UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 PETITION FOR REVIEW OF LBP-11-22

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Dated: September 16, 2011

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b), Virginia Electric and Power Company, dba Dominion Virginia Power ("Dominion"), hereby petitions the Commission for review of the Atomic Safety and Licensing Board's ("Board's") decision in LBP-11-22.[1] In LBP-11-22, the Board declined to terminate the contested portion of the North Anna Power Station, Unit 3 ("North Anna") combined license ("COL") proceeding, even though all contentions of the sole intervenor Blue Ridge Environmental Defense League ("BREDL") have been dismissed.[2] As set forth herein, Commission review is warranted under 10 C.F.R. § 2.341(b)(4)(ii) because the Board's ruling is clearly erroneous as a matter of law. Governing precedent makes clear that the contested portion of a licensing proceeding terminates when the last contention(s) (proposed or admitted) of the last intervenor are resolved. Further, if left in place, the Board's ruling will require this adjudicatory proceeding to remain open until August 2013 at the earliest and will effectively bypass the Commission's standards for reopening. In addition, the Board's ruling will defer any

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[1] Memorandum and Order (Denying Dominion's Motion for Clarification of LBP-11-10), LBP-11-22, 74 N.R.C. __, slip op. (Sept. 1, 2011) ("LBP-11-22").

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

right of appeal of the Board's prior decisions on intervention and contention admissibility until very late in this proceeding, thus preventing timely review of prior decisions and leaving any appeal to a point in time when it would create the greatest risk of delaying license issuance.

The Board's ruling is also clearly erroneous as a matter of law because it is based on a fundamental misinterpretation of case law concerning hearing rights under the Atomic Energy Act ("AEA"). In essence, the Board views the Commission's standards governing reopening of a closed record as being inconsistent with these hearing rights, contrary to governing precedent, and has thus created a structure that inappropriately avoids application of those standards later in this proceeding. Any one of these errors alone would warrant Commission review of the Board's decision. Accordingly, Dominion respectfully requests that the Commission grant this Petition, reverse LBP-11-22, and terminate the contested portion of the North Anna COL adjudicatory proceeding.

II. STATEMENT OF CASE

A. Background

This proceeding involves the COL application ("COLA") filed by Dominion in November 2007 to construct and operate a new reactor at its North Anna site.[3] As initially filed, the COLA referenced the standardized ESBWR design. BREDL petitioned to intervene and proposed eight contentions purporting to challenge aspects of the North Anna 3 Final Safety Analysis Report ("FSAR") and Environmental Report ("ER"). The Board granted BREDL's hearing request, finding BREDL had standing and had submitted one admissible contention (Contention 1) alleging omission of a plan for managing Class B and C low-level radioactive

[3] See 73 Fed. Reg. 12,760 (Mar. 10, 2008).

waste.[4] In 2009, following an amendment to the COLA providing a plan for management of this waste, the Board dismissed Contention 1 as moot,[5] but admitted a new contention (Contention 10) challenging the adequacy of the plan.[6]

In June 2010, Dominion revised its COLA to reference a different standardized design, the US Advanced Pressurized Water Reactor ("US-APWR"), and shortly thereafter moved to dismiss Contention 10 as moot based on the inclusion in the revised COLA of a dedicated Interim Radwaste Storage Facility for storage of Class B and C waste. BREDL filed new Contention 11 challenging the legality of Dominion's COLA revision. See LBP-11-10 at 3. In opposing this new contention, both Dominion and the NRC Staff suggested that the Board issue an order establishing a schedule for the filing of any new contentions based on the revised COLA, which the Board did by Order of August 11, 2010. Id. at 4.

The Board subsequently determined that Contention 10 was mooted by the revised COLA and that Contention 11 was inadmissible, but appropriately retained jurisdiction to decide whether to admit any new contentions that BREDL might submit pursuant to the August 11, 2010 Order.[7] In accordance with the schedule set by the Board, BREDL filed new Contentions 12 and 13 on October 2, 2010. LBP-11-10 at 4.

In LBP-11-10, the Board found both of BREDL's proposed new contentions to be inadmissible. Id. at 1. As a result of this decision, there are no longer any proposed or admitted

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[4] LBP-08-15, 68 N.R.C. 294, 338 (2008). The other seven contentions were found to be inadmissible. An additional late filed contention challenging the NRC's waste confidence rule was subsequently rejected. Order (Denying Motion to Admit Proposed Contention Nine) (June 2, 2009).

[5] Licensing Board Order (Dismissing Contention 1 as Moot) (Aug. 19, 2009) at 1, 4 (unpublished). In this decision, the Board retained jurisdiction to decide whether the pending proposed new contention was admissible.

[6] LBP-09-27, 70 N.R.C. 992, 1016 (2009).

