

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

Docket No. 52-017

NRC STAFF ANSWER TO "DOMINION'S PETITION FOR REVIEW OF LBP-11-22"

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September 26, 2011

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(North Anna Power Station, Unit 3))

NRC STAFF ANSWER TO DOMINION'S PETITION FOR REVIEW OF LBP-11-22

Pursuant to 10 C.F.R. §§ 2.341(b)(3) and 2.341(f)(2), the staff of the Nuclear Regulatory Commission (Staff) hereby answers "Dominion's Petition for Review of LBP-11-22" (Dominion Petition), which the Virginia Electric and Power Company, d/b/a Dominion Virginia Power (Dominion), filed on September 16, 2011. As discussed below, the Staff supports the Dominion Petition.

BACKGROUND

On March 10, 2008, the Commission published in the *Federal Register* a Notice of Hearing on Dominion's application for a combined license (COL) for North Anna Unit 3, which Dominion submitted to the Commission on November 26, 2007. See Dominion Virginia Power; Notice of Hearing and Opportunity to Petition for Leave To Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 12,760 (Mar. 10, 2008) (Notice of Hearing).¹ The Application

¹ On April 18, 2008, the NRC issued a supplement to the Notice of Hearing. Dominion Virginia Power; Supplement to Notice of Hearing and Opportunity to Petition for Leave To Intervene on a Combined License for North Anna Unit 3; Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and Safeguards Information (SGI) for Contention Preparation, 73 Fed. Reg. 21,162 (Apr. 18, 2008). Subsequently, the Commission corrected the Notice of Hearing. See Virginia Electric and Power Company, d/b/a Dominion Virginia Power, and Old Dominion Electric Cooperative; Correction to Notice of Hearing and Opportunity To Petition for Leave To Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 31,516 (June 2, 2008).

initially referenced the Economic Simplified Boiling Water Reactor (ESBWR).² Virginia Electric and Power Company and Old Dominion Electric Cooperative Combined License Application North Anna Power Station Unit 3, Part 1, Rev. 0, at 1 (ML073321125) (Application). In response to the Notice of Hearing, on May 9, 2008, the Blue Ridge Environmental Defense League (BREDL) and its chapter People's Alliance for Clean Energy (PACE) (collectively, Petitioners) filed a "Petition for Intervention and Request for Hearing" (BREDL 2008 Petition).

The Atomic Safety and Licensing Board (Board) designated to preside over this proceeding granted the BREDL 2008 Petition. See *Virginia Electric and Power Co. (North Anna Power Station, Unit 3)*, LBP-08-15, 68 NRC 294 (2008). In LBP-08-15, the Board found that Petitioners had standing and admitted one of their eight proposed contentions (Contention 1) but denied the rest. See *id.* at 299. On June 1, 2009, Dominion filed a motion to dismiss Contention 1 as moot. See *Dominion's Motion to Dismiss BREDL Contention 1 as Moot (June 1, 2009)* (ML091520634). Dominion based its motion on new information included in a revision to the Application. See *id.* at 1, 4-5. On August 19, 2009, the Board granted Dominion's motion and dismissed BREDL Contention 1 as moot. See *Virginia Electric and Power Co. (North Anna Power Station, Unit 3), Order (Dismissing Contention 1 as Moot)* (Aug. 19, 2009) (unpublished Licensing Board Order) (ML092310462). The Board, however, retained jurisdiction to consider the admissibility of a new contention BREDL had proposed (Contention 10) based on the new information that rendered BREDL Contention 1 moot. See *id.* at 1, 4. On November 25, 2009, the Board admitted Contention 10 in part. See *Virginia Electric and Power Co. (North Anna Power Station, Unit 3)*, LBP-09-27, 70 NRC 992, 1016 (2009).

In a letter dated May 18, 2010, Dominion informed the NRC Staff that it had selected the Mitsubishi Heavy Industries, Ltd., U.S. Advanced Pressurized Water Reactor (US-APWR) design

² The Application also references the Early Site Permit (ESP) for the North Anna ESP Site, ESP-003, which the NRC issued on November 27, 2007. The Staff evaluated many environmental impacts of construction and operation of a reactor at the North Anna ESP site in connection with its review of the ESP application. See NUREG-1811, "Environmental Impact Statement [(EIS)] for an [ESP] at the North Anna ESP Site," Final Report (Dec. 2006).

to reference in the Application. See Letter from E.S. Grecheck, Dominion, to NRC (May 18, 2010) (ML101410207).³ In response, BREDL proposed new Contention 11 on June 17, 2010. See Intervenor's New Contention Eleven (June 17, 2011) (ML101680516). By letter dated June 28, 2010, Dominion revised the Application to incorporate by reference the US-APWR design control document (DCD) instead of the ESBWR DCD.⁴ See Letter from E.S. Grecheck, Dominion, to NRC (June 28, 2010) (ML102040697) (forwarding Submissions 6 (SUNSI version) and 7 (public version) of the North Anna COL Application). On July 12, 2010, Dominion moved to dismiss BREDL's Contention 10 as moot in view of the revision to the Application. See Dominion's Motion to Dismiss BREDL's Contention 10 as Moot (July 12, 2010) (ML101930609).

On August 11, 2010, the Board issued a scheduling Order in which it provided BREDL 60 days from August 3, 2010, the day when the revised Application became available in ADAMS, to file new contentions on the revised Application. See *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), Order (Setting Deadline for Filing New Contentions Based on New Information in the Applicant's June 29, 2010 Revision to the License Application) (Aug. 11, 2010) (unpublished Licensing Board Order) (ML102230333) (2010 Scheduling Order).

