

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

In the Matter of

VIRGINIA ELECTRIC AND POWER  
COMPANY d/b/a DOMINION VIRGINIA  
POWER and OLD DOMINION ELECTRIC  
COOPERATIVE

(Combined License Application for  
North Anna Unit 3)

Docket No. 52-017-COL

**CLI-12-14**

**MEMORANDUM AND ORDER**

Virginia Electric and Power Company, d/b/a Dominion Virginia Power (Dominion), has petitioned for review of the Atomic Safety and Licensing Board's decision denying its request to terminate the contested portion of the proceeding on its combined license (COL) application.<sup>1</sup> For the reasons given below, we grant review and reverse the Board's decision.<sup>2</sup>

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<sup>1</sup> *Dominion's Petition for Review of LBP-11-22* (Sept. 16, 2011) (Petition for Review).

<sup>2</sup> LBP-11-22, 74 NRC \_\_ (Sept. 1, 2011).

## I. BACKGROUND

Dominion holds an early site permit to build additional nuclear power reactors at the North Anna site, about 40 miles north-northwest of Richmond, Virginia.<sup>3</sup> In November 2007, Dominion applied for a COL to construct and operate one new reactor at the site (North Anna Unit 3).

The COL proceeding before the Board has been pending since 2008. The issues in the adjudication have changed as the applicant has amended its COL application and as the intervenor, Blue Ridge Environmental Defense League (BREDL), has raised new challenges. Dominion's petition before us today, as explained below, was brought during an interval when there were no unresolved contentions awaiting consideration. This interval closed, however, with BREDL's filing of a new proposed contention on the implications of the August 23, 2011, earthquake in Virginia centered approximately eleven miles from the North Anna facility.<sup>4</sup> That contention is currently being held in abeyance by consent of the parties while Dominion considers the earthquake's impact on its COL application.<sup>5</sup>

### 1. *Litigation History*

BREDL filed a timely request for a hearing and petition to intervene, which included eight proposed contentions.<sup>6</sup> In May 2008, the Board found that BREDL had demonstrated standing, and admitted one contention relating to long-term onsite storage of low-level radioactive waste

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<sup>3</sup> See North Anna Early Site Permit, ESP-003 (Nov. 27, 2007) (ADAMS accession no. ML073180440).

<sup>4</sup> *Request to Admit Intervenor's New Contention* (Sept. 22, 2011).

<sup>5</sup> *Consent Motion to Hold BREDL's New Contention in Abeyance* (Oct. 12, 2011).

<sup>6</sup> *Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League* (May 9, 2008).

(LLRW).<sup>7</sup> The Board rejected the remaining proposed contentions.<sup>8</sup> Shortly thereafter, the Board issued a scheduling order governing the timing of future pleadings, including setting a timetable for BREDL to propose new contentions on the Staff's Final Safety Evaluation Report (FSER) and Final Supplemental Environmental Impact Statement (SEIS).<sup>9</sup>

Dominion amended its application to address the concerns in BREDL's sole admitted contention, and soon thereafter moved to dismiss the contention as moot.<sup>10</sup> In response, BREDL filed a "Motion to Submit a New Contention," but did not file the new contention—Contention 10, challenging the specifics of Dominion's new plan for long-term LLRW storage—until two weeks later.<sup>11</sup> After BREDL filed its motion but before BREDL filed the contention itself, the Board ruled on Dominion's motion to dismiss.<sup>12</sup> The Board dismissed BREDL's original contention as moot, but said it would retain jurisdiction to consider the admissibility of Contention 10.<sup>13</sup> The Board admitted BREDL's new Contention 10 in a separate decision shortly thereafter.<sup>14</sup>

In June 2010, Dominion revised its COL application to change the referenced reactor design from the Economic Simplified Boiling Water Reactor (ESBWR) to the U.S. Advanced

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<sup>7</sup> LBP-08-15, 68 NRC 294 (2008).

<sup>8</sup> *Id.*

<sup>9</sup> See Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) (unpublished).