[7] LBP-10-17, 72 N.R.C. __, slip op. (Sept. 2, 2010).

contentions before the Board. All contentions seeking to challenge either the initial or revised COLA have been rejected as inadmissible or dismissed as moot.

While LBP-11-10 rejected the last contentions proposed in this proceeding, the Board did not indicate that the contested portion of this proceeding was being terminated. Instead, LBP-11-10 stated:

> Any new contentions based on new information, including but not limited to contentions based on new information in the Staff's Safety Evaluation Report ["SER"] or Supplemental EIS ["SEIS"], neither of which has yet been issued, 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. Those prior scheduling orders anticipated compliance with the Commission's model milestones (10 C.F.R. Part 2, App. B), which suggest that "proposed late-filed contentions on the SER and necessary NEPA documents" be filed within 30 days of their issuance.

B. Pleadings in Which Matters of Law Presented in this Petition Were Previously Raised Before the Board

Dominion timely moved the Board to clarify whether LBP-11-10 had terminated the contested portion of the North Anna COL proceeding. Motion for Clarification of LBP-11-10 (Apr. 18, 2011) ("Motion"). Dominion filed the Motion because LBP-11-10 appeared to suggest that the contested portion of the proceeding would remain open until sometime after the NRC Staff issues SEIS and SER. See Motion at 1. Currently, the final SEIS and SER are scheduled to be issued in this proceeding in October 2012 and July 2013, respectively. In its Motion, Dominion presented the precedents indicating that the contested portion of a proceeding should be terminated when the last contentions have been resolved. See Motion at 2-5.

On April 22, 2011, the Board issued an order[8] stating its intention to treat the Motion as a motion to terminate the proceeding, posing five questions[9] for BREDL and the NRC Staff to answer, and providing Dominion the opportunity to reply to those answers. LPB-11-22 at 7. The NRC Staff supported the Motion,[10] BREDL opposed it,[11] and Dominion filed a Reply that addressed the Board's questions.[12] The Board then issued LBP-11-22 on September 1, 2011, denying the Motion.

C. Summary of Decision of Which Review Is Sought

In LBP-11-22, the Board denied the Motion, despite the fact that governing precedent requires termination of the adjudicatory proceeding where the last proposed and/or admitted contentions of the sole intervenor are resolved. According to the Board, it did not terminate the proceeding because of the "ongoing licensing process" and in order to preserve "BREDL's continuing right to file new contentions . . . based on new information in the SER and the new

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[8] Licensing Board Order (Regarding Dominion's Motion for Clarification of LBP-11-10) (Apr. 22, 2011) (unpublished) ("April 22 Order").

[9] The five questions are:

> 1. Whether applicable NRC regulations require termination of a proceeding in the circumstances present here;
> 2. Whether [the parties] contend [10 C.F.R. § 2.318(a)] or any other relevant regulation or applicable Commission or Appeal Board decision mandates 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 . . . [which] factors [the parties] believe the Board should consider in deciding whether termination is appropriate;
> 4. [W]hether, if the Board were to terminate the proceeding at this point, the Intervenor would have a right of appeal under 10 C.F.R. §§ 2.311, 2.341, or any other provision; and
> 5. The relevance to the termination issue, if any, of the Emergency Petition recently filed before the Commission in this and other proceedings.

LBP-11-22 at 7 n.31.

[10] 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").

[11] Intervenor's Reply Regarding Dominion's Motion for Clarification of LBP-11-10 (May 5, 2011) ("BREDL Answer").

[12] Dominion's Reply to Licensing Board's April 22, 2011 Order (May 12, 2011) ("Dominion Reply").

SEIS," and also in light of BREDL's then pending Emergency Petition.[13] LBP-11-22 at 10-11. The Board reasoned that, because BREDL successfully intervened in the proceeding, it "remains a party to [the] proceeding . . . and may propose new contentions for litigation until the license is issued." Id. at 9-10. The Board therefore stated it will hold the proceeding open until "the deadlines in [its] scheduling orders for filing new or amended contentions have expired" and it "has resolved all contentions that were admitted or proposed before those deadlines expired." Id. at 17. This means the proceeding will remain open for at least another two years, even though BREDL has had ample opportunity over the last four years to propose contentions on the both the original and amended COLA.

The Board provides several reasons for its decision. First, despite the fact that the Commission capably handles issues raised subsequent to the termination of a licensing board's jurisdiction in any given proceeding, the Board seeks to avoid any such complications that may result were it to terminate the proceeding now. LBP-11-22 at 11, 17. The Board also suggests that termination of the proceeding now would eliminate "control of the prehearing and hearing process" and cause parties "to be left to guess what deadlines govern the filing and adjudication of any future contentions." Id. at 27.