The Board subsequently granted Dominion's motion, dismissed BREDL Contention 10 as moot, and declined to admit BREDL Contention 11. See *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-10-17, 72 NRC __ (Sept. 2, 2010) (slip op. at 1). The Board retained jurisdiction to rule on any contention BREDL might file in accordance with the Board's August 11 scheduling order. See *id.* at 19.

On October 2, 2010, BREDL proposed two new contentions. See Intervenor's New Contentions, at 2-3, 6 (Oct. 2, 2010) (ML110030450). In its decision in LBP-11-10, the Board

³ The Staff provided a copy of this letter to the Board and the parties to this proceeding. See Letter from R. Weisman, NRC Staff Counsel, to Board and parties (June 1, 2010) (ML101520734).

⁴ In February 2010, the Staff had issued an SEIS on the Application based on the construction and operation of an ESBWR on the North Anna site. See NUREG-1917, *Supplemental Environmental Impact Statement for the Combined License (COL) for North Anna Power Station Unit 3* (Feb. 2010).

declined to admit these two new contentions. See *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-11-10, 73 NRC __ (Apr. 6, 2011) (slip op. at 1).⁵ Although the Board declined to admit BREDL'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, 2010.⁶ *Id.* at 36; see *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), Order (Establishing Schedule to Govern Further Proceedings), at 2 (Sept. 10, 2008) (unpublished Licensing Board Order) (ML082540792) (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 Electric and Power Co.* (North Anna Power Station, Unit 3), Order (Updating Schedule Governing Proceeding), at 3 (March 22, 2010) (unpublished Licensing Board Order) (ML100810364) (referring to the Model Milestones of 10 C.F.R. Part 2, Appendix B, for filings not otherwise covered in the Order, including proposed late-filed contentions). In this regard, the Board indicated that new information in the Staff's Safety Evaluation Report (SER) or Supplemental Environmental Impact Statement (SEIS) might provide a basis for new contentions.⁷ See *North Anna*, LBP-11-10, 73 NRC __ (slip op. at 36). The Board did not discuss termination of the proceeding. See *id.*

On April 18, 2011, Dominion filed a motion in which it sought clarification that the contested portion of this proceeding was terminated by the issuance of LBP-11-10. See

⁵ BREDL labeled its new contentions as Contentions 1 and 2, but the Board designated them as Contentions 12 and 13 in order to distinguish them from BREDL Contentions 1 and 2, as proposed in the BREDL 2008 Petition, and avoid confusion. See *North Anna*, LBP-11-10, 73 NRC __ (slip op. at 1).

⁶ Neither the Intervenor's Emergency Petition of April 18, 2011, in which it requested suspension of this proceeding, nor its August 11, 2011, supplemental comments of to the April 18, 2011 Emergency Petition, proposed any new contentions. See 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 at 1-4 (April 18, 2011) (ML111110862) (Emergency Petition). The Commission recently denied the Emergency Petition. See *Ameren Missouri, et al.* (Callaway Plant, Unit 2, *et al.*), CLI-11-05, 74 NRC __ (Sept. 9, 2011) (slip op. at 32-36).

⁷ In March 2011, the Staff announced its intention to issue the SER in July 2013, a draft SEIS in March 2012, and the final SEIS in October 2012. See Letter from D. Matthews, NRC, to E.S. Grecheck, Dominion (Mar. 2, 2011) (ML110310169).

Dominion's Motion for Clarification of LBP-11-10 (Apr. 18, 2011) (ML111080578) (Dominion Motion). In light of the Dominion Motion, the Board issued an order in which it requested additional explanation of five matters relating to the Dominion request. See *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), Order (Regarding Dominion's Motion for Clarification of LBP-11-10) (April 22, 2011) (unpublished Licensing Board Order) (ML111120196) (April 22 Board Order). The Staff answered the Dominion Motion and responded to the Board's questions on May 2, 2011. See NRC Staff Answer to Dominion's Motion for Clarification and Response to Licensing Board Order Dated April 22, 2011 (May 2, 2011) (ML111220674) (Staff May Response). BREDL also filed a reply to the Dominion Motion. See Intervenor's Reply Regarding Dominion's Motion for Clarification of LBP-11-10 (May 5, 2011) (ML111250648). Dominion replied to the Staff May Response and the BREDL Reply in a filing dated May 12, 2011, in which Dominion also addressed the Board's questions. See Dominion's Reply to Licensing Board's April 22, 2011 Order (May 12, 2011) (ML111320534).

On September 1, 2011, the Board issued LBP-11-22. Subsequently, BREDL filed its "Request to Admit Intervenor's New Contention," dated September 22, 2011, in which it requests admission of a seismic contention. This new contention is the only matter now pending before the Board.⁸

⁸ While a proposed contention is now pending before the Board, Dominion's request for review of LBP-11-22 remains "live" and should not be rejected as moot. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 205 (1993). Dominion has raised a dispute which is "capable of repetition, yet evading review," which is an exception to the mootness doctrine. See *id.* Specifically, in accordance with *Comanche Peak*, an appeal should not be rejected as moot if "both the challenged action was in its duration too short to be litigated *and* there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (emphasis in original) (footnote omitted). The circumstances here fit the two-pronged *Comanche Peak* test. First, the challenged decision, LBP-11-22, was in effect for only 21 days before a request for admission of a new contention was filed, a duration too short to litigate the correctness of that decision. Second, should the Board deny the proposed contention, there is every reason to expect the Board to follow the procedure it established in LBP-11-22 and not terminate this proceeding, such that Dominion would again be subject to the same action about which it is aggrieved. Accordingly, the pendency of a new contention before the Board is no reason for the Commission to refuse to take review of LBP-11-22.