<sup>10</sup> See Grecheck, Eugene S., Vice-President of Nuclear Dev., Dominion Energy, Inc., letter to U.S. Nuclear Regulatory Comm'n (May 21, 2009) at 1 (ML0915206360); *Dominion's Motion to Dismiss BREDL's Contention 1 as Moot* (June 1, 2009).

<sup>11</sup> *Intervenor's Motion to Submit New Contention* (June 8, 2009); *Intervenor's Amended Contention Ten* (June 26, 2009).

<sup>12</sup> Order (Dismissing Contention 1 as Moot) (Aug. 19, 2009) (unpublished).

<sup>13</sup> See *id.* at 3-4.

<sup>14</sup> LBP-09-27, 70 NRC 992 (2009).

Pressurized Water Reactor (US-APWR).<sup>15</sup> In response, BREDL submitted a proposed new Contention 11, arguing that amending a COL application to reference a completely different reactor design was improper.<sup>16</sup> Dominion opposed the contention<sup>17</sup> and, on the same day, moved to dismiss Contention 10 as moot because, due to the change in reactor design, its application no longer made the claims on which Contention 10 was based.<sup>18</sup>

In September 2010, the Board dismissed Contention 10 and declined to admit Contention 11.<sup>19</sup> At that point in the proceeding, no contentions remained. A supplemental scheduling order, however, gave BREDL until October 4, 2010, to file new contentions based on the new reactor design referenced in Dominion's revised COL application.<sup>20</sup>

Under this schedule, BREDL timely filed two new contentions—Contentions 12 and 13—related to the revised COL application.<sup>21</sup> In LBP-11-10, the Board rejected both new contentions. The Board declined to admit Contention 12 on the ground that it raised issues

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<sup>15</sup> Lewis, David R., Counsel for Dominion, letter to Atomic Safety and Licensing Board (June 29, 2010) (advising Board and parties of change in application).

<sup>16</sup> *Intervenor's New Contention Eleven* (June 17, 2010).

<sup>17</sup> *Dominion's Opposition to BREDL's New Contention 11* (July 12, 2010). See also *NRC Staff's Answer to the Blue Ridge Environmental Defense League's New Contention Eleven* (July 2, 2010).

<sup>18</sup> *Dominion's Motion to Dismiss BREDL's Contention 10 as Moot* (July 12, 2010).

<sup>19</sup> LBP-10-17, 72 NRC 501, 507-08, 509-17 (2010).

<sup>20</sup> 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).

<sup>21</sup> *Intervenors New Contentions* (Oct. 2, 2010). Although BREDL designated these Contentions One and Two, the Board referred to them as Contentions 12 and 13 for clarity. Proposed Contention 12 argued that the new US-APWR reactor design would use more fresh water and release more heated water into Lake Anna as compared to the ESBWR design originally referenced, and that the harmful impacts of the design—increased thermal discharges, consumptive water use, and water quality effects resulting from the discharge of pollutants in the blowdown from Unit 3—justified reconsidering the use of a dry cooling tower for Unit 3. Proposed Contention 13 argued that Dominion “improperly requested a site-specific exemption from the Design Control Document (DCD) Tier 1” for Unit 3, relative to the site-specific safe shutdown earthquake peak ground acceleration. *Id.*

resolved in the ESP proceeding, and declined to admit Contention 13 on the ground that it failed to raise a genuine dispute with the revised application.<sup>22</sup>

Although, at this point, there were no contentions pending in the proceeding, the Board did not terminate the proceeding. Instead, the Board stated that any contentions based on new information arising later, including new information in the NRC Staff's as-yet unreleased Safety FSER or SEIS, should be filed within the time periods set forth in the Board's previous scheduling orders.<sup>23</sup> The Board also suspended the mandatory disclosure obligations under 10 C.F.R. § 2.336(a) until further notice.

## **2. Denial of Dominion's Motion for Clarification**

According to Dominion, the Board's order should have included a statement terminating the contested portion of the hearing, because there were no longer any contentions at issue in the case. Dominion filed a "Motion for Clarification" asking the Board to "clarify" that it had, in fact, terminated the contested proceeding in LBP-11-10.<sup>24</sup> In response, the Board ordered the parties to brief the law relating to the timing and effect of closing agency adjudicatory proceedings.<sup>25</sup>

After receiving those briefs, the Board denied Dominion's motion, which it treated as a request to terminate the contested proceeding.<sup>26</sup> This is the Board ruling (LBP-11-22) that is the

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<sup>22</sup> LBP-11-10, 73 NRC \_\_ (Apr. 6, 2011) (slip op.).

