August 3, 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'S RESPONSE TO BREDL'S MOTION TO REOPEN THE RECORD AND MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT NORTH ANNA, UNIT 3

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to the Blue Ridge Environmental Defense League's ("BREDL's") Motion to Reopen the Record for North Anna Unit 3 ("Motion") and Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at North Anna Unit 3 ("Petition") (July 10, 2012)[1] (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12192A001). The Petition raises a new contention based on the D.C. Circuit Court of Appeal's June 8, 2012 opinion in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, the Motion and Petition should be denied because BREDL fails to meet the standards for reopening a closed record in this proceeding, as required by 10 C.F.R. § 2.326.

[1] Although BREDL's Motion and Petition are dated July 9, 2012, they were filed on the Electronic Information Exchange on July 10, 2012. In addition, they are available together at the noted ADAMS Accession number on the Electronic Hearing Docket as a single, consecutively numbered document. The Petition begins on page seven (7) of that document in ADAMS.

BACKGROUND

A. Procedural History

This proceeding concerns the application submitted by the Virginia Electric and Power Company, doing business as Dominion Virginia Power ("Dominion"), for a combined license ("COL") for a nuclear reactor unit at the North Anna Power Station site in Louisa County, Virginia. Details of the procedural history of this proceeding are set forth in the Commission's decision in CLI-12-14 and need not be repeated here. *See Virginia Elec. and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC __ (slip op. at 2-5) (June 7, 2012). As relevant to BREDL's July 9, 2012, filing, the record of this adjudicatory proceeding is closed. *Id*., slip op. at 15. In addition, the Commission has directed the Atomic Safety and Licensing Board ("Board") originally designated to preside over this proceeding to exercise jurisdiction for the limited purpose of considering whether to reopen the record and admit a seismic contention BREDL proposed in a filing dated September 22, 2011. *Id*., slip op. at 9, 14; Request to Admit Intervenor's New Contention (Sept. 22, 2011) (ADAMS Accession No. ML11265A350).

On June 8, 2012, the United States Court of Appeals for the D.C. Circuit vacated the NRC's Waste Confidence Decision Update and Temporary Storage Rule and remanded those rulemakings back to the agency. *New York v. NRC*, 681 F.3d at 483. Shortly thereafter, BREDL, together with various other organizations, submitted a petition requesting that the NRC "suspend its final licensing decisions in all pending NRC licensing proceedings pending completion of the remanded proceedings[.]" *See* Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings, at 3 (June 18, 2012) (ADAMS Accession No. ML12170B123). These petitioners also requested that the Commission establish a 60-day timetable for submitting new site-specific contentions based on the D.C. Circuit's ruling. *Id.* at 12. As part of its response, the Staff stated that the Commission's normal adjudicatory procedures in 10 C.F.R. Part 2 provide "well-understood and appropriate means for raising contentions based on new information[.]"

See NRC Staff's Answer to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings, at 4-5 (June 25, 2012). BREDL then filed its Motion and Petition, which the Staff now answers.

B. The NRC's Waste Confidence Decision

In the National Environmental Policy Act of 1969 ("NEPA"), Congress announced a national policy "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). NEPA requires the NRC to prepare an environmental impact statement ("EIS") to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an environmental report ("ER") as part of a licensing application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor's spent fuel after the licensed period of operation ends. *Minnesota v. NRC*, 602 F.2d 412, 414-15, 419 (D.C. Cir. 1979). In the past, "the Commission sensibly has chosen to address high-level waste disposal generically." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999). The agency has most recently addressed issues pertaining to spent fuel storage and disposal in its "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010) ("Waste Confidence Decision") and a temporary storage rulemaking, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation," Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) ("Temporary Storage Rule").

The Waste Confidence Decision Update and the Temporary Storage Rule support generic findings in 10 C.F.R. § 51.23(a), regarding the impacts of spent fuel storage after the licensed period of operation. *See* 10 C.F.R. § 51.23(a); Petition at 10. The Commission

rendered several findings in § 51.23(a). Two of those findings are (1) that spent fuel "can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation" and (2) that "there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary." 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude "discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license" from any EIS, Environmental Assessment, or ER. 10 C.F.R. § 51.23(b).

DISCUSSION

BREDL based the proposed contention on the D.C. Circuit Court of Appeals' recent decision in *New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit's decision vacated the NRC's updated Waste Confidence Decision and its Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed contention states as follows:

> The Environmental Report for the North Anna nuclear power plant does not satisfy NEPA because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals in *State of New York v. NRC,* No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no license may be issued.

Petition at 10. At root, the Motion asserts that because the generic findings in the Commission's rulemaking have been vacated, "the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings." Id.

As discussed further below, the Staff recognizes that, upon issuance of the D.C. Circuit's mandate, the underlying contention may meet the general NRC contention admissibility requirements in 10 C.F.R. § 2.309. However, the Staff concludes that, in this proceeding, the Petitioner's failure to meet the standards for reopening the record requires that the Motion and Petition be denied.

I. Reopening Standards

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, BREDL asserts that it meets the standards of § 2.309(f)(2) for late-filed contentions. Petition at 12-13. Considering the holding of the D.C. Circuit and that the Petition was filed within 31 days[2] of the ruling, the Staff agrees that if the § 2.309(f)(2) standards were the applicable criteria in this proceeding,[3] BREDL could have demonstrated the timeliness of its filing under that regulation.

However, because the record in this proceeding has closed, BREDL must satisfy the motion to reopen criteria in § 2.326 in addition to the contention admissibility criteria for its proposed new contention to be considered. *North Anna*, CLI-12-14, 75 NRC __ (slip op. at 13, 15). Where a petitioner seeks to reopen the record and file a new contention, the petitioner must submit a "'fresh intervention petition' that fulfills the applicable standards that govern such filings, presumably including an appropriate standing demonstration." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-21, 72 NRC 616, 640 (2010) (citing *U.S. Army Installation Command* (Schofield Barracks, Oahu, Haw. & Pohakuloa Training Area, Island of Haw., Haw.), CLI-10-20, 72 NRC 185, 195 & n.56 (2010)). As explained below, BREDL's failure to address the factors of § 2.309(c) as required by § 2.326 is fatal to its Motion.

BREDL must meet the reopening standards because, as stated above, the record in the proceeding has closed. *North Anna*, CLI-12-14, 75 NRC at __ (slip op. at 14-15). Pursuant to

[2] Mr. Louis Zeller submitted a letter to the Secretary of the Commission indicating that the cause for filing BREDL's Motion and Petition late, on July 10, 2012, was due to his spouse's medical issues. Letter from Louis Zeller to Secretary of the Commission (July 10, 2012) (ADAMS Accession No. ML12192A130).

[3] The Commission has indicated that where there is no proceeding in which to file a new or amended contention, the standards of § 2.309(f)(2) do not apply; under such circumstances, a pleading seeking to introduce a new contention is simply a new intervention petition and must meet the standards of § 2.309(c) (and the standards of § 2.326 for reopening a closed record, if applicable). *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, __ (slip op. at 18 n.65) (Sept. 27, 2011).

10 C.F.R. § 2.326, a motion to reopen a closed record must (1) be timely, (2) "address a significant safety or environmental issue," and (3) "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.326(a). Section 2.326(b) further requires the motion to be accompanied by supporting affidavits that "set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) be satisfied. 10 C.F.R. § 2.326(b). "Each of the criteria must be separately addressed, with a specific explanation as to why it has been met." *Id.*

In addition, a motion to reopen relating to a contention not previously in controversy must satisfy the requirements for nontimely contentions in § 2.309(c).[4] 10 C.F.R. § 2.326(d). The reopening rule explicitly requires petitioners to satisfy the requirements for nontimely contentions in § 2.309(c) when the motion relates to a contention not previously in controversy. *Id*.; *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC __, __ (slip op. at 15-16) (Sept. 27, 2011). Section 2.309(c) requires a balancing of eight factors, the most important of which is "good cause, if any, for the failure to file on time." 10 C.F.R. § 2.309(c)(1)(i)-(viii); *Vogtle*, CLI-11-08, 74 NRC at __ (slip op. at 17) (citing *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 322-23

[4] As far back as the proceeding on the North Anna early site permit ("ESP"), BREDL has raised waste confidence contentions, but these were not admitted. *See Dominion Nuclear North Anna, L.L.C.* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-69 (2004); *Virginia Elec. and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 336-37 (2008). However, "the evaluation of a contention that is performed at the contention-admissibility stage should not be confused with the evaluation that is later conducted at the merits stage of a proceeding. At the contention-admissibility stage, a Board evaluates whether a petitioner has provided sufficient support to justify admitting the contention for further litigation. The facts and issues raised in a contention are not 'in controversy' and subject to a full evidentiary hearing unless the proposed contention is admitted." *Vogtle*, CLI-11-08, 74 NRC __ (slip op. at 7). Accordingly, BREDL's proposed contentions in connection with the proposed North Anna 3 facility were never "in controversy," as the Commission has defined that term. Moreover, in the ESP proceeding, BREDL argued that the Waste Confidence Decision should be reconsidered for its asserted failure to account for the "increased threat of terrorist attacks against U.S. facilities." *North Anna*, LBP-04-18, 60 NRC at 268-69, *citing* "Hearing Request and Petition To Intervene by [BREDL, Nuclear Information Resource Service, and Public Citizen]" at 15-20 (Jan. 2, 2004). The D.C. Circuit decision in *New York v. NRC* was not based on any such reasoning—BREDL's new contention is based on the D.C. Circuit's ruling regarding consideration of spent fuel pool leakage and fires. *See New York v. NRC*, 681 F.3d 471.

(2010)). These eight criteria must be addressed with specificity. *Vogtle*, CLI-11-08, 74 NRC at __ (slip op. at 16) (citing 10 C.F.R. § 2.309(c)(2)).

Although BREDL makes a single reference to § 2.309(c) and states that it has "good cause for the filing at the present time based on new information; i.e, the US Court of Appeals order on June 8, 2012," BREDL does not address the remaining seven criteria of § 2.309(c)(1). Motion at 4. Consequently, Petitioners do not demonstrate that a balancing of the § 2.309(c)(1) factors weighs in favor of allowing the nontimely filing; this failure to address the § 2.309(c)(1) factors, in turn, fails to satisfy § 2.326(d). While BREDL addressed the three § 2.309(f)(2) criteria for new or amended contentions (Petition at 12-13), the Commission has stated that the failure to address the eight criteria in § 2.309(c)(1) for nontimely filings is a potentially fatal omission even where the movant for reopening has addressed the § 2.309(f)(2) factors. *Vogtle*, CLI-11-08, 74 NRC at __ (slip op. at 16-17 & n.59, 18 n.65). The Commission has noted that its "rules place a heavy burden on petitioners who ask to have a record reopened," and that the failure to address the § 2.309(c) factors is "reason enough to reject the proposed new contentions." *Id*. at __ (slip op. at 8) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668-69 (2008)); *Millstone*, CLI-09-05, 69 NRC at 125-26. As BREDL's Motion does not fully comply with § 2.326 because it does not address all of the § 2.309(c) criteria, it should be rejected.

Should the Commission determine that BREDL satisfies the § 2.309(c) criteria as required by § 2.326(d), the Staff would agree that BREDL satisfies the remaining reopening standards of § 2.326, subject to the admissibility of the proposed contention, as discussed below. BREDL characterizes its contention as "based primarily on law rather than facts," cites *New York v. NRC* as the basis for the contention, and disputes the legal adequacy of the environmental analysis on which the applicant relies in seeking a COL.[5] Petition at 12. As

[5] Because a Final Supplemental Environmental Impact Statement (SEIS) has already been issued for the North Anna Unit 3 COL (*see* NUREG-1917, "[SEIS] for the [COL] for North Ann Power

such, the Staff views the contention as a legal contention, which does not rely on facts or technical analysis for its support. The Motion addresses each of the § 2.326(a) criteria separately and specifically. First, the Motion states the proposed contention is timely because it is based on and was filed within 30 days of the D.C. Circuit Court of Appeals' decision in *New York v. NRC*. Motion at 1. Second, the Motion asserts that the contention presents a significant environmental issue because the D.C. Circuit vacated the 2010 Waste Confidence Decision Update, which it found be "a major federal action because it is a logical predicate to every decision to license a nuclear plant.[6] Motion at 1-2. Third, the Motion asserts a materially different result is likely because there is no longer a legal basis for § 51.23(b), which exempts environmental analyses prepared in connection with COLs from addressing the environmental impacts of spent fuel storage in reactor facility storage pools, so the Commission or licensing board will have to examine the environmental consequences of long-term storage of spent fuel at reactor sites. Motion at 3-4. The Staff does not oppose BREDL's representational standing,[7]

Station Unit 3 (Final Report) (Feb. 2010) (ADAMS Accession No. ML100680117), the Staff understands the Petition's references to the applicant's environmental analysis or the Environmental Report (Petition at 7, 10, 12) to be a challenge to the approach used in the Final SEIS, which also relies on 10 C.F.R. § 51.23(b) for resolution of spent fuel storage impacts.

[6] The Petitioner also cites the comments of Dr. Arjun Makhijani that were filed in 2009 on the Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage. Motion at 2 & n.1 (citing Comments of the Institute for Energy and Environmental Research on the U.S. Nuclear Regulatory Commission's Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage, Arjun Makhijani, Ph.D. President, Institute for Energy and Environmental Research, 6 February 2009 (ADAMS Accession No. ML090680888). The Staff notes that these comments do not form a sufficient basis for finding that the § 2.326 criteria have been met. The comments relate to the proposed rule, rather than the stated basis of the contention, which is the D.C. Circuit's decision in *State of New York v. NRC*. As the comments were filed in 2009, they do not, and could not, address the three criteria in § 2.326(a). Additionally, there is no indication that Dr. Makhijani supports the use of his remarks in the context of the court decision and Petitioners' Motion.

[7] Where an organization seeks to establish "representational standing," it must show that at least one of its members may be affected by the proceeding and would have standing in his or her own right, it must identify that member by name and address, and it must show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf." *See e.g.*, *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007) (citations omitted); *CPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Further, the interests the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (citing *Hunt v. Washington*

nor does the Staff oppose the Motion and Petition based on a lack of affidavits.[8] The Staff explains below why the new BREDL proposed contention may meet the contention admissibility standards other than those of § 2.309(c).

II. Contention Admissibility Standards

The Board that was previously constituted in this proceeding discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. *North Anna*, LBP-08-15, 68 NRC at 311-12, 336, 337. BREDL recognizes that "because the mandate has not yet issued in *State of New York*, this contention may be premature." Petition at 8. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect . . .." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (*citing Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC

State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). BREDL notes that it has previously been admitted as an intervenor in this proceeding, and it attached a declaration from its principal officer stating that (1) BREDL continues to represent the interests of the members who previously filed standing declarations in the proceeding, (2) there has been no substantial change in the organization's status or standing regarding its participation in the proceeding, and (3) there has been no material change in the factual bases upon which the members' standing declarations were based. Motion at 4, 6 (Declaration of Janet Marsh).

[8] Although the Commission has recently emphasized the importance of the affidavit requirement under § 2.326(b), the Staff does not consider the lack of a supporting affidavit addressing the § 2.326(a) criteria fatal to the Motion because, in the context of legal contentions, the Commission has also stated that "requiring a petitioner to allege 'facts' under section 2.309(f)(1)(v) or to provide an affidavit that sets out the 'factual and/or technical bases' under section 51.109(a)(2) in support of a *legal* contention—as opposed to a *factual* contention—is not necessary." *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009) (Section 51.109(a)(2) links the procedural standards for admission of environmental contentions in the High-Level Waste Repository proceeding to those for reopening under § 2.326, and therefore, the Commission's holding in CLI-09-14 supports the conclusion that affidavits are likewise unnecessary for reopening a record on a legal contention pursuant to § 2.326.); *cf. Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation),* LBP-99-07, 49 NRC 124, 128-29 (1999) (In discussing the petitioner's ability to contribute to the development of a sound record under § 2.309(c)(viii), the board indicated that, where legal issues are the focal point of a late-filed contention, "the need for an extensive showing regarding witnesses and testimony may be less compelling."); *but see Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-03, 75 NRC __, ___ (Feb. 22, 2012) (slip op. at 18 n.86) ("Litigants seeking to reopen a record must comply fully with section 2.326(b)"); *Vogtle*, CLI-11-08, 74 NRC __ (slip op. at 9) (stating that Appellants' motion to reopen and proposed new contention pleading "could have been rejected solely on the basis of the Appellants' failure to comply fully with § 2.326(b)).

regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id*. at 467. Moreover, licensing boards have typically found contentions premature, and therefore inadmissible, when those contentions relied on court decisions for which a mandate had not issued. *E.g., Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).[9] As the licensing board in *Perry* stated, "Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.[10] *Id.*

Under the Federal Rules of Appellate Procedure, a "court's mandate must issue 7 days after the time to file a petition for rehearing expires or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate, whichever is later." Fed. R. App. P. 41(b). On July 6, 2012, at the Commission's request, the D.C. Circuit extended the period of time to file a petition for rehearing of *New York v. NRC* to August 22, 2012. *New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing). As a result, under Rule 41(b), the mandate is not likely to issue until at least August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require exclusion of BREDL's contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends

[9] *But see Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because "the mandate of that case has not been issued. . . we have deferred our rulings on these requests").

[10] The Commission recognizes its responsibility to "act promptly and constructively in effectuating the decisions of the courts." *Vermont Yankee Nuclear Power Corp*. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that "all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC[;] the eventual – legally required – issuance of the mandate is hardly an 'unanticipated event.' " *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court's mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, a contention that challenges an NRC regulation is inadmissible before a court of appeals issues its mandate striking down that regulation.

on whether the mandate has issued when the Commission rules on the Petition.[11]

If the D.C. Circuit's mandate issues before the Commission rules on the contention's admissibility, upon the mandate's issuance, the contention as pled would satisfy each of the § 2.309(f)(1) criteria and would be admissible as a contention of omission. *See* Petition at 10-11. This determination, however, would remain subject to direction or action taken by the Commission in response to the D.C. Circuit's ruling, including any generic rulemaking action and issuance of any Commission instruction with respect to how contentions based on the court's ruling are to be addressed in individual NRC proceedings. For example, in the event that the Commission solely undertakes a generic rulemaking approach to address these issues, the contention may need to be dismissed. *See, e.g.*, *Oconee*, CLI-99-11, 49 NRC at 345 ("'Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'").

If the D.C. Circuit's mandate has not issued by the time the Commission rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC NEPA documents a consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because the contention demands such a consideration, Petition at 10-11, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court's mandate, the contention should be rejected, subject to refiling without prejudice when, and if, the mandate issues. If BREDL were to refile the contention after the court issues the mandate, it would be timely if filed within 30 days of the mandate's issuance and would be otherwise admissible provided the claims it raises do not become the subject of a generic rulemaking. *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.*

[11] *See* 10 C.F.R. § 2.335(a) (noting that unless a party seeks a waiver of Commission regulations, "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding").

(Vermont Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 342 n.43 (2011); *Oconee*, CLI-99-11, 49 NRC at 345.

The above rationale applies equally in the context of reopening. If the Commission rules on the Motion after the D.C. Circuit issues the mandate in *New York v. NRC*, then the Staff would not oppose BREDL's claim that it has satisfied the § 2.326(a) criteria.[12] However, if the Commission rules on the Motion before the mandate is issued, then the § 2.326(a)(2) and (a)(3) criteria would not be satisfied. To satisfy § 2.326(a)(2) and (a)(3), BREDL relies on the WCD rule being vacated by the D.C. Circuit. *See* Motion at 1-4. If the WCD rule remains in effect, then the environmental impacts of spent fuel storage have been addressed, and the NRC need not revisit its environmental analysis of those impacts before issuing reactor licenses. In that case, BREDL would not have presented a significant environmental issue, nor shown that a materially different result would have been likely had its contention been considered initially.[13] However, as discussed above, independent of whether the contention were to meet the standards of § 2.309(f)(1) upon issuance of the court's mandate, BREDL's present failure to meet the standards for reopening the record requires denial of the Motion and Petition.

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[12] The Staff notes that the North Anna COL application references an early site permit (ESP) that was previously issued for the North Anna site; the ESP is generally referenced throughout the Environmental Report in the COL application and is acknowledged in the EIS. Notice of Issuance of Early Site Permit for Dominion Nuclear North Anna, LLC Located 40 Miles North-Northwest of the City of Richmond, VA, 72 Fed. Reg. 68,202 (Dec. 4, 2007); Notice of Receipt and Availability of Application for a Combined License Dominion Virginia Power-North Anna Unit 3, 72 Fed. Reg. 70,619 (Dec. 12, 2007); NUREG-1917, "Supplemental Environmental Impact Statement for the Combined License (COL) for North Anna Power Station Unit 3" (March 2010). With respect to an application for a COL that references an ESP, any environmental issues resolved in the ESP proceeding are considered to have finality at the COL stage unless information that is both "new and significant" has been identified. *See* 10 C.F.R. § 52.39(c)(1)(v). BREDL does not specifically address 10 C.F.R. § 52.39, which has already been applied in this proceeding. *See, e.g.,* North Anna, LBP-11-10, 73 NRC at __ (slip op. at 9, 22 n.111).

[13] BREDL complains that it raised a waste confidence contention in its original petition to intervene in this proceeding, but that the contention was not properly considered. Motion to Reopen at 3, 4, *citing North Anna*, LBP-08-15, 68 NRC 294. In its decision in CLI-12-14, however, the Commission afforded the BREDL an opportunity to petition for review of previous Board decisions in this proceeding. *North Anna*, CLI-12-14, 75 NRC __ (slip op at 15). BREDL did submit a filing in response to this opportunity and mentioned the Board decision rejecting this proposed waste confidence contention. *See* Petition for Review of CLI-12-14 at 6 (June 22, 2012) (ADAMS Accession No. ML12174A440). BREDL, however, failed to request review of that Board decision. *Id*. To the extent BREDL seeks review of the Board decision in LBP-08-15 rejecting BREDL's original waste confidence contention, that request is impermissibly late and should be rejected.

CONCLUSION

For the foregoing reasons, the Motion and Petition should be denied because the Motion fails to meet the standards for reopening a closed record in this proceeding, as required by 10 C.F.R. § 2.326. If the Commission nevertheless determines that the reopening standards have been met, the Staff considers the new contention to be admissible assuming the Commission issues its ruling after the D.C. Circuit issues the mandate in *New York v. NRC*. However, if the Commission rules before the mandate issues, then the Commission's existing regulations bar admission of the contention, and the Commission should dismiss it without prejudice to timely refiling upon issuance of the court's mandate. Finally, the admission of this contention is subject to any further action by the Commission, including commencement of a generic rulemaking to address these matters, and the issuance of instructions as to how the contention should be addressed.

Respectfully Submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 3rd day of August, 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 COOPERATIVE	)	Docket No. 52-017-COL
	)	
(North Anna Power Station, Unit 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO BREDL'S MOTION TO REOPEN THE RECORD AND MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT NORTH ANNA, UNIT 3" has been served upon the following persons by Electronic Information Exchange this 3rd day of August, 2012:

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