Second, the Board states that, because termination of the adjudicatory proceeding would require BREDL to meet the Commission's reopening standards (at 10 C.F.R. § 2.326) in order to propose any further contentions, such action "would be inconsistent with the agency's obligation under AEA Section 189a to provide a hearing at the Intervenor's request on any issue material to

[13] Emergency Petition to Suspend All Pending Reactor Licensing Decision and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Corrected Version, filed Apr. 19, 2011) ("Emergency Petition"). The Emergency Petition included a request that the Commission "establish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings." LBP-11-22 at 11. However, the Commission has since rejected this request, Ameren Missouri, *et al* (Callaway Plant, Unit 2, *et al*), CLI-11-05, 74 N.R.C. __ slip op. at 32-36 (Sept. 9, 2011) "(CLI-11-05"), thus rendering invalid this basis for the Board's decision not to terminate the proceeding.

the licensing decision." LBP-11-22 at 18. See also id. at 30 (requiring BREDL to meet the reopening standards "would unreasonably and unfairly restrict BREDL's ability to obtain a hearing based on material new information"). The Board bases this opinion on Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443 (D.C. Cir 1984) ("UCS I"), see LBP-11-22 at 11-12, which the Board appears to interpret as supporting an unencumbered right to a hearing on information contained in the SER and SEIS licensing documents. Id. at 13, 17, 20. In essence, the Board views the Commission's reopening standards as inconsistent with the agency's obligation to provide a hearing on any material issue, id. at 18, 29-30, because the reopening standards would "create a substantial barrier" to BREDL's ability to file proposed contentions on the SER and SEIS. Id. at 12-13, 21.

Third, the Board states that there is no sound reason for applying the Commission's standards for reopening of a closed adjudicatory record here because "not only has there been no decision on the merits of any admitted contention, but no evidentiary hearing has begun." LBP-11-22 at 13 (footnote omitted), 27-28. Similarly, the Board states that "the requirements of Section 2.326 have no logical application at this juncture of the adjudicatory proceeding" because any future contentions will "argu[e] issues that differ from those previously resolved by the Board." Id. at 28.

Fourth, the Board states that under 10 C.F.R. § 2.318(a) the Board's jurisdiction has not terminated because none of the three events in that regulation specifying proceeding termination has occurred. Id. at 22.

Lastly, the Board endeavors to distinguish numerous Commission and licensing board decisions that have terminated contested hearings when all contentions have been resolved. Id. at 30-35.

III. STATEMENT WHY COMMISSION REVIEW OF LBP-11-22 SHOULD BE EXERCISED

Dominion respectfully submits that this petition for review should be considered authorized under 10 C.F.R. § 2.341(b), because LBP-11-10 resolved all remaining contentions in this proceeding and therefore should have constituted the Board's final reviewable decision; and LBP-11-22 in effect denied reconsideration of the Board's decision not to terminate this proceeding, thus making the issue now ripe for review.[14] Moreover, the Commission should accept review under this provision because "[a] necessary legal conclusion is without governing precedent or is a departure from or contrary to established law," and "[a] substantial and important question of law, policy, or discretion has been raised." 10 C.F.R. § 2.341(b)(4)(ii)-(iii). As discussed in more detail below, the Board's decision is inconsistent with governing precedent requiring termination of a contested adjudicatory proceeding when all pending contentions have been resolved. Further, the Board's decision is based on the view that the Commission's rule providing standards for reopening a closed record violates hearing rights under the Atomic Energy Act. This position is also contrary to established law and challenges the validity of the NRC's rules. Finally, the procedure that the Board has now established, which may keep this adjudication alive for two more years without any pending contentions, circumvents the reopening standards if late contentions are filed, and delay timely review, raises substantial questions of law, policy, and discretion.

Even if LBP-11-22 were considered interlocutory, Dominion respectfully submits that the Commission should grant review because the Board's decision not to terminate this proceeding "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.341(f)(2)(ii). LBP-11-22 affects this proceeding in a pervasive and unusual manner because it

[14] See 10 C.F.R. § 2.341(b)(6).

requires that the contested portion of the proceeding remain open for years even without any pending contention; ignores and negates the Commission's reopening standards, permanently relieving BREDL of the obligation of meeting these requirements; and withholds finality from its prior decisions, thus postponing BREDL's appeal rights as to any previously resolved issues until about the time of the mandatory hearing. Indeed, the Board's decision will result in Dominion being treated differently from the manner in which all other ESP and COL applicants have been treated when contentions have been resolved in those proceedings.

As the Commission has stressed,

> [O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 N.R.C. __, slip op. at 6 (Mar. 10, 2011), quoting AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (emphasis added). Thus, the Commission's reopening standards should not be disregarded in this proceeding. Those standards are intended to attach finality to the hearing process when all timely raised issues have been resolved. Id. at 4 & n.14. That is the situation here.