<sup>23</sup> *Id.* at \_\_ (slip op. at 36). See Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) (establishing schedule for proceedings with respect to contention one, and setting deadlines for other filings in accord with the model milestones in 10 C.F.R. Part 2, App. B, for subpart L proceedings); Order (Updating Schedule Governing Proceeding) (Mar. 22, 2010) (setting deadlines relating to Contention Ten and setting deadline for other filing in accord with the model milestones).

<sup>24</sup> *Dominion's Motion for Clarification of LBP-11-10* (Apr. 18, 2011).

<sup>25</sup> Order (Regarding Dominion's Motion for Clarification of LBP-11-10) (Apr. 22, 2011) (unpublished).

<sup>26</sup> LBP-11-22, 74 NRC at \_\_ (slip op. at 1).

subject of Dominion's instant petition for review. The Board reasoned that if it closed the record, BREDL would have to meet the elevated procedural requirements for reopening a closed proceeding before it could propose any new contention.<sup>27</sup> The Board pointed out that the Staff's review was still ongoing, and its final review documents (SER or SEIS) were still outstanding. These documents could, theoretically, contain significant new information upon which new contentions might be grounded. The Board further pointed out that, as long as the license review is ongoing, the licensing "proceeding" is still in existence.<sup>28</sup> The Board said that it would not be appropriate to require BREDL to meet the agency's "reopening" procedural standards, which are more stringent than for an ordinary late-filed contention, should the Staff's review documents give rise to a new issue.<sup>29</sup> The Board reasoned that, in this situation, adding the reopening standards to NRC's already-strict contention-admissibility standards would impose such a high burden on the intervenors as to risk a conflict with the Atomic Energy Act § 189a requirement (42 U.S.C. § 2239(a)) that the public be given the opportunity for a hearing.<sup>30</sup> The Board also reasoned that keeping the adjudicatory proceeding open before the Board while the license review is ongoing was an efficient means to provide a forum for future filings.<sup>31</sup>

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<sup>27</sup> LBP-11-22, 74 NRC \_\_ (slip op. at 12) (citing 10 C.F.R. § 2.326).

<sup>28</sup> *Id.* at \_\_ (slip op. at 9) (citing *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 6 n.5 (1992)).

<sup>29</sup> *Id.* at \_\_ (slip op. at 11-13).

<sup>30</sup> *Id.* at \_\_ (slip op. at 29-30).

<sup>31</sup> *Id.* at \_\_ (slip op. at 14-16). The Board also pointed to an "Emergency Petition," in which BREDL joined with several intervenors and petitioners in other matters to file directly with the Commission in response to the Fukushima Dai-ichi accident. *See id.* at \_\_ (slip op. at 17). The petition asked us, among other things, to suspend licensing actions pending the agency's investigation in response to the Fukushima Dai-ichi accident. *See generally Virginia Electric and Power Co. d/b/a/ Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna, Unit 3), *Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima* (continued . . . )

The Board rejected arguments by Dominion and the NRC Staff that either Commission case law or its regulations required termination. First, the Board pointed to the language of the Notice of Hearing, which delegated to the Board the authority to provide the hearing mandated by the Atomic Energy Act.<sup>32</sup> Next, the Board pointed to NRC regulations governing the termination of the Board's jurisdiction. According to 10 C.F.R. § 2.318(a), a Board's jurisdiction 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."<sup>33</sup> The Board found the plain text of this provision delineates the occasions that trigger termination of the presiding officer's jurisdiction, and none applied.<sup>34</sup> Citing the rule of construction that the specific inclusion of some conditions implies the exclusion of those not mentioned, the Board rejected the argument that its jurisdiction must end in other circumstances not mentioned in the regulation.<sup>35</sup> Further, the Board concluded that nothing in NRC rules explicitly states that an intervenor loses its status as a party whenever its sole remaining admitted contention is dismissed prior to the issuance of the SER and Staff NEPA documents.

