earliest. The amendment makes clear that presiding officers, who exercise quasi-judicial functions, would have no authority or responsibility to take any action after that time.

Id. at 12,775 (emphasis added). Thus, even without an explicit reference to the presiding officer's initial decision, the Statement of Considerations makes clear that the amended language concerning termination of the presiding officer's jurisdiction presupposes that the licensing board has issued an initial decision after a hearing. This same language was incorporated into

⁷ “As guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the [Statement of Considerations] is entitled to ‘special weight.’” Pa’ina Hawaii, LLC (Materials License Application), CLI-08-3, 67 N.R.C. 151, 166 (2008). See also id. at 163 n.46.

Section 2.318(a) in 2004 when the Commission reorganized its Rules of Practice. Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,223 (Jan. 14, 2004) (“This section continues without change the existing provisions in § 2.717 with respect to the commencement and termination of the jurisdiction of a presiding officer.”). Because the current Section 2.318(a) is essentially unchanged since the 1966 version of the former Section 2.717(a), Section 2.318(a) should also be read to presuppose that an initial decision has issued after a hearing.⁸

Therefore, Section 2.318(a) neither applies to nor addresses present circumstances. The last admitted contention was dismissed as moot,⁹ and the remaining proposed contentions were found inadmissible,¹⁰ so the Board no longer has before it any contention on which to hold a hearing and issue an “initial decision.”¹¹ Further, the Commission has indicated that it will preside over the mandatory, uncontested portion of this adjudicatory proceeding.¹²

Consequently, there is no indication that the Board will ever have occasion to render an “initial

⁸ It should also be noted that the term “Presiding Officer” in Section 2.318(a) may not refer solely to the Board. “[T]he identity of the presiding officer changes as the proceeding moves up the appellate ladder either as to an entire initial decision or as to particular issues.” Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), 16 N.R.C. 1190, 1193, aff’d, ALAB-699, 16 N.R.C. 1324 (1982). Commission case law has long held that, with certain limited exceptions (such as the filing of a timely motion for reconsideration), a Licensing Board loses jurisdiction after an initial decision is appealed. See, e.g., The Curators of the University of Missouri, CLI-95-1, 41 N.R.C. 71, 93-94 (1995), and cases cited therein. Since Section 2.318(a) does not bar such transfer of jurisdiction after an initial decision, it should not be construed as barring transfer of jurisdiction to the Commission when all admitted contentions are resolved prior to an initial decision.

⁹ Memorandum and Order (Rulings on Motion to Dismiss Contention 10 and proposed new Contention 1), LBP-10-17, 72 N.R.C. ___, slip op. at 4-5 (Sept. 2, 2010).

¹⁰ LBP-11-10, slip op. at 28, 35-36.

¹¹ The action closest to an initial decision in this proceeding was issuance of LBP-10-17, which dismissed the only remaining admitted contention as moot. LBP-10-17, slip op. at 4-5. At this juncture, the Board issued its decision resolving the only contention admitted for hearing. If LBP-10-17 were considered as the Board’s initial decision for purposes of applying Section 2.318(a), the Board’s jurisdiction would have terminated last year, because the time for review of LBP-10-17 has long expired. However, because BREDL’s motion to admit proposed contentions 12 and 13 was already before the Board when it issued LBP-10-17, Dominion believes it was appropriate for the Board to retain jurisdiction and render a decision on the pending requests to admit new contentions, before terminating the contested portion of the proceeding.

¹² See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-07-24, 66 N.R.C. 38, 38 & n.2 (2007). See also Memorandum from A. Vietti-Cook to S. Burns, Staff Requirements – SECY-10-0082 – Mandatory Hearing Process for Combined License Application Proceedings Under 10 C.F.R. Part 52 (Dec. 23, 2010) (ADAMS Accession No. ML103570203).

decision” as contemplated by Section 2.318(a). As noted by the NRC Staff (NRC Staff Answer at 8), it is pure conjecture whether BREDL will propose new contentions for admission, any new contention will be admitted, or any hearing will be held.

Indeed, application of Section 2.318(a) to the present circumstances might imply that the Board’s jurisdiction would never terminate in a proceeding in which all issues are resolved prior to hearing, and that an intervenor whose contentions have all been thus resolved or dismissed would never have a final decision that it might appeal to the Commissioners. Obviously, such results would make no sense.

Although no Commission regulation explicitly addresses whether the proceeding should be terminated under present circumstances, controlling Commission precedent requires termination of the contested portion of this adjudicatory proceeding.¹³ Dominion’s Motion cited the Commission’s decision in Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 N.R.C. 185 (1991),¹⁴ and Dominion agrees with the NRC Staff (NRC Staff Answer at 3, 6-7) that Turkey Point is controlling precedent here. Specifically, in addressing the consideration of *sua sponte* issues, Turkey Point provides that:

[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.

Turkey Point, CLI-91-13, 34 N.R.C. at 188 (emphasis added; footnote omitted). LBP-11-10 dismissed the only remaining proposed contentions of the sole intervenor BREDL. Under

¹³ It is common practice for the Commission to address circumstances not contemplated by its regulations through adjudication. See, e.g., Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 N.R.C. 326, 330 (1998) (holding that the presiding officer disqualification provisions of its (former) regulations governing the formal hearing process would also apply to the informal hearing process where neither the regulations nor the regulatory history for the informal hearing process addressed the matter).

¹⁴ See Motion at 2.

Turkey Point, BREDL's participation in the contested portion of this proceeding has thus "involuntarily" ceased, leaving "no proceeding before the board relating to the [North Anna Unit 3 COL] application."

Dominion also agrees with the NRC Staff that the Appeal Board's decision in Portland General Electric Co. (Trojan Nuclear Plant), ALAB-796, 21 N.R.C. 4 (1985) applies here. See NRC Staff Answer at 6. In Trojan, the Appeal Board declined to take *sua sponte* review of a licensing board decision that was based on proposed findings of fact and conclusions of law that were stipulated to by the parties after a brief hearing on the admitted contentions. Trojan, ALAB-796, 21 N.R.C. at 4-5. The Appeal Board held that,

where the Board has raised no significant safety or environmental issues on its own motion, . . . the only issues to be decided by a licensing board are those contested by the parties[, and] [o]nce those issues are no longer in dispute, whether before or after the hearing, the proceeding should be dismissed.

Trojan, ALAB-796, 21 N.R.C. at 5 (emphasis added). Although the circumstances in the Trojan proceeding differ from circumstances here in that there has been no hearing and no stipulation to findings of fact and conclusions of law, the Trojan Appeal Board's ruling that the proceeding should be dismissed once contested issues are resolved – "whether before or after the hearing" – does apply and should be followed by the Board.¹⁵ Accordingly, the contested portion of this proceeding should be terminated automatically.¹⁶

¹⁵ The NRC Staff cites to other cases (NRC Staff Answer at 4) where the circumstances of the proceedings differ from those present in this proceeding, but nonetheless explain general principles applicable here. See, e.g., Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 N.R.C. 360, 382 (1985) ("Where only a single intervenor is participating in an operating license proceeding, its withdrawal serves to bring the proceeding to an end.").

¹⁶ Because controlling precedent requires automatic termination of the contested portion of this adjudicatory proceeding when all issues before the Board have been dismissed, Dominion has not addressed the third issue raised by the Board, concerning factors that might apply if termination is not automatic.

B. Issuance of LBP-11-10 Triggered BREDL'S Right of Appeal Under 10 C.F.R. § 2.341(b)

Because LBP-11-10 resolved the last remaining issues BREDL had pending before the Board, LBP-11-10 triggered the BREDL's right of appeal under 10 C.F.R. § 2.341(b). That rule provides:

Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission

.....

10 C.F.R. § 2.341(b)(1) (emphasis added). Here, no partial or full initial decision has issued because there has been no hearing on the merits for any admitted contention. The Board dismissed the only remaining admitted contention as moot in September 2010. LBP-10-17. However, the Section 2.341(b) right of appeal was not triggered at that time because the Board still had pending before it proposed contentions 12 and 13, which were not rejected as inadmissible until April 6, 2011. LBP-11-10. Because LBP-11-10 resolved BREDL's last remaining issues, Dominion submits that LBP-11-10 qualified as "any other decision or action by a presiding officer with respect to which a petition for review is authorized." 10 C.F.R. § 2.341(b)(1). Accordingly, the fifteen day time period for BREDL to petition for review of LBP-11-10 expired on April 21, 2011.

C. The Emergency Petition is Irrelevant to this Proceeding's Termination

Dominion agrees with the NRC Staff (NRC Staff Answer at 9) that the Emergency Petition is irrelevant to this proceeding's termination. First, the Emergency Petition was filed with the Commission, not the Board. The Commission has not referred any issue relating to the Emergency Petition to the Board, and the Board should not undertake any action related to the Emergency Petition, or fail to take any otherwise required action, unless and until the

Commission directs it to do so. Second, the Emergency Petition was filed after the Board issued LBP-11-10, which resolved all of BREDL's remaining pending issues before the Board and thus terminated the proceeding. Dominion submits that the Board therefore has no jurisdiction to consider any issue related to the Emergency Petition. Finally, the Emergency Petition did not propose any contention on, or otherwise dispute, the North Anna Unit 3 COL. For all of these reasons, the Emergency Petition is irrelevant to the termination of the contested adjudicatory proceeding.

IV. Conclusion

For the foregoing reasons, Dominion respectfully submits that this proceeding terminated with the issuance of LBP-11-10.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: May 12, 2011

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CERTIFICATE OF SERVICE

I hereby certify that Dominion's Reply to Licensing Board's April 22, 2011 Order, dated May 12, 2011, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 12th day of May, 2011.

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