IV. STATEMENT WHY LBP-11-22 IS ERRONEOUS

A. The Board's Ruling Contradicts Precedent Governing the Termination of Licensing Proceedings

As explained in Dominion's Motion (at 2-3), longstanding Commission precedent makes it clear that an order dismissing the last contention of the last or sole intervenor in a proceeding

ordinarily terminates the proceeding. In Turkey Point[15] the Commission indicated that when the last intervenor voluntarily or involuntarily withdraws from a proceeding, a licensing board is to dismiss the case. In explaining in that case that a licensing board has no authority to raise a sua sponte issue when there is no longer a proceeding before the board, the Commission stated:

> [t]his rule applies, for example, where a single intervenor left in a proceeding voluntarily or involuntarily has withdrawn from the proceeding . . . [and] [i]f . . . a licensing board believes that there are serious safety issues that remain to be addressed, it should dismiss the case and refer the issues to the Staff for review.

Id. (emphasis added) (footnote omitted). Accordingly, Turkey Point requires that the contested portion of the North Anna COL proceeding be terminated because sole intervenor BREDL's last remaining contentions were rendered moot or denied admission – i.e., it has "involuntarily" withdrawn from the proceeding.

In Turkey Point, the Commission cited to and attached the previously unpublished Commission decision in Fort St. Vrain,[16] which held that "[w]here there is only a single intervenor, its withdrawal brings that proceeding to a close." Id. In that case, the sole intervenor settled its concerns regarding the application and withdrew from the proceeding. Id. Fort St. Vrain, in turn, cited to the Appeal Board's decision in South Texas Project,[17] where one of two intervenors wished to withdraw from the proceeding, and the remaining intervenor sought to untimely adopt the withdrawn intervenor's contentions. Id. Even though the circumstances in South Texas Project involved more than one intervenor, the Appeal Board made a point to explicitly state that, "[w]here only a single intervenor is participating in an operating license proceeding, its withdrawal serves to bring the proceeding to an end." Id.

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[15] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 N.R.C. 185, 188 (1991).

[16] Public Service Co. of Colorado (Fort St. Vrain Independent Spent Fuel Storage Installation), 34 N.R.C. 190 (1990).

[17] Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 N.R.C. 360, 382 (1985).

In addition to the precedent cited above, the NRC Staff cited to the Appeal Board's Trojan[18] decision (NRC Staff Answer at 4-6), where the Appeal Board declined to conduct sua sponte review of a licensing board decision where the parties had settled the issues. Trojan, ALAB-796, 21 N.R.C. at 5. Upon such settlement, the Appeal Board ruled that there was "no need for the Board below to do anything more than dismiss the proceeding." Id.[19]

The Board gives short shrift to the Commission's Turkey Point and related precedent, finding it "readily distinguishable" from the circumstances here because it "ha[s] not received a notice of withdrawal or any other indication that BREDL intends to withdraw from this proceeding." LBP-11-22 at 30-31. Turkey Point, however, explicitly holds that the Board should dismiss the proceeding "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). In that proceeding, the "sole remaining intervenor" was dismissed "for lack of standing to intervene," id. at 187, clearly indicating that the intervenor did not leave the proceeding voluntarily. Commission precedent on proceeding termination draws no distinction between intervenors who voluntarily or involuntarily withdraw.

The Board attempts to distinguish the Appeal Board's Trojan decision (and would presumably attempt to distinguish the Appeal Board's South Texas Project decision on the same grounds) as "stand[ing] for the unremarkable proposition that, if the parties settle their dispute after a hearing, the board should dismiss the adjudication." LBP-11-22 at 32. The Board's

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[18] Portland General Electric Co. (Trojan Nuclear Plant), ALAB-796, 21 N.R.C. 4, 5 (1985).

[19] As noted in Dominion's Motion at 2, there is one exception (not applicable here) to the rule that disposal of the last contention of the sole remaining intervenor ordinarily terminates the proceeding. That exception is where the sole remaining admitted contention is a contention of omission subsequently mooted by new applicant information, and the intervenor is afforded an opportunity to challenge the new information. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 N.R.C. 737, 744 (2006), citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 N.R.C. 373 (2002).

position, however, is contradicted by Turkey Point, which draws no distinction between voluntary and involuntary intervenor withdrawal.

As described in Dominion's Motion (at 3-6), the Board's position is further undermined by multiple examples of recent Commission and licensing board decisions that adhere to the principle that the contested portion of an adjudicatory COL proceeding terminates upon resolution of the last contention of the last (if not sole) intervenor, even where NRC Staff licensing documents (i.e., SER, SEIS) had not yet been issued.