The Board noted the Staff's acknowledgment that it is not unusual to keep a proceeding open when a contention of omission is mooted by new information, in order to allow the

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*Daiichi Nuclear Power Station Accident* (Apr. 18, 2011). At the time of the Board's ruling in LBP-11-22, we had not ruled on the petition, but we subsequently denied the request to suspend proceedings. *Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 73 NRC \_\_ (Sept. 9, 2011) (slip op.).

<sup>32</sup> LBP-11-22, 74 NRC \_\_ (slip op. at 19-21) (citing Nuclear Regulatory Commission, 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)).

<sup>33</sup> 10 C.F.R. § 2.318 ("Commencement and termination of jurisdiction of presiding officer").

<sup>34</sup> LBP-11-22, 74 NRC \_\_ (slip op. at 22).

<sup>35</sup> *Id.* at \_\_ (slip op. at 23) (citing the Supreme Court's recent discussion in *Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068, 1076 (2011)).

intervenors to formulate new contentions based on the new information.<sup>36</sup> The Board pointed out that it had already kept the proceeding open twice for that purpose. But it found nothing in the regulations to suggest that this is the only situation where a board may hold a proceeding open without a viable contention before it.<sup>37</sup> Nowhere do the regulations state, the Board pointed out, that the intervenor must lose its status as a party if, during the “dynamic” licensing process, it no longer has a live contention.<sup>38</sup>

The Board also relied on the model milestones in 10 C.F.R. Part 2, appendix B, which anticipate that the intervenor will have the opportunity to pose contentions on the SER and EIS.<sup>39</sup> The Board said it was appropriate to keep the proceeding open “particularly in a case as this where the Applicant has made substantial changes to the COLA that are still being evaluated by the NRC Staff.”<sup>40</sup> In addition, the Board pointed to the scheduling order it issued at the outset of the proceeding, which indicated that the intervenors would have the opportunity to file contentions within 30 days of the issuance of the Staff’s final review documents.<sup>41</sup> The scheduling order was based on the Part 2 model milestones. The Board noted that the model milestones contemplate proceedings extending beyond issuance of the staff review documents. “Nothing in Appendix B conditions an intervenor’s right to file new contentions based on [these] documents on whether previously admitted contentions are still pending,” the Board reasoned.<sup>42</sup>

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<sup>36</sup> LBP-11-22, 74 NRC at \_\_ (slip op. at 23) (citing the *NRC Staff Answer to Dominion’s Motion for Clarification and Response to Licensing Board Order Dated April 22, 2011*, at 6 (May 2, 2011) (Staff Answer to Motion for Clarification)).

<sup>37</sup> *Id.* at \_\_ (slip op. at 24).

<sup>38</sup> *Id.* at \_\_ (slip op. at 25).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \_\_ (slip op. at 16-17).

<sup>41</sup> *Id.* at \_\_ (slip op. at 25-26).

<sup>42</sup> *Id.*

The Board was particularly concerned that closing the record of the proceeding at this stage of the license review would potentially violate BREDL's right to a hearing under the AEA. Citing the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*,<sup>43</sup> the Board found that the Commission cannot restrict the opportunity for a hearing so much that it effectively removes from the hearing issues that are material to the licensing decision.<sup>44</sup>

### **3. BREDL's Contention Concerning the Virginia Earthquake**

On August 23, 2011, an earthquake registering 5.8 on the Richter scale struck Mineral, Virginia, approximately 13 miles from the North Anna site, causing an extended shutdown of the existing reactors at the site. BREDL timely filed a request to admit a new contention on the earthquake's implications for the COL application.<sup>45</sup> The parties jointly consented to hold the contention in abeyance while Dominion assessed whether the earthquake would require any changes to its application.<sup>46</sup> According to the parties' consent motion, Dominion expects to finish its assessment by the third quarter of 2012.<sup>47</sup>

The Board granted the request to hold the contention in abeyance.<sup>48</sup> It also set deadlines for amending or supplementing the contention, as well as for the Staff and applicant to amend or supplement their answers, after Dominion's assessment is complete.<sup>49</sup> Accordingly, this contention remains pending before the Board.