THE LICENSING BOARD DECISION IN LBP-11-22

On September 1, 2011, the Board issued LBP-11-22, in which the Board rejected the Dominion Motion. See *Virginia Electric and Power Co. (North Anna Power Station, Unit 3)*, LBP-11-22, 74 NRC ___ (Sept. 1, 2011) (slip op.). Specifically, the Board ruled “that it continues to have jurisdiction and that it is appropriate in the present circumstances not to terminate this adjudication.” *Id.* at 16. To support this decision, the Board analyzed (1) the Notice of Hearing (*id.* at 16, 19-21), (2) the Rules of Practice in 10 C.F.R. Part 2, in particular 10 C.F.R. § 2.318(a) (*id.* at 22-27), (3) the decision in *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm’n*, 735 F.2d 1437, 1443 (D.C. Cir. 1984) (*UCS I*) regarding hearing rights under Section 189a. of the Atomic Energy Act of 1954, as amended (the Act), in the context of the reopening standards of 10 C.F.R. § 2.326 (*id.* at 18, 27-30), and (4) the NRC decisions cited by Dominion and the Staff as requiring the Board to terminate this proceeding (*id.* at 30-35).

In regard to the Notice of Hearing, the Board quotes it (*id.* at 19), and states that BREDL, having “met the criteria for intervention[,] . . . became a party to the licensing proceeding and [is] entitled to participate fully in the conduct of the hearing” (*id.* at 21). The Board concludes that “[t]his necessarily entails the right to propose contentions that have a bearing on the licensing decision, including those based on the SER and the new SEIS when they are issued, or on the Fukushima accident.” *Id.*

In regard to NRC regulations, the Board quotes the standards of 10 C.F.R. § 2.318(a) that define the events that terminate the presiding officer’s jurisdiction, namely, “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.” *Id.* at 22, quoting 10 C.F.R. § 2.318(a). The Board states that none of these events has occurred, and concludes that “a licensing board does not lose its jurisdiction whenever during some period of the lengthy and dynamic licensing process there is no pending contention.” *North Anna*,

LBP-11-22, 74 NRC __ (slip op. at 23). The Board also states that “we find nothing in the regulations to suggest that an intervenor loses its status as a party to the licensing proceeding or forfeits its right to a hearing whenever its admitted contention has become moot prior to the issuance of the SER and required Staff NEPA documents.” *Id.* at 24. The Board concludes that under relevant NRC regulation it continues to have jurisdiction in this proceeding. *Id.* at 27.

In regard to the reopening standards, the Board states that “to be consistent with [§ 189a. of the Act] as interpreted in [*UCS I*], the agency must provide an appropriate procedure that would allow an intervenor to reopen the terminated proceeding to propose new contentions based on new and material information generated later in the licensing process. But the regulations do not provide such a procedure.” *Id.* at 27-28 (citations and footnotes omitted). The Board goes on to state that the Commission “has implicitly recognized that it would be inequitable to apply the reopening requirements when, due to factors beyond a party’s control, it presently lacks the information to frame an admissible contention.” *Id.* at 29. The Board quotes *Shaw AREVA MOX Servs., LLC (Mixed Oxide Fuel Fabrication Facility)*, CLI-09-02, 69 NRC 55, 65 (2009) in support of this proposition.⁹ Further, the Board stated that in this case, “not only would imposing the reopening requirements be inequitable, it would be unlawful as well if doing so precluded BREDL from litigation an otherwise admissible contention.” *Id.* The Board indicated that doing so would violate not only § 189a. of the Act, but the Administrative Procedure Act (APA), specifically, 5 U.S.C. § 706(2)(a). *Id.* at 29-30. The Board concluded that “[g]iven the lack of an appropriate mechanism for an intervenor to reopen a terminated

⁹ The Board’s reliance on the *MOX* decision with respect to the reopening factors appears to be inconsistent with the Commission’s statement in that decision that it is not precedential. See *MOX*, CLI-09-2, 69 NRC at 59 n.8. With respect to the relief afforded the *MOX* intervenors in regard to the reopening standards of § 2.326, the Commission stated that “[t]he peculiar procedural circumstances and the unusual nature of the equities favoring Intervenors combine to render this decision *sui generis*. As such it should not be considered precedential.” *Id.* The *MOX* decision, however, may have precedential value for the proposition that a licensing board is not permitted to do indirectly what it may not do directly. *Id.* at 63.

proceeding to propose new contentions based on new and material information generated later in the licensing process, we decline to terminate this proceeding now.” *Id.* at 30.

With respect to the Commission and Atomic Safety and Licensing Appeal Board decisions the Staff and Dominion cited in the Dominion Motion, the Staff May Response, and the Dominion Reply, the Board identified differences in the facts underlying those decisions and the facts of this proceeding and concluded that those decisions did not control here. *See id.* at 30-33. The Board also indicated that decisions of other licensing boards were not binding on it, nor did the other boards indicate that they were compelled to follow the particular procedure they chose. *Id.* at 33. The Board concluded by stating that it did not intend to lay down a rule for all other boards to follow, but merely decided that the course it has chosen is within the bounds of its authority. *Id.* at 35.