For example, in the Vogtle COL proceeding, the Licensing Board granted summary disposition on the only admitted contention in that proceeding, holding that its "order concludes the contested portion of this COL proceeding in that no admitted contentions remain for litigation."[20] This decision preceded both the Advanced SER and the Draft SEIS.[21] Moreover, when intervenors in the Vogtle proceeding submitted a new contention to the Licensing Board two-and-a-half months after the Vogtle Licensing Board's decision in LBP-10-8, the Licensing Board ruled that it did not have jurisdiction to consider the new contention because its prior decision had terminated the proceeding, and therefore it referred the new contention to the Commission.[22] The Commission agreed that "the contested proceeding ha[d] been terminated, and jurisdiction over the filing [lay] with the Commission."[23] The Commission thus referred the matter to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for

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[20] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 N.R.C. __, slip op. at 18 (May 19, 2010) (footnote omitted).

[21] See Application Review Schedule for the [Vogtle COLA], available at http://www.nrc.gov/reactors/new-reactors/col/vogtle/review-schedule.html.

[22] Vogtle, Memorandum (Referring Request to Admit New Contention to the Commission), at 2 (Aug. 17, 2010). Similarly, in the COL proceeding for the William States Lee III Nuclear Station, when BREDL proposed an additional contention after the Board had denied its earlier petition to intervene for failure to plead any admissible contention, the Licensing Board denied the new request because it no longer had jurisdiction. Duke Energy Carolinas, LLC (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), Memorandum and Order (Regarding BREDL's New Contention 11) (April 29, 2009).

[23] Vogtle, Commission Order at 1 (Aug. 25, 2010).

appropriate action. Id. The Chief Administrative Judge established a licensing board (consisting of the same members as the initial Vogtle Board) to consider the new contention.[24] The new Board then denied the motion to admit the new contention, "which once again terminates the contested portion of this COL proceeding before the Board."[25]

In the Comanche Peak COL proceeding, where the Licensing Board dismissed remaining contentions as moot, the Board found "no remaining matters to be adjudicated in this proceeding on either or both of the preceding grounds" and "therefore ORDER[ed] that this matter be terminated."[26]

The North Anna early site permit ("ESP") proceeding licensing board terminated the contested portion of that adjudicatory proceeding upon granting applicant's request for summary disposition of the sole remaining contention, and noted that the NRC Staff's licensing documents had yet to be issued.[27]

In the recently concluded contested portion of the Summer COL proceeding, the Licensing Board ruled on remand that petitioners' sole remaining contention was not admissible, accordingly denied the intervention petition, and thus stated that "the proceeding is terminated."[28] The Commission affirmed LBP-10-6 and "terminate[d] the contested portion of

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[24] 75 Fed. Reg. 53,985 (Sept. 2, 2010).

[25] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-21, 72 N.R.C. __, slip op. at 2 (Nov. 30, 2010). The Board's concern that termination of the proceeding would complicate resolution of any future contentions filed, LBP-11-22 at 11, 17, is as demonstrated by Vogtle hardly complicated at all. The Commission and the reconstituted licensing board were quite able to address the late-filed contention even though the initial licensing board's jurisdiction had ceased.

[26] Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-11-04, 73 N.R.C. __, slip op. at 40 (Feb. 24, 2011).

[27] Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-06-24, 64 N.R.C. 360, 365 (2006).

[28] South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-10-6, 71 N.R.C. 350, 386 (2010).

this proceeding."[29] Both the Summer licensing board and Commission decisions preceded the NRC Staff's issuance of the Advanced FSER and the FSER, and the Licensing Board's decision preceded issuance of the Draft EIS, and the Commission's decision preceded the FEIS.[30]

The Board makes no attempt to distinguish the circumstances in Vogtle, Comanche Peak, and North Anna ESP decisions other than to state that those are non-binding licensing board decisions and that none of the licensing boards claimed it was compelled by regulations or precedent to terminate the proceeding. LBP-11-22 at 33-34. But these decisions, as well as Summer, adhered to the Commission's Turkey Point precedent, and there was thus no reason for the licensing boards to provide further explanation. The Board attempts to distinguish Summer because the intervenor there had standing but was not admitted into the proceeding for failing to proffer an admissible contention at the proceeding's outset. LBP-11-22 at 31. But this position is inconsistent with the Board's claim that the proceeding must stay open until the Staff's licensing documents are issued because an admissible contention might be possible based on those documents. Moreover, the Board's rationale would treat classes of petitioners differently for no apparent good reason. Under the Board's rationale, petitioners who involuntarily withdraw from a proceeding by way of summary disposition or a hearing on the merits will have to meet the reopening standards for any new contentions, but an intervenor like BREDL, which has had its contentions disposed of before the summary disposition and hearing stages, will not have to meet those standards for any new contentions. Certainly, the Commission does not intend its regulations to be applied based on such arbitrary distinctions between intervenors, nor is there any basis in the regulations for doing so.

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[29] South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-21, 72 N.R.C. __, slip op. at 6 (Aug. 27, 2010).