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<sup>43</sup> 735 F.2d 1437, 1447 (D.C. Cir. 1984) ("UCS I").

<sup>44</sup> LBP-11-22, 74 NRC \_\_ (slip op. at 29).

<sup>45</sup> *Request to Admit Intervenor's New Contention* (Sept. 22, 2011).

<sup>46</sup> *Consent Motion to Hold BREDL's New Contention in Abeyance* (Oct. 12, 2011).

<sup>47</sup> *Id.* at 1.

<sup>48</sup> *Order (Granting Consent Motion to Hold BREDL's New Contention in Abeyance)* (Oct. 20, 2011) (unpublished).

<sup>49</sup> *Id.*

## II. DISCUSSION

### A. Review under 10 C.F.R. § 2.341

Dominion argues that the Board’s decision to reject all contentions but not to terminate the adjudication is tantamount to a partial or final initial decision, and thus immediately reviewable by the Commission under 10 C.F.R. § 2.341. The NRC Staff supports Dominion’s interpretation of our regulations in this regard.<sup>50</sup> We agree: the Board’s ruling resolving the last pending contention (that is, LBP-11-10) amounted to a final board decision. That ruling would have triggered the time for filing petitions for review but for the Board’s additional ruling in LBP-11-22—which we now find to be in error—that the proceeding would be held open to entertain new contentions. The Board’s decision raises a potentially recurring procedural issue of some importance. Hence, we exercise our discretion under section 2.341 to review it.

As a consequence of our ruling today that the Board should have terminated the proceeding once it resolved all contentions, all of the Board’s earlier interlocutory orders now become ripe for our appellate review. Therefore, any party who wishes to file a petition for review should comply with the timing and procedural provisions of 10 C.F.R. § 2.341, which, as we explain below, we adapt to fit the unusual procedural posture of this case.

### B. Analysis

#### 1. *The Record Properly Closed with the Disposition of the Last Contention*

We find that the Board erred in denying Dominion’s motion. The Board’s approach cannot be squared with the longstanding practice in our proceedings that, once all contentions have been decided, the contested proceeding is terminated.<sup>51</sup> Our review of agency case law

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<sup>50</sup> *NRC Staff Answer to “Dominion’s Petition for Review of LBP-11-22”* (Sept. 26, 2011). See also *NRC Staff Answer to Motion for Clarification*.

<sup>51</sup> See, e.g., *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC \_\_, \_\_ (2012) (slip op. at 9-12); *Luminant* (continued . . . )

reveals no situation where a Board has held a proceeding open after the resolution of the last contention because new information triggering fresh contentions might appear later in the Staff's final review documents. The courts of appeals have repeatedly approved our practice of closing the hearing record after resolution of the last "live" contention, and of holding new contentions to the higher "reopening" standard.<sup>52</sup> Agencies need not keep adjudications open indefinitely to await potential new developments. An "unfettered ability to file a late contention may significantly undermine the efficiency of a proceeding even if the contention is based on newly discovered information."<sup>53</sup>

We reject the Board's reasoning that applying the reopening standards to a new contention is tantamount to denying BREDL its right to a hearing under the AEA. BREDL will have the opportunity to move to reopen the record to raise new contentions on the Staff's review documents. While our rule governing motions to reopen sets a high standard—focusing on the timeliness, seriousness, and materiality of the new claim—it by no means prohibits hearings on significant new safety or environmental issues.<sup>54</sup> The very purpose of having the reopening rule

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*Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-11-9, 74 NRC \_\_, \_\_ (Oct. 4, 2011) (slip op. at 13); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC \_\_ (Sept. 27, 2011) (slip op. at 1 n.1). See also *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 183 (2005) ("There being no admitted contention remaining to be litigated, the contested portion of this proceeding is terminated.").

<sup>52</sup> See, e.g., *New Jersey Environmental Federation v. U.S. Nuclear Regulatory Comm'n*, 645 F.3d 220, 232-33 (3d Cir. 2011); *State of Ohio v. Nuclear Regulatory Comm'n*, 814 F.2d 258, 262-64 (6th Cir. 1987); *Oystershell Alliance v. U.S. Nuclear Regulatory Comm'n*, 800 F.2d 1201, 1207-08 (D.C. Cir. 1986).

<sup>53</sup> *Massachusetts v. NRC*, 924 F.2d 311, 334 (D.C. Cir. 1990).

<sup>54</sup> To admit a new contention after the contested proceeding has terminated, a petitioner must meet three criteria: (1) the motion must be "timely" (this criterion may be waived if the issue presented is "exceptionally grave"), (2) the contention must address a "significant" safety or environmental issue, and (3) the contention must demonstrate that a "materially different result" would be likely if the proffered evidence had been considered initially. In addition, a motion to reopen must be accompanied by a supporting affidavit. 10 C.F.R. §2.326(a), (b).

is to make sure that petitioners have an opportunity to raise serious issues after the close of the record.<sup>55</sup> In unusual circumstances, where fairness dictates, we have been willing to soften or waive our reopening requirements.<sup>56</sup> The D.C. Circuit has considered and rejected the argument that applying heightened late-filing standards to contentions triggered by the Staff's review documents violates a petitioner's AEA hearing rights.<sup>57</sup> In so ruling, the D.C. Circuit held that the AEA does not "guarantee[] all private parties the right to have the staff studies as a sort of pre-complaint discovery tool."<sup>58</sup> Recently, the Third Circuit expressly found NRC's approach to reopening consistent with the AEA's hearing requirement.<sup>59</sup>

We find the Board's other stated reasons for keeping the hearing record open unconvincing. First, the provision regarding termination of the Board's jurisdiction, 10 C.F.R. § 2.318(a), which covers some procedural situations but by no means all, does not purport to provide an exhaustive list of every situation where Board jurisdiction lapses. The three situations specifically listed in section 2.318, for example, do not address the situation where a board's jurisdiction ends after it has rendered a final decision and jurisdiction passes to the

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<sup>55</sup> See *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC \_\_ (Mar. 30, 2012) (slip op.) (2012). See also *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), LBP-01-17, 53 NRC 398, 406-07 (2001) (the Board, on reconsideration and after remand from Commission, reopened the record with respect to a previously disposed contention, to consider the effect of the licensee's losing track of a fuel rod).

<sup>56</sup> *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 (2009) (in the interest of fairness, based on specific facts of the case, Commission waived late-filing and reopening standards with respect to claims that facility had not been constructed in accordance with its permit).

<sup>57</sup> *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 55 (D.C. Cir. 1990) ("Petitioner also is mistaken in reading *UCS I* to require that a licensing hearing embrace *anything* new revealed in the SER or the NEPA documents . . ." (emphasis in original)).

<sup>58</sup> *Id.* at 55-56.

<sup>59</sup> See *N.J. Env'tl. Fed'n v. U.S. Nuclear Regulatory Comm'n*, 645 F.3d at 232-33.

Commission to consider any appeals (or *sua sponte* review). This is the most common instance where the Board's jurisdiction ends, and indeed, is in essence the situation before us today.

## **2. *Remand to the Board for Consideration of the Motion to Reopen***

Under our decision today, the Board lost jurisdiction once it completed action on BREDL's last remaining contention. Any new contentions must satisfy our reopening standards. Thus, given that the Board ought to have terminated its jurisdiction, consideration of any motion to reopen, including any motion associated with BREDL's proposed new earthquake-related contention, which has been now held in abeyance, would normally pass to the Commission in the first instance.<sup>60</sup> Several factors, however, persuade us that in the particular circumstances of the present case, the Board should consider the motion to reopen the record to admit BREDL's contention relating to the August 23, 2011, earthquake (or any future revision to that contention). This is consistent with our ordinary practice of referring reopening motions to the Board, particularly where complex safety issues are in question, as we have done on several occasions in recent years.<sup>61</sup>

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<sup>60</sup> See, e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) ("Generally, once there has been an appeal or petition to review a Board order . . . jurisdiction passes to the Commission"); *Northeast Nuclear Energy Company* (Millstone Nuclear Power Station Unit 3), CLI-00-25, 52 NRC 355, 357 n.3 (observing that after a petition to review a final order has been filed with the Commission, the Board no longer has jurisdiction to consider a motion to reopen and the motion is properly filed with the Commission).