DISCUSSION

Below, the Staff states the legal standards that apply to petitions for review, discusses how the Dominion Petition satisfies those standards, and analyzes three errors in LBP-11-22 that warrant reversal of that decision. These errors are: First, the Board does not identify a meaningful distinction between this proceeding and the facts of the *Turkey Point* decision, which controls whether this proceeding must be terminated. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185 (1991). Second, the Board considers the application of the reopening standards of 10 C.F.R. § 2.326 in this proceeding, but such standards are not now in issue in this proceeding and are irrelevant to the NRC decisions requiring termination of this proceeding. Third, the Board interpretation of intervenor’s rights to a hearing under the Act, as discussed in *UCS I*, is overbroad. In short, the Dominion Petition should be granted.

I. Legal Standards:

A petition for review filed under 10 C.F.R. § 2.341(b) may be granted “in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

- i. A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- ii. A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- iii. A substantial and important question of law, policy, or discretion has been raised;
- iv. The conduct of the proceeding involved a prejudicial procedural error; or
- v. Any other consideration which the Commission may deem to be in the public interest.”

10 C.F.R. § 2.341(b)(4). This regulation does not require the Commission to take review; the Commission retains full discretion on whether to grant review of initial board decisions. *Private Fuel Storage* (Independent Spent Fuel Storage Facility), CLI-04-10, 61 NRC 129, 132 (2004).

The Commission has stated that “review is particularly appropriate where the Board’s ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider.” *Id.* (internal citations omitted).

The regulations set forth additional standards for petitions for interlocutory review.

Specifically, a petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

- i. Threatens the party adversely affect by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer’s final decision; or
- ii. Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.341(f)(2)(i)-(ii). A licensing board's order is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory. *Pa'ina Hawaii, LLC.*, CLI-06-18, 64 NRC 1, 4 n.10 (2006), quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074 (1983).

In addition, a petition for review must contain the following information:

- i. A concise summary of the decision or action of which review is sought;
- ii. A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;
- iii. A concise statement why in the petitioner's view the decision or action is erroneous; and
- iv. A concise statement why Commission review should be exercised.

10 C.F.R. § 2.341(b)(2).

II. The Dominion Petition Satisfies the Standards of 10 C.F.R. § 2.341.

A. Section 2.341(b)(2) is met.

The Dominion Petition states that in LBP-11-22 "the Board declined to terminate the contested portion of [this proceeding], even though all contentions of the sole intervenor [BREDL] have been dismissed." Dominion Petition at 1. This is a concise summary of the decision for which review is sought, as required by § 2.341(b)(2)(i).

The Dominion Petition also indicates that the Dominion Motion at 2-3 raised the applicable case law below to the Board, including the *Turkey Point* decision (CLI-91-13, 34 NRC 185), among others. Dominion Petition at 9-10. In LBP-11-10, the Board did not discuss termination of the proceeding at all, and *per force* did not give any reasons for then declining to terminate this proceeding. See *North Anna*, LBP-11-10, 73 NRC ___ (slip op. at 36). Further, the only other indication the Board gave the parties as to what it might consider in deciding whether or not to grant the Dominion Motion was in its April 22 Order, in which it asked

the parties to address five questions. None of these five questions referred to the reopening standards of 2.326.¹⁰ April 22 Board Order at 2.

In answer to the Dominion Motion and Board Questions 1 and 2, the Staff stated 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. NRC Staff Answer to Dominion's Motion for Clarification and Response to Licensing Board Order Dated April 22, 2011 at 3, 4-8 (May 2, 2011) (ML111220674) (Staff May Response) *citing 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)). The Staff stated that no further answer to Question 3 would appear necessary given the Staff's answer to Questions 1 and 2, but suggested that a factor the Board may wish to consider is whether failure to terminate the proceeding might delay BREDL's right to appeal, which the Staff believes should have then accrued under 10 C.F.R. § 2.341.¹¹ Staff May Response at 3, 8-9 (responding to Board Questions 3 and 4). Dominion, for its part, analyzed the applicable NRC regulations, including § 2.318(a), and applicable case law, thus responding to Board questions 1 and 2. Dominion Reply at 3-8. Dominion did not address Board question 3 (*id.* at 8 n.16), but did answer Board questions 4 and 5 (*id.* at 9-10).

The Board gave no indication in LBP-11-10 or the April 22 Order that the Board was considering analyzing the reopening standards of 10 C.F.R. § 2.326 under the requirements of

¹⁰ In essence, the Board posed the following five questions to the parties: (1) Do applicable NRC regulations require termination of a proceeding in the circumstances present here? (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? *Id.*

¹¹ Although not relevant to the Dominion Petition, the Staff explained that the Emergency Petition is irrelevant to any aspect of the termination issue. Staff May Response at 3, 9.

§ 189a. of the Act. Since these matters were not then and are not now at issue in this proceeding, they are irrelevant to the question of whether or not this proceeding should be terminated. Accordingly, there was no reason for Dominion to raise them in its Motion or the Staff to raise them in the Staff May Response.

In view of the foregoing, Dominion raised to the Board applicable controlling Commission decisions regarding termination of a proceeding, and need not have discussed the application of the reopening standards of § 2.326 or § 189a. of the Act. Accordingly, the Dominion Petition satisfies the requirements of § 2.341(b)(2)(ii).

Dominion, in the first paragraph of Section IV of its Petition, concisely identifies the error in LBP-11-22 for which it seeks Commission review. Dominion Petition at 9-10. Accordingly, the Dominion Petition satisfies the requirements of § 2.341(b)(2)(iii).

Similarly, Dominion concisely describes why the Commission should exercise review of LBP-11-22. Dominion Petition at 8-9. Accordingly, the Dominion Petition satisfies the requirements of § 2.341(b)(2)(iv).

In view of the foregoing, the Dominion Petition satisfies all the requirements of § 2.341(b)(2). As described in more detail in the next section of this Answer, the Staff submits that the Commission should take review of LBP-11-22.

B. Section 2.341(b)(4) is met.

The Staff describes below how the decision in LBP-11-22 is a departure from established law under § 2.341(b)(4)(ii) or otherwise raises a substantial and important question of law, policy, or discretion under § 2.341(b)(4)(iii). First, however, the Staff discusses whether it is more appropriate to apply the standards of § 2.341(b)(4) (governing appeals of final decisions) or § 2.341(f) (governing interlocutory appeals) to the Dominion Motion.

As stated above, in *Seabrook*, the Appeal Board established the test for determining whether an appeal is interlocutory, and the Commission reaffirmed this test in *Pa'ina*:

A licensing board's order is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.

Pa'ina, CLI-06-18, 64 NRC at 4 n.10, quoting *Seabrook*, ALAB-731, 17 NRC 1073, 1074 (1983).

At first blush, this test seems to apply quite simply to Dominion in this proceeding, since LBP-11-22 did not terminate Dominion's right to participate, nor did it dispose of a major segment of the case, insofar as it did not rule on the merits of any contention. Therefore, it might appear that Dominion's appeal is interlocutory.

In LBP-11-22, however, the Board explained the reasons LBP-11-10 did not terminate the proceeding. And LBP-11-10 *did* "dispose of a major segment of the case," insofar as it denied the last pending request for admission of a contention, and *should have* terminated a party's right to participate—BREDL's—in accordance with *Seabrook*, as explained below.¹²

In *Seabrook*, the Appeal Board held that a petition for review was interlocutory. *Seabrook*, ALAB-731, 17 NRC at 1075. The Appeal Board stated that the Seacoast Anti-Pollution League (SAPL), which filed the appeal, was "still a party to the proceeding below notwithstanding the dismissal of its Supplemental Contention 3." *Id.* at 1074. Although this was the last of the contentions SAPL originated, the Appeal Board stated that "SAPL itself notes that it has joined in a contention filed by the State of New Hampshire that remains before the [Seabrook] Licensing Board." *Id.* The Appeal Board accordingly ruled the appeal interlocutory and denied review.¹³ *Id.* at 1075. Had SAPL *not* joined in a contention filed by the State of New Hampshire, SAPL would have had no further contentions pending before the *Seabrook* licensing

¹² A right to request review would of course not accrue to Dominion if BREDL's right to participate in the proceeding was terminated.

¹³ The *Seabrook* licensing board dismissed SAPL's contention on a motion for summary disposition, rather than a motion to dismiss, as employed by Dominion in this proceeding. *See Seabrook*, ALAB-731, 17 NRC at 1074. Although a ruling on a motion for summary disposition is a merits determination, it seems to the Staff that an intervenor whose contention is dismissed on summary disposition has a stronger claim to party status under the reasoning in LBP-11-22 than an intervenor whose contention did not warrant any merits inquiry. Rulings based on such a distinction determining party status, appeal rights, and the like, would appear to have the illogical result of such matters turning on the litigation tactics of counsel, rather than the nature and substance of the underlying issue.

board. In that case, it would have appeared that SAPL was not “still a party to the proceeding,” and that the Appeal Board would have considered SAPL’s right to participate to have terminated and *granted* review.

BREDL’s status in this proceeding is similar, but the decision in LBP-11-22 has clouded the question of whether BREDL’s right to request Commission review of the denial of its contentions has accrued. Conversely, while Dominion has prevailed with respect to all admitted and proposed contentions, it is still party to a contested proceeding. Since LBP-11-10 allows the filing of contentions on the SER (*North Anna*, LBP-11-10, 73 NRC at ___ (slip op. at 36)), Dominion may be faced with new contentions on the eve of the mandatory hearing, which will likely occur shortly after the Staff issues a final SER. Further, litigation of those new contentions may delay issuance of a COL for North Anna Unit 3 (assuming the Staff does not contest the application on some issue). Moreover, if BREDL’s opportunity to request review of the denial of its contentions is delayed until after the SER is issued, Dominion could possibly face a remand at the very end of the licensing process.

The decisions in LBP-11-22 and LBP-11-10 have rendered murky the previously clear law regarding the standards for the Commission to accept review of licensing board decisions. The Commission should treat those two decisions together as disposing of a major portion of the proceeding under *Pa’ina*, since all of BREDL’s pending requests for admission of contentions were denied, and the last admitted BREDL contention had already been dismissed. In addition, had the Board terminated the proceeding in its decision in LBP-11-10, BREDL could unquestionably have requested Commission review under § 2.341(b)(4), *i.e.*, BREDL’s appeal would not have been interlocutory.

Notwithstanding whether BREDL then desired to seek review of any Board decision, the Commission has an interest in ensuring that termination of an intervenor’s participation in a proceeding is in accordance with Commission regulations and applicable precedent. Specifically, if an intervenor’s participation has been terminated in error (*e.g.*, through erroneous

denial or rejection of its contentions), the Commission would avoid delay at the end of the proceeding by identifying the error on appeal under § 2.341(b)(4) and remanding for further proceedings close in time to the erroneous decision. Moreover, a decision terminating an intervenor's right of participation, if affirmed or allowed to become final by the Commission, is final agency action as to the intervenor under the Hobbs Act, and the intervenor may seek review in the appropriate Court of Appeals. *Environmental Law and Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 681 (7th Cir. 2006). Accordingly, the decision in LBP-11-22 raises a substantial and important question of law, policy, or discretion, as illustrated by the foregoing discussion, and Dominion has satisfied § 2.341(b)(4)(iii).

As for the Board's application of established law, in LBP-11-22, the Board distinguishes the cases Dominion and the Staff cite as falling into a category in which the intervenor either settles or abandons all of its contentions. *North Anna*, LBP-11-22, 74 NRC at ___ (slip op. at 14 n.64). The decision in LBP-11-22 states that neither of those circumstances are present here. *Id.* The Board appears to distinguish the *Turkey Point* decision on the basis that the intervenor withdrew its petition. *Id.* at 14 n.64, 30-31. The *Turkey Point* proceeding, however, involved two petitioners, both of which established standing, but only one was admitted as a party to the proceeding. See *Turkey Point*, CLI-91-13, 34 NRC at 187 affirming *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521 (1991). The petitioner who was not admitted withdrew, and the petitioner admitted as a party was dismissed for lack of standing.¹⁴ *Id.* Accordingly, *Turkey Point* cannot meaningfully be distinguished from this proceeding on the basis suggested in LBP-11-22.

¹⁴ In *Turkey Point*, a licensing board determined that Mr. Thomas Saporito and the Nuclear Energy Accountability Project (NEAP) had standing, and admitted NEAP as a party to the proceeding. See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 511-16, 514, 538 (1990). Mr. Saporito filed a motion to withdraw, which the *Turkey Point* board granted, so the board did not admit him as a party to the proceeding. *Id.* at 514. Mr. Saporito, however, was representing both himself and NEAP in the *Turkey Point* proceeding, and NEAP's standing was based on Mr. Saporito's standing. *Id.* at 514; see *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 14-15 (1990). Accordingly, the *Turkey Point* board *denied* Mr. Saporito's motion to withdraw as NEAP's member upon which NEAP's standing was

To the contrary, a petitioner in the *Turkey Point* proceeding “involuntarily withdrew” from the proceeding, in the Commission’s language, and this required that the proceeding be terminated. *Turkey Point*, CLI-91-13, 34 NRC at 188. Similarly, BREDL was “withdrawn” from this proceeding, albeit involuntarily under *Turkey Point*, by virtue of the Board’s decision in LBP-11-10 denying the last of BREDL’s proposed contentions, and in this respect, LBP-11-22 is contrary to established law in this respect. There is no rational distinction between the facts of *Turkey Point*, in which the licensing board involuntarily “withdrew” a party for lack of standing, and this proceeding, in which BREDL was effectively (involuntarily) withdrawn for lack of a contention. Accordingly, Dominion has satisfied § 2.341(b)(4)(ii) in this regard, and the Commission should take review of LBP-11-22.

C. In the alternative, the Dominion Petition meets the interlocutory review standards.

To the extent that the Dominion Petition for review of LBP-11-22 is viewed as interlocutory, the Dominion Petition meets the standards for interlocutory review, as set forth below. Under § 2.341(f)(2)(ii), interlocutory review is warranted if a decision affects the basic structure of the proceeding in a pervasive or unusual manner. In this proceeding, LBP-11-22 continued a contested proceeding (although there was no contested issue), under circumstances in which there should have been no such proceeding.¹⁵ A decision can have no

based. *Turkey Point*, LBP-90-16, 31 NRC at 514. Although NEAP attempted to demonstrate that it continued to have standing by other means, the *Turkey Point* board determined that Mr. Saporito no longer had standing, as he had been discharged from his employment, the location of which was the basis for his standing, and NEAP otherwise failed to establish that it still had standing to intervene in the proceeding. *Turkey Point*, LBP-90-24, 32 NRC at 14-15. Accordingly, the *Turkey Point* board found that NEAP’s standing to intervene in the proceeding had been vitiated, and dismissed NEAP from the proceeding for lack of standing. *Id.* at 19. The *Turkey Point* board also dismissed Mr. Saporito from the proceeding, which it had inadvertently failed to do in a previous decision. *Id.* at 13 n.1, 19. The Staff notes that NEAP had been admitted as a party in *Turkey Point*, just as BREDL was admitted as a party in this proceeding. In its decision in ALAB-952, the Appeal Board subsequently affirmed the decision in LBP-90-24. *Turkey Point*, ALAB-952, 34 NRC at 523.

¹⁵ The definition of “contested proceeding” in 10 C.F.R. § 2.4 includes a proceeding in which “a petition for leave to intervene in opposition to an application for a license . . . has been granted or is pending before the Commission.” 10 C.F.R. § 2.4, *Contested proceeding*, definition (3). However, a person petitioning for leave to intervene must propose an admissible contention in order for the petition to be granted under 10 C.F.R. § 2.309. If the last admitted contention is dismissed, the initial grant of the petition should be considered vitiated. Similarly, the denial of the last request for admission of a

more pervasive effect on a contested proceeding than the difference between it continuing on the docket or not. Dominion satisfies the requirements of § 2.341(f)(2)(ii), and the Dominion Petition, if interlocutory, should be granted.

III. LBP-11-22 is erroneous with respect to the law governing termination and reopening.

A. Application of governing law regarding termination of proceedings

The Staff explained above that the decision in LBP-11-22 is contrary to controlling precedent in the *Turkey Point* decision. See *supra* pp. 15-16. While other decisions the Staff cited in its May Response involved the settlement or withdrawal of contentions, they remain instructive, given the Commission's language in *Turkey Point* directing termination of a proceeding in which the last intervenor has withdrawn "voluntarily or involuntarily." See *Turkey Point*, CLI-91-13, 34 NRC at 188. The Staff summarizes those cases 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

contention would effectively vitiate any petition for leave to intervene before the Commission. Although not stated in this fashion, this may be the rationale underlying the decisions that terminated proceedings cited in the Dominion Petition and this Staff Answer.

The provisions of 10 C.F.R. § 2.318(a) do not allow for a contrary result. Those provisions terminate the presiding officer's jurisdiction (1) when the period within which the Commission may direct that the record be certified to it for final decision expires, (2) when the Commission renders a final decision, or (3) when the presiding officer withdraws from the case upon considering himself or herself disqualified. 10 C.F.R. § 2.318(a). The first two of these events mark final agency action on the application under the Hobbs Act, and the initiation of the time in which an aggrieved party may seek review of that final agency action in a Court of Appeals. See *Environmental Law and Policy Ctr.*, 470 F.3d at 681. They have no relevance to termination of the proceeding before a licensing board and transfer of jurisdiction to the Commission in its role as the presiding officer *before* the agency action is final as to the applicant. The third event is the unusual circumstance in which a particular presiding officer no longer has jurisdiction over a proceeding and may not take any action in it. In such an instance, however, the proceeding will continue, but a different presiding officer will have jurisdiction.

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); *see, e.g., North Anna*, LBP-10-17, 72 NRC ___ (slip op. at 1, 4-5, 19) citing 2010 Scheduling Order (Dismissing contention as moot; 2010 Scheduling 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 *Trojan*, the contention was settled. *Id.* 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 ___ (Mar. 17, 2010) (slip op. at 37)), and another declared that the contested portion of the proceeding had been "conclude[d]" (*Southern Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC ___ (May 19, 2010) (slip op. at 18)). Significantly, the licensing board decisions follow the rule established in *Turkey Point* regardless of whether intervention is denied initially for lack of standing or failure to submit an admissible contention, after admission of contentions but before a hearing on the merits, or after evidentiary hearing on the merits. *See, e.g., PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 335 (2009) (terminating proceeding in which one intervenor failed to establish standing and another failed to submit an admissible contention); *Luminant Generation Co., LLC* (Comanche Peak Nuclear

Power Plant, Units 3 and 4), LBP-11-04, 73 NRC ___ (Feb. 24, 2011) (slip op.) (last admitted contention dismissed as moot on summary disposition and proceeding terminated); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-07, 69 NRC 613 (2009) (terminating proceeding after hearing on the merits).

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 at ___ (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).¹⁶ The Staff is unaware of any licensing board decision disposing of all contentions or pending requests to admit contentions that does not terminate the proceeding or fall within one of these well-established exceptions.¹⁷

¹⁶ In addition, 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 (1974). A statement in an initial decision that the proceeding is "terminated" does not relinquish the licensing board's jurisdiction for such purposes. *Id.* at 646 n.2.

¹⁷ The Staff is also unaware of any other decision in which a licensing board took the novel step of determining that an intervenor, once admitted, remained a party to the proceeding even if all admitted contentions were dismissed and all requests for admission of new contentions denied. The *Seabrook* decision would appear to require the opposite result. See *Seabrook*, ALAB-731, 17 NRC at 1074.

B. The concerns underlying the Board decision in LBP-11-22 are not well taken.

In its decision in LBP-11-22, the Board explains that the licensing process is ongoing and that BREDL has a continuing right to file new contentions, and in this light, the Board did not terminate this proceeding when it issued LBP-11-10. *North Anna*, LBP-11-22, 74 NRC at ___ (slip op. at 9-10), citing *North Anna*, LBP-11-10, 73 NRC at ___ (slip op. at 36). The Board supports its decision in LBP-11-10 by identifying two undesirable consequences of termination of the proceeding. *North Anna*, LBP-11-22, 74 NRC at ___ (slip op. at 11-12). First, the Board identifies the possibility for multiple adjudicatory proceedings or multiple boards in the same proceeding and associated inefficiency.¹⁸ *Id.* at 11, 14. Second, the Board indicates that there would be “significant implications for the rights of intervenors under [Section 189a. of the Atomic Energy Act of 1954, as amended (the Act)].” *Id.* at 11, citing § 189a. of the Act (42 U.S.C. § 2239(a)(1)(A)). This second concern seems to be at the root of the Board’s decision not to terminate this proceeding. As explained below, however, the legal basis for this concern is not correct.

With respect to the first concern, regarding the potential for confusion and inefficiency, the Commission followed just such a procedure in the *Vogtle* proceeding apparently believing it would not result in confusion or inefficiency. *North Anna*, LBP-11-22, 74 NRC at ___ (slip op. at 11 n.50). In regard to the second concern, the Board stated its rationale as follows: First, the Board indicated that “the hearing ‘must encompass all material factors bearing on the licensing decision raised by the requester.’” *Id.* at 11-12 (quoting *UCS I*). Second, the Board indicated that if it terminated the proceeding, BREDL would have to satisfy the reopening standards in

¹⁸ The Board reiterated its concern in LBP-11-22 by stating: “If BREDL files new contentions based on the Fukushima accident, the SER, or the new SEIS, they would have to be filed with the Commission, which would decide whether to refer the matter to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel to appoint a new licensing board, or to conduct the new adjudicatory proceeding itself. Thus, there could be multiple adjudicatory proceedings and multiple licensing boards in the same licensing proceeding.” *Id.* at 11. The Commission and the Chief Judge of the Panel would assign these tasks in a manner that would ensure they are accomplished most efficiently.

