

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman  
Dr. Richard F. Cole  
Dr. Alice C. Mignerey

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

ASLBP No. 08-863-01-COL

June 13, 2014

MEMORANDUM AND ORDER

(Denying BREDL's Motion to Reopen and Admit Contention 14)

Before the Board is a motion ("the Motion") by Blue Ridge Environmental Defense League ("BREDL" or "Petitioner") to reopen this proceeding and admit a new contention ("Contention 14") related to the August 23, 2011 earthquake in Mineral, Virginia.<sup>1</sup> The earthquake's epicenter was only 11 miles from the existing and proposed units at the North Anna Power Station operated by Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("Dominion" or "Applicant").<sup>2</sup> Because Petitioner fails to satisfy the standard for admission of a new contention, the Board declines to admit Contention 14. BREDL's accompanying request to reopen the proceeding to admit the new contention is therefore moot.

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<sup>1</sup> See Motion to Reopen and Admit New Contention (Mar. 7, 2014) [hereinafter 2014 Motion].

<sup>2</sup> Dominion's Answer to BREDL's Motion to Reopen and Admit New Contentions (Apr. 1, 2014) at 4.

Thus, we need not consider whether the Motion satisfies the reopening standard of 10 C.F.R. § 2.326.

I. Procedural Background

On September 22, 2011, BREDL submitted an earlier version of Contention 14 based upon the occurrence of the Virginia earthquake.<sup>3</sup> On October 20, 2011, the Board granted a motion to hold that contention in abeyance pending Applicant's assessment of the seismic analysis in its application in light of the earthquake.<sup>4</sup> On June 7, 2012, the Commission ruled that the proceeding should have been terminated prior to submission of BREDL's seismic contention and remanded to the Board "to exercise jurisdiction for the limited purpose of considering whether to reopen the record and admit BREDL's seismic contention."<sup>5</sup> On July 26, 2012, the Board ordered BREDL to submit any potential motion to reopen the proceeding for consideration of a new seismic contention within 60 days of Applicant's completion of its post-earthquake seismic assessment.<sup>6</sup> On January 6, 2014, Dominion notified the Board that it had completed its seismic assessment and included the results in its updated application.<sup>7</sup> BREDL subsequently filed the pending motion to reopen, along with an amended version of Contention 14, on March 7, 2014.<sup>8</sup>

Meanwhile, on July 9, 2012, BREDL filed a proposed new contention and accompanying motion to reopen concerning temporary storage and ultimate disposal of nuclear waste ("Waste

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<sup>3</sup> Request to Admit Intervenor's New Contention (Sept. 22, 2011) at 1 [hereinafter 2011 Motion].

<sup>4</sup> Licensing Board Order (Granting Consent Motion to Hold BREDL's New Contention in Abeyance) (Oct. 20, 2011) at 2 (unpublished).

<sup>5</sup> CLI-12-14, 75 NRC 692, 702 (2012).

<sup>6</sup> Licensing Board Order (Setting Time for Filing Motion to Reopen the Proceeding) (July 26, 2012) at 2 (unpublished) [hereinafter Scheduling Order].

<sup>7</sup> Letter from David R. Lewis, Counsel for Dominion, to ASLBP (Jan. 6, 2014) at 1.

<sup>8</sup> 2014 Motion at 1–2.

Confidence Contention”).<sup>9</sup> The proposed new contention was based on the D.C. Circuit’s decision in New York v. NRC.<sup>10</sup> On August 7, 2012, the Commission directed that BREDL’s Waste Confidence Contention (as well as similar contentions filed in numerous other proceedings) be held in abeyance pending further order from the Commission.<sup>11</sup> On September 25, 2012, the Commission reiterated that the fate of BREDL’s Waste Confidence Contention must await the Commission’s “ultimate direction.”<sup>12</sup>

II. Petitioner’s Proposed Contention

BREDL seeks to admit a new contention asserting that, “Dominion-Virginia Power . . . has not presented a sound probabilistic basis for the magnitude of the possible adverse consequences and the likelