

July 2, 2012

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
COOPERATIVE)
)
(North Anna Power Station, Unit 3))

NRC STAFF ANSWER IN OPPOSITION TO THE BLUE RIDGE ENVIRONMENTAL
DEFENSE LEAGUE PETITION FOR REVIEW OF CLI-12-14

Pursuant to 10 C.F.R. §§ 2.341(b)(3) and 2.345(b), the staff of the Nuclear Regulatory Commission (Staff) answers the “Petition for Review of CLI-12-14” (Petition) filed by the Blue Ridge Environmental Defense League and its chapter People’s Alliance for Clean Energy (collectively, BREDL) on June 22, 2012. For the reasons set forth below, the Commission should deny the Petition.

BACKGROUND

In November 2007, the Virginia Electric and Power Company, doing business as Dominion Virginia Power (Dominion), applied for a combined license (COL) to construct and operate one new reactor at its North Anna site approximately 40 miles from Richmond, Virginia. See 73 Fed. Reg. 12760 (Mar. 10, 2008).¹ In June 2010, Dominion revised its COL application to change its referenced reactor design to the U.S. Advanced Pressurized Water Reactor (US-APWR). Letter from D. R. Lewis, Counsel for Dominion, to the Atomic Safety and Licensing Board (July 1, 2010) (ADAMS Accession No. ML101820626). The Atomic Safety and

¹ The procedural history of this proceeding is set forth in detail in the Commission order in *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), CLI-12-14, 75 NRC ___, __ (June 7, 2012) (slip op. at 2-9), and need not be fully restated in this answer.

Licensing Board (Board) presiding over the proceeding allowed sixty days for BREDL to file new contentions based on this reactor design change. 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Based on New Information in the Applicant's June 29, 2010 Revision to the License Application) (Aug. 11, 2010) (unpublished) (ADAMS Accession No. ML102230333) (Board August 2011 Order). In September 2010—during the sixty day window for the filing of new contentions set by the Board—the Board dismissed as moot the only remaining admitted contention and denied admission of a contention proposed in regard to the change in the referenced reactor design. *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), LBP-10-17, 72 NRC 501, 507-08, 517 (2010). In October 2010, BREDL timely filed two new contentions based on Dominion's change to the US-APWR design. *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), LBP-11-10, 73 NRC __. __ (Apr. 6, 2011) (slip op. at 1). The Board rejected both proposed contentions. *Id.* Although no proposed or admitted contentions then remained pending, the Board chose to retain jurisdiction and did not close the record, reasoning that the NRC Staff was still drafting its final review documents and significant new information might yet be revealed that could lay the foundation for future contentions. *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), LBP-11-22, 74 NRC __, __ (Sep. 1, 2011) (slip op. at 9-11).

The Commission reversed the Board's decision to retain jurisdiction, and reiterated the NRC's longstanding practice of terminating contested proceedings when all contentions have been decided. *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), CLI-12-14, 75 NRC __, __ (June 7, 2012) (slip op. at 10). The Commission's ruling closed the record for the contested proceeding, and remanded the matter to the Board to exercise jurisdiction solely for the limited purpose of considering whether to reopen the record

and admit a pending earthquake-related contention.² *Id.* at 13-14. The Commission further stated that its order triggered “the time for petitioning for review of any of *the Board’s prior interlocutory rulings* (e.g., the Board’s various contention-admissibility rulings)” and that “[a]ny party seeking review of such *Board decisions* should file a petition within fifteen days” of the order. *Id.* at 15 (emphasis added). BREDL now petitions the Commission for “review of its decision.” Petition at 1.

DISCUSSION

BREDL claims it is seeking “review” of the Commission’s decision to reverse the Board and terminate this contested proceeding. Review sought under 10 C.F.R. § 2.341(b), however, is reserved for situations in which a party is seeking discretionary Commission review of a full or partial decision by a presiding officer. 10 C.F.R. §§ 2.341(a) and (b)(1); *see, e.g., North Anna*, CLI-12-14, 75 NRC at ___ (slip op. at 10, 15) (authorizing the filing of a petition for review of Board decisions); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC ___, ___ (June 7, 2012) (slip op. at 7) (reciting standards for granting Commission review of a licensing board decision). Although styled as a “petition for review,” the “review” BREDL is seeking is of the Commission decision in CLI-12-14 “to close the record for this proceeding.” Petition at 1, 2. A party seeking reevaluation of a Commission order, as BREDL does here, should file a petition for reconsideration under 10 C.F.R. § 2.345(b). *See, e.g., Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-22, 65 NRC 525, 527 (2007). Since the substance of BREDL’s request amounts to a petition for reconsideration of CLI-12-14, the Staff

² Following a magnitude 5.8 earthquake near the North Anna site on August 23, 2011 (the August 2011 Mineral, Virginia earthquake), BREDL sought to admit a new contention concerning the earthquake’s implications on the COL proceeding. Request to Admit Intervenor’s New Contention (Sep. 22, 2011) (ADAMS Accession No. ML11265A350). BREDL, Dominion, and the NRC Staff jointly consented to hold this contention in abeyance while Dominion studied the effects of the earthquake on its COL application. Consent Motion to Hold BREDL’s New Contention in Abeyance (Oct. 12, 2011) (ADAMS Accession No. ML11285A433). The Board granted this request. Order (Granting Consent Motion to Hold BREDL’S New Contention in Abeyance) (Oct. 20, 2011) (ADAMS Accession No. ML11293A207) (October 2011 Order).

below applies the standards of 10 C.F.R. § 2.345 to it. As explained in more detail below, BREDL's petition should be denied because the Commission's ruling was correct and BREDL has not shown any compelling circumstances that render the decision invalid.³

I. LEGAL STANDARDS

A motion for reconsideration may not be filed except with leave of the presiding officer, "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid." 10 C.F.R. § 2.323(e).⁴ When faced with a petition for reconsideration, the Commission has stressed that it does "not lightly revisit our own already-issued and well-considered decisions." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004). Rather, the Commission does so "only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point." *Id.* Petitioners who seek reconsideration of a Commission order must demonstrate the Commission "has committed 'clear' error, must do so by raising new arguments, and must not previously have been able to make those arguments." *Palisades*, CLI-07-22, 65 NRC 525, 527 (2007). Simply disagreeing with a Commission decision while relying on rejected arguments or failing to offer decisive new elements is not sufficient support

³ The standards for granting review stated in § 2.341(b) are inapposite to a request such as BREDL's for reconsideration of a Commission decision. Even assuming, *arguendo*, that the Petition is properly styled as a petition for review under 10 C.F.R. § 2.341(b), BREDL has not demonstrated that the Petition meets those standards, since BREDL has not even addressed the § 2.341(b) standards for granting review. Specifically, BREDL has not asserted that a finding of material fact in any Board decision is clearly erroneous, that a necessary legal conclusion is a departure from established law or lacks governing precedent, that a substantial and important question of law, policy, or discretion has been raised, or that the conduct of the proceeding involved a prejudicial procedural error; nor has BREDL identified any other consideration that the Commission might deem to be in the public interest. See 10 C.F.R. § 2.341(b)(4). BREDL does not raise any issue with respect to any Board decision in this proceeding, and the Petition is not sufficient to justify review. *Cf. Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297-98 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F3d 903 (6th Cir. 1995) (unpublished).

⁴ Section 2.345(a)(2) states that petitions for reconsideration of Commission decisions are subject to the requirements of § 2.341(d), which states that "[a]ny petition for reconsideration will be evaluated against the standard in § 2.323(e)."

for a petition for reconsideration. See *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401, n.6 (2006); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003) (“[p]etitions for reconsideration should not be used merely to re-argue matters that the Commission already considered but rejected”) (internal quotations omitted).

II. BREDL’S PETITION DOES NOT MEET THE RECONSIDERATION STANDARD

BREDL does not meet the high standard for a petition for reconsideration. BREDL has not demonstrated any compelling circumstances, such as a clear error or misunderstanding of the law, that render the Commission’s decision invalid. BREDL instead either reiterates arguments that were explicitly considered and rejected by the Commission in its decision or misapprehends the import of earlier Board decisions.

In its petition, BREDL urges the Commission to restore the Board’s decision to keep the record open based on four arguments. Petition at 2, 5-7. Specifically, BREDL argues that (1) the Commission’s decision has denied its right to a hearing under Section 189a. of the Atomic Energy Act of 1954, as amended (AEA or Act), in regard to “Dominion’s substitute design-basis plant design” (*id.* at 5); (2) the Commission’s decision is unfair insofar as it requires BREDL to meet the reopening standards of 10 C.F.R. § 2.326 with respect to its proposed seismic contention that the Board held in abeyance in the October 2011 Order (*id.* at 6-7); (3) the Commission’s decision is unfair because it is “contrary” to the Board’s October 2011 Order, and BREDL apparently would not have consented to that Order “knowing what it knows now” (*id.*); and (4) the Commission incorrectly interpreted 10 C.F.R. § 2.318(a) in its decision in CLI-12-14 (*id.* at 7).⁵

⁵ BREDL also alludes to its previously rejected contention regarding waste confidence in light of the recent D.C. Circuit decision vacating the NRC’s Waste Confidence Decision Update and Temporary Storage Rule. Petition at 6, citing *New York v. NRC*, No. 11-1045 (D.C. Cir. June 8, 2012). However, BREDL does not seek review of the Board decision rejecting this contention, nor does BREDL even mention the review standards of § 2.341(b) in regard to this rejected contention.

First, BREDL claims that the Commission decision to reverse the Board's decision to keep the record open compromised its rights to a hearing under Section 189a. of the Act in regard to Dominion's change to the US-APWR design. *Id.* at 5. This argument is simply wrong because the Board already afforded BREDL the opportunity to propound contentions relating to Dominion's change to the US-APWR design. See Board August 2011 Order. BREDL, however, failed to propose an admissible contention. See *North Anna*, LBP-11-10, 73 NRC at ___ (slip op. at 9, 28, 35).⁶ Accordingly, BREDL has already been afforded all rights to a hearing arising from the change to the US-APWR design required by § 189a. of the Act. Accordingly, BREDL's argument regarding its hearing rights fails to identify a clear error or misunderstanding in the Commission's decision in CLI-12-14.

Second, BREDL seems to argue that the Board's order in LBP-11-10 (rejecting the new contentions based on the change to the US-APWR design) explicitly preserved its earthquake-related contention for future adjudication as more details on seismic issues surfaced. Petition at 5. The Commission, however, has clearly stated that this was improper and rejected this argument as a reason for keeping the record open. *North Anna*, CLI-12-14, 75 NRC at ___ (slip op. at 11) ("Agencies need not keep adjudications open indefinitely to await potential new developments.") BREDL has not made any argument based on the § 2.341 or § 2.345 standards as to why the decision in CLI-12-14 might have been incorrect in this regard. To the extent BREDL is complaining that application of the reopening standards of 10 C.F.R. § 2.326 to the new seismic contention BREDL proposed after the August 2011 Mineral, Virginia earthquake would deprive it of its rights to a hearing under § 189a. of the Act, the Commission explicitly considered and rejected this argument in CLI-12-14. *Id.* at 11-12 ("We reject the

⁶ In its decision, the Board applied the late-filing standards of 10 C.F.R. § 2.309, and not the reopening standards of 10 C.F.R. § 2.326. *North Anna*, LBP-11-10, 73 NRC at ___ (slip op. at 9, 28). BREDL's seeming implication that it had to meet the reopening standards with respect to new contentions related to the Dominion change to the US-APWR design is also in error.

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.").

Third, BREDL argues that the Commission's decision in CLI-12-14 is contrary to the agreement among Dominion, BREDL, and the NRC Staff to hold BREDL's proposed earthquake-related contention in abeyance and therefore improper. Petition at 6-7. In this respect, BREDL rhetorically asks why it would have agreed to the October 2011 Order, and seemingly characterizes the decision as an unfair bait-and-switch. *Id.* BREDL, however, does not explain how the Commission decision in CLI-12-14 might have prejudiced it, notwithstanding its complaint regarding the application of the reopening standards, discussed above. *See id.*

The Commission decision in CLI-12-14 indicates that consideration of BREDL's proposed earthquake-related contention would normally have passed to the Commission, given that the Board should have terminated its jurisdiction upon completing action on BREDL's last remaining contention. *North Anna*, CLI-12-14, 75 NRC at ___ (slip op. at 13). Nonetheless, the Commission directed the Board to exercise jurisdiction for the limited purpose of considering whether to reopen the record and admit BREDL's new contention. *Id.* at 14. The Commission left to the Board's discretion whether to move forward now on reopening issues or hold those issues in abeyance. *Id.* The Board's October 2011 Order, however, simply held consideration of the new contention in abeyance, and did not alter the contention admissibility standards applicable to the contention. BREDL must now meet the reopening standards because the Board's decision not to terminate the proceeding in LBP-11-10 was erroneous, not because BREDL subsequently consented to holding the ruling on its earthquake-related contention in abeyance. Consequently, the Commission decision in CLI-12-14 did not prejudice BREDL because BREDL should have already been obligated to meet the reopening standards with respect to its earthquake-related contention, regardless of whether it consented to the October 2011 Order.

Lastly, BREDL seems to claim that the Commission incorrectly interpreted 10 C.F.R. § 2.318(a), which lists circumstances in which a presiding officer's jurisdiction in a proceeding terminates. Petition at 7. BREDL asserts this list is exclusive. *Id.* This too was explicitly considered and rejected in CLI-12-14. *North Anna*, CLI-12-14, 75 NRC at ___ (slip op. at 12-13) ("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"). Accordingly, BREDL's argument in this regard is unavailing.⁷

III. CONCLUSION

For the reasons set forth above, the Commission should deny the BREDL Petition.

Respectfully Submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 2nd day of July, 2012

⁷ The BREDL Petition is also impermissibly late. A petition for reconsideration of a final decision must be filed by a party within ten days after the date of the decision. 10 C.F.R. § 2.345(a)(1). The Commission issued CLI-12-14 on June 7, 2012, and any petition for reconsideration of it was due on June 18, 2012. BREDL, however, filed its Petition on June 22, 2012, which is four days late. Under BREDL's mistaken impression that it was filing a petition for review under 10 C.F.R. § 2.341(b) (which provides fifteen days to file), the Petition would be timely. If correctly viewed as a petition for reconsideration under 10 C.F.R. § 2.345(b), however, the Petition is impermissibly late.

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(North Anna Power Station, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER IN OPPOSITION TO THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE PETITION FOR REVIEW OF CLI-12-14" have been served upon the following persons by Electronic Information Exchange this 2nd day of July, 2012:

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