<sup>61</sup> Recently, for example, the Secretary of the Commission has referred such motions to reopen to the Atomic Safety and Licensing Board Panel pursuant to her authority under 10 C.F.R. § 2.346(i). See e.g., *Southern Nuclear Operating Company* (Vogtle Electric Generating Plant, Units 3 and 4), Order (Aug. 30, 2011) (Order of the Secretary referring motions to reopen the *Vogtle, Comanche Peak, and Bell Bend* combined license application proceedings to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel); *Southern Nuclear Operating Company* (Vogtle Electric Generating Plant, Units 3 and 4), Order (Aug. 25, 2010) (Order of the Secretary referring motion to reopen to Board); *Amergen Energy Company, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Order (May 9, 2008) (Order of the Secretary referring motion to reopen to Board).

Several reasons support referral of the earthquake contention to the Board. As an initial matter, the earthquake contention has already been raised before the Board, although BREDL must now move to reopen the record and include appropriate support to gain admission.<sup>62</sup> In addition, the Board is the agency’s expert body on matters of contention admissibility, and we generally defer to its judgment on contention admissibility.<sup>63</sup> Similarly, the Board is in a better position than the Commission to consider any expert affidavit or affidavits BREDL submits to support its motion to reopen.<sup>64</sup> We also think the Board is better positioned than we are to consider, in the first instance, whether BREDL has shown that a “materially different result” is likely should it prove the claims in the contention.<sup>65</sup> Here, the Board must consider whether the change in outcome BREDL advocates is both likely and material.<sup>66</sup>

We therefore direct the Board to exercise jurisdiction for the limited purpose of considering whether to reopen the record and admit BREDL’s seismic contention. We leave to the Board’s discretion whether to move forward on the reopening issues now, or, in the alternative, to hold those issues in abeyance pending Dominion’s ongoing review of the earthquake.

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<sup>62</sup> We recognize that BREDL’s proposed new earthquake-related contention was not accompanied by a motion to reopen because, at the time the contention was filed, the Board had just ruled that it would not close the record.

<sup>63</sup> See, e.g., *Nuclear Management Company, LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 728 (2006); *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439-40 (2006).

<sup>64</sup> See *Vogtle*, CLI-11-8, 74 NRC at \_\_\_ (slip op. at 5) (deferring to Board’s ruling on “threshold issue” of whether pleading met reopening standards); *Millstone*, CLI-00-25, 52 NRC at 357 (remanding to the board consideration of a motion to reopen, given board’s “greater familiarity with the record” in that case).

<sup>65</sup> See 10 C.F.R. § 2.326(a)(3).

<sup>66</sup> The denial or conditioning of a license would obviously be a “materially different result.” *Oyster Creek*, CLI-08-28, 68 NRC at 673. But BREDL might, alternatively, seek the addition of an ITAAC, a design modification, or the performance of additional analyses prior to license issuance.

### **C. Deadline for Petitioning for Review of Intermediate Board Rulings**

As a result of our ruling today, the record of the adjudicatory proceeding is closed, and the time for petitioning for review of any of the Board's prior interlocutory rulings (e.g., the Board's various contention-admissibility rulings) will run from today.<sup>67</sup> Any party seeking review of such Board decisions should file a petition within fifteen days of the service of this order, in accordance with the requirements for such petitions set forth in 10 C.F.R. § 2.341.

### **III. CONCLUSION**

For the foregoing reasons, the Board decision in LBP-11-22 to keep the adjudicatory record open and to retain jurisdiction is *reversed* and the case is *remanded* to the Board for further proceedings consistent with our opinion.

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland  
this 7<sup>th</sup> day of June, 2012

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<sup>67</sup> See 10 C.F.R. § 2.341.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
Virginia Electric and Power Company d/b/a )  
Dominion Virginia Power (DVP or Dominion) ) Docket No. 52-017-COL  
and Old Dominion Electric Cooperative (ODEC) )  
)  
(North Anna Power Station, Unit 3) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-12-14)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 7th day of June 2012