[30] See Application Review Schedule for the [Summer COLA], available at http://www.nrc.gov/reactors/new-reactors/col/summer/review-schedule.html.

Most recently, the Commission has issued two orders referring Fukushima-related contentions to the Chief Administrative Law Judge for appropriate action in five COL proceedings where the contested portion of the proceeding had been previously terminated. See Duke Energy Carolinas, LLC, et al. (William States Lee III Nuclear Station, Units 1& 2, et. al), Order (Aug. 18, 2011); Southern Nuclear Operating Co. et al (Vogtle Electric Generating Plant, Units 3 & 4, et al), Order (Aug. 30, 2011). These orders again reflect the Commission's recognition that the contested portion of COL proceedings have regularly terminated when intervenors' contentions have been resolved or dismissed, and they also reflect the Commission's ability to handle subsequent new contentions.

The Board claims that the Commission's decision in MOX[31] supports its ruling. However, the circumstances there are easily distinguished from those present here. As the Commission stated, the ruling at issue in this case "derive[d] from the unusual (perhaps unique) nature of this proceeding." MOX, CLI-09-2, 69 N.R.C. at 62. In an earlier stage of the proceeding, the Commission had determined that a two-step licensing process was appropriate and "went on to approve a procedural scheme crafted specifically for this adjudication." Id. (footnote omitted). After completion of a Construction Authorization proceeding, the Licensing Board and Commission grappled with the timing of contentions in the subsequent proceeding for a license to possess and use the MOX fuel fabrication facility – and more specifically how to handle a contention alleging that the facility had not been completed in accordance with the application when, at the time of the application, construction had not even begun. Id. at 60-61. The Commission contrasted the MOX proceeding from the COL process that prescribes a mechanism for interested persons to request a hearing as to the adequacy of construction after

[31] Shaw Areva MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 N.R.C. 55 (2009) ("MOX")

issuance of a combined license. Id. at 61 n.20. Thus, the Commission created a unique process in the MOX case by which the intervenors in that proceeding would be permitted to challenge whether the facility had been properly built after the Staff made a completion of construction finding. Id. at 59, 65. This case is sui generis, id. at 59 n.8, and therefore has no bearing on this COL proceeding.

B. Termination of the Proceeding Will Not Deny BREDL Any Right to a Hearing on Any Material Issue

Commission regulation prescribes that "[c]ontentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner." 10 C.F.R. § 2.309(f)(2) (emphasis added). Here, BREDL has proffered contentions on both the initial and revised COLA, and the Board has since dispensed with them, finding them either inadmissible or mooted subsequent to their admission into the proceeding. Thus, BREDL has been afforded the hearing opportunity provided under the NRC rules.

The Board's decision not to terminate this proceeding rests on its erroneous view that BREDL's right to a hearing on all material issues includes a right to proffer additional contentions on the SER and SEIS unencumbered by the Commission's regulations for reopening the record. The Board relies predominantly on the DC Circuit's ruling in UCS I that a hearing must "encompass all material factors bearing on the licensing decision raised by the requester." LBP-11-22 at 11-12 (emphasis omitted) (quoting UCS I, 735 F.2d at 1443). However, the D.C. Circuit has made it clear that UCS I only "stands for the proposition that Section 189(a) prohibits the NRC from preventing all parties from *ever* raising in a hearing on a licensing decision a specific issue it agrees is material to that decision." NIRS v. NRC, 969 F.2d 1169, 1174 (D.C.

Cir. 1992) (emphasis in original). In Union of Concerned Scientists v NRC, 920 F.2d 50 (D.C. Cir.1990) ("UCS II"), the Court held that UCS I does not "require that a licensing hearing embrace *anything* new revealed in the SER or the NEPA documents" and therefore does not prohibit the NRC from employing a balancing test to preclude consideration of new "information." UCS II, 920 F.2d at 55 (emphasis in original). The Court found it

> unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to challenge it either originally opted not to make or which simply did not occur to it at the outset. [There is] nothing in the statute that guarantees all private parties the right to have the staff studies as a sort of pre-complaint discovery tool.

Id. at 55-56 (footnote omitted).[32]

Consistent with this case law, the Commission has explicitly rejected the claim that its reopening standards violate UCS I, specifically pointing to that decision's statement that "'[Section 189(a)'s hearing requirement does not unduly limit the Commission's wide discretion to structure its licensing hearings in the interests of speed and efficiency.'" AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 677 (2008), (quoting UCS I). This holding was affirmed in New Jersey Envtl. Fed'n v. NRC, 645 F.3d 220, 232 (3d Cir. 2011). In that case, the Third Circuit rejected the claim that the reopening standards could not apply to "a new issue, as opposed to new evidence about an issue that has already been heard." Id. Finding that the reopening proponents had erroneously relied on USC I, the Third Circuit ruled that the NRC had not categorically barred anyone from raising a contention, but

[32] This same rationale applies to contentions challenging the COLA based on any new information in the SER. Compare LBP-11-22 at 17 n.72.

appropriately applied the reopening standard because the record was closed by the time the contention was raised. Id.[33]

Thus, the Board clearly erred in assuming in LBP-11-22 that BREDL's hearing rights would be impermissibly burdened were the reopening standards to apply to any contentions BREDL proffers related to information in the SER and SEIS. Although the Commission's reopening standards are stringent, they do not categorically exclude consideration of any purported new, material information that may be raised in either the SER or SEIS. See UCS II, 920 F.2d at 55-56. Rather, a late-filed contention based on any new information in those documents will be heard if it is timely raised, concerns a significant issue, and would be likely to result in a materially different outcome, 10 C.F.R. § 2.326, and otherwise meets the Commission's standards for late-filed contentions in 10 C.F.R. § 2.309(c).

The Board also pointed to the Commission regulation providing that the hearing should not commence prior to the Staff's issuance of the SER and SEIS, implying that an intervenor therefore has a right to a hearing on those documents. LBP-11-22 at 15-16 & n.69. This rule is not based on any entitlement to challenge the Staff's review. Rather, the Commission has made clear that hearings generally are not to be held before the Staff issues its safety and environmental licensing documents because the Staff "may not be in a position to provide testimony or take a final position on some issues until these documents have been completed." 69 Fed. Reg. 2,182, 2,187 (Jan. 14, 2004). In addition, UCS II makes clear that the fact that the

[33] Other federal courts have upheld the reopening standards in various contexts. For example, the Sixth Circuit upheld the NRC's refusal to reopen the record to consider "new data, in the form of an unexpected earthquake . . . since the closing of the record" where the reopening proponent did not show that it "could assist materially in the analysis of that new data," and otherwise affirmed application of the reopening standards. State of Ohio v. NRC, 814 F.2d 258, 262 (6th Cir. 1987). The Third Circuit upheld the NRC's refusal to reopen the record with respect to proceedings to restart the undamaged nuclear reactor at Three Mile Island. Three Mile Island Alert v. NRC, 771 F.2d 720, 721, 732-38 (3d Cir. 1985). See also Oystershell Alliance v. NRC, 800 F.2d 1201, 1207 (D.C. Cir. 1986) (approving of the NRC's "court-sanctioned test" for reopening the record).

NRC discloses these documents before a hearing provides "parties to that hearing . . . a right to object to or use all information contained in those reports bearing on issues the parties had timely raised." UCS II, 920 F.2d at 56 (emphasis added). Thus, the hearing is not delayed in order to fulfill any purported right to hearing on the Staff's documents.

Indeed, consistent with the above-described precedent, the Commission's rules do not permit contentions challenging the NRC Staff's safety evaluation:

> The Commission also declines to adopt the thrust of the suggestions to allow free amendment and addition of contentions based on new information such as the SER. The NRC staff has the independent authority, indeed the responsibility, to review all safety matters . . . . The adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the SER are not cognizable in a proceeding.

69 Fed. Reg. at 2,202. See also 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989). Thus, "[t]he NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."[34] Therefore, a contention challenging the adequacy of the Staff's SER is inadmissible.[35] The Board's assumption that BREDL must have the opportunity to proffer contentions based on the SER is thus not supported.

The Commission treats the Staff's NEPA documents differently than its safety documents in that the Commission's regulations contemplate petitioners proffering contentions based on those documents:

> On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents.

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[34] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 476 (2008) (footnote omitted).

[35] U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 N.R.C. 438, 456 (2006).

10 C.F.R. § 2.309(f)(2). But the opportunity for petitioners to file contentions based on the Staff's NEPA documents does not foreclose application of the Commission's procedures. UCS II makes clear that so long as the NRC is not categorically eliminating any right to a hearing on a material issue, it would be unreasonable for the NRC to disregard its procedures concerning consideration of allegedly new information related to material issues that were apparent earlier:

> NEPA does not alter the procedures agencies may employ in conducting public hearings . . . it instead merely prevents agencies from excluding as *immaterial* certain environmental issues from those hearings.

UCS II, 920 F.2d at 56 (emphasis in original) (footnote omitted).[36]

In summary, the Board's decision to keep open this proceeding in order to preserve BREDL's ability to proffer contentions on the SER and SEIS without meeting the reopening standards is clear error warranting review and reversal by the Commission.

C. There Are No Other Valid Reasons to Keep this Proceeding Open

None of the additional grounds advanced by the Board support keeping open the contested portion of the North Anna COL proceeding.