10 C.F.R. § 2.326 should it later seek admission of a new contention. *North Anna*, LBP-11-22, 74 NRC at ___ (slip op. at 12). Third, since reopening the record is an “extraordinary action’ and . . . proponents of motions seeking to reopen the record bear a ‘heavy burden[.]’ (*id.* at 12 (quoting *MOX*, CLI-09-02, 69 NRC at 65) (internal citations omitted)), the Board reasoned that granting the Dominion Motion “would create a substantial barrier to BREDL’s ability to file proposed contentions based on new information[.]” *Id.* at 12. Fourth, the Board distinguishes this proceeding from a proceeding in which there was an evidentiary hearing on the merits, and concludes that “there are no sound reasons for imposing such a demanding burden in this case.” *Id.* at 13.

The rationale in LBP-11-22 does not withstand scrutiny. First, the Board’s view of the significance of *UCS I* is overbroad. The D.C. Circuit decision in *UCS I* invalidated a rule completely prohibiting contentions on the adequacy of emergency planning issues, which the NRC conceded were material to licensing. See *UCS I*, 735 F.2d at 1443. This is a far cry from imposing progressively more difficult procedural hurdles to the admission of contentions depending on the procedural status of the proceeding. In that regard, the D.C. Circuit held that the late-filing standards applied by the NRC (now codified in 10 C.F.R. § 2.309(c)) comported with the Act. See *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54-56 (D.C. Cir. 1990) (*UCS II*). As the Court of Appeals stated, “we think 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 a challenge it either originally opted not to make or which simply did not occur to it at the outset.” *Id.* at 55.

But *UCS II* was not the last decision to address such issues. The D.C. Circuit next interpreted § 189a. of the Act in a decision on Part 52. See *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992) (*NIRS*). In *NIRS*, the petitioner challenged the scheme in 10 C.F.R. Part 52 in which intervenors were afforded an opportunity to intervene in proceedings on all safety issues in a COL proceeding (or to comment on such issues in design

certification rulemakings), but could only intervene on whether the acceptance criteria in the license were met post-construction. See *id.* at 1171-72. Petitioners argued that they should be allowed to raise *all* issues material to licensing at the post-construction hearing. *Id.* at 1172-73. The petitioners relied on *UCS I* to support their view. *Id.* at 1174. The Court of Appeals, however, rejected that argument:

This reading of *UCS I* misconstrues the language and purpose of the case. *UCS I* did not require every hearing in the licensing process to encompass every material issue of fact. Rather, as *UCS II* made clear *UCS I* “stands for the proposition that [§ 189a.] 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.” Taking this view of *UCS I*’s requirements, the Commission’s post-construction hearing regulations pose no problem. Under Part 52, parties are uncontestably permitted their day in court on every material issue at some point in the licensing process.

Id. (emphasis in original) (citation omitted). The Board makes the same mistake as the petitioners in *NIRS*. The Rules of Practice in 10 C.F.R. Part 2 allow for a hearing on every issue material to licensing, albeit with more stringent intervention requirements depending on the procedural posture of the individual proceeding. Accordingly, the Rules of Practice, including the more stringent reopening standards in § 2.326, comport with *UCS I*.

The Staff agrees that if the proceeding were terminated, BREDL would have to satisfy the reopening standards of 10 C.F.R. § 2.326 if it sought admission of a new contention. Further, the NRC decisions are clear that a proponent of a motion to reopen bears a “heavy burden.” See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983). The decision in LBP-11-22, however, does not recognize that controlling Commission precedent requires application of the reopening standards under circumstances similar to those presented in this proceeding.¹⁹ See *Northeast*

¹⁹ Whether the Board or Commission will ever be called upon to decide whether a person offering new contentions in this proceeding meets the reopening standards of § 2.326 is speculative. The Board should have terminated this proceeding. If it later faced a request to admit a new contention under circumstances in which the Board determined that the reopening standards of § 2.326 applied but the Board thought it inequitable to apply them to deny reopening, the Board could have certified a question

Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355 (2000) (Millstone I), cited approvingly by *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 n.25 (2009).

In *Millstone I*, a licensing board admitted three contentions into the proceeding, which was held under the hybrid procedures of 10 C.F.R. Part 2, Subpart K. *Millstone I*, CLI-00-25, 52 NRC at 356. While one contention was settled, the *Millstone I* licensing board denied the other two and terminated the proceeding. *Id.* While a petition for review was pending, the intervenor filed a motion to reopen, which the Commission remanded to the licensing board. *Id.* at 356-57. The *Millstone I* proceeding was similar to this proceeding in that two admitted contentions there were dismissed without an evidentiary hearing, although this occurred as contemplated under Subpart K. The *Millstone I* licensing board terminated the proceeding as Dominion argues should have been done here, and the Commission explicitly applied the reopening standards to a new contention proposed by the intervenor. *Id.* at 357. Significantly, there was no controversy over what standards should apply to the admission of the new contentions. *Id.* Accordingly, the Commission has already determined that the reopening standards should be applied in cases in which an admitted intervenor's contention is dismissed before an evidentiary hearing on the merits.

regarding that matter to the Commission under § 2.341(a). As shown by its action in the *MOX* proceeding, the Commission does not hesitate to grant carefully crafted, appropriately circumscribed relief, if warranted. See *MOX*, CLI-09-2, 69 NRC at 59, 65. The Staff certainly does not expect the Board to mechanically apply the Rules of Practice in 10 C.F.R. Part 2 in situations not contemplated by the rules and in a manner that would be inequitable to a party or a person seeking party status.

CONCLUSION

For the reasons set forth above, the Commission should grant the Dominion Petition.

Respectfully Submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 26th day of September, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO 'DOMINION'S PETITION FOR REVIEW OF LBP-11-22'" has been served upon the following persons by Electronic Information Exchange this 26th day of September, 2011:

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