The Board's concern that termination of the contested proceeding would result in parties having "to guess what deadlines govern the filing and adjudication of any future contentions," LBP-11-22 at 27, is belied by the Commission's recent decision in CLI-11-05 responding to the multiple Fukushima-related emergency petitions, including BREDL's. There, the Commission affirmed application of its "existing procedural rules for issues raised late in ongoing

[36] It should be noted that BREDL intervened in the North Anna ESP proceeding and thus has already had the opportunity for hearing on the environmental review conducted in that proceeding. In addition, BREDL has had the opportunity to submit contentions challenging Dominion's original ER in this COL proceeding, the Supplemental Environmental Impact Statement for the Combined License (COL) for North Anna Power Station Unit 3, NUREG-1917 (March 2010) prepared prior to the technology change, and Dominion's revised ER submitted after the technology change. The only environmental contention that BREDL submitted after Dominion revised its COLA sought to raise issues that were either resolved in the ESP proceeding or could have been raised at the outset of the COL proceeding (i.e., were not affected by any technology change). See LBP-11-10 at 8-28.

adjudications" concerning the extraordinary events of Fukushima. CLI-11-05 at 35. Certainly, then, the Commission's existing procedural rules are also adequate to handle any issues that may arise with respect to ordinary and predictable licensing actions such as issuance of the SER and SEIS.

Nor is there merit to the Board's assertion that the Commission's reopening standards do not logically apply because any new contentions on the SER and SEIS would likely be arguing issues different than those previously resolved by the Board. See LBP-11-22 at 28. The governing regulation explicitly applies the reopening standards "to a contention not previously in controversy among the parties." 10 C.F.R. § 2.326(d). Further, in the Statement of Considerations accompanying the promulgation of Section 2.734, the former version of Section 2.326,[37] the Commission directly addressed and rejected the assertion that the reopening standards "should only apply to a motion to offer additional evidence on an issue already considered" and that a "motion to offer additional contentions should not be construed as a motion to reopen . . . ." 51 Fed. Reg. at 19,538.

> A motion to reopen must be filed whenever a proponent seeks to add new information to a closed record, whether the information concerns a new contention or one which has already been heard.

Id. at 19,538-39 (emphasis added). Moreover, the Third Circuit recently affirmed application of the reopening standards to previously unlitigated contentions.[38]

In the same vein, the Board's assertion that the reopening standards do not logically apply where an evidentiary hearing has not yet been conducted (LBP-11-22 at 13, 28) is inconsistent with Commission decisions requiring application of the reopening standards when

[37] Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535 (May 30, 1986).

[38] New Jersey Envtl. Fed'n, 645 F.3d at 233.

new contentions are proffered after intervention requests have been denied. As the Commission has held, where an intervention petition has been denied, "a motion to file new or amended contentions must address the motion to reopen standards." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-09-5, 69 N.R.C. 115, 120 (2009) (footnote omitted).[39] Thus, the thesis that Section 2.326 only applies when a hearing has occurred in obviously incorrect. Further, the Board's position seems inconsistent with the Commission's policy goal of achieving finality:

> The purpose of this rule is not to foreclose the raising of important safety issues, but to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process. Otherwise, it is doubtful whether a proceeding could ever be completed.

51 Fed. Reg. at 19,539 (emphasis added). Although no evidentiary hearing has been conducted, all of BREDL's timely raised issues have been dismissed. To ensure that finality attaches to the hearing process, the contested portion of the proceeding should be terminated now that all proffered contentions have been resolved and the reopening standards should be applied thereafter.

Finally, the Board also erred in reasoning that, under 10 C.F.R. § 2.318(a), its jurisdiction has not terminated because none of the three specified events that could trigger such termination has occurred. LBP-11-22 at 22. 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.

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[39] See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 N.R.C. 32, 37 (2006) (applying the factors in 10 C.F.R. § 2.326(a) when a petitioner sought to introduce new contentions after its initial petition to intervene had been denied).

10 C.F.R. § 2.318(a). As Dominion explained in its Reply (at 4-7), 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 after a hearing on the merits. Where all of the contentions are resolved prior to an evidentiary hearing (either by rejection, subsequent dismissal as moot, or summary disposition), no such decision will even be issued. Thus, Section 2.318(a) neither applies to nor addresses present circumstances. In light of the examples discussed herein where proceedings have terminated without issuance of any initial decision, the Board's position is incorrect and otherwise contrary to the Commission's Turkey Point decision holding that a proceeding terminates when the last or sole intervenor voluntarily or involuntarily withdraws.

V. CONCLUSION

For all of the above stated reasons, the Commission should grant the Petition, reverse LBP-11-22, and terminate the contested portion of the North Anna COL proceeding.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: September 16, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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	)	

CERTIFICATE OF SERVICE

I hereby certify that Dominion's Petition for Review of LBP-11-22, dated September 16, 2011, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 16th day of September, 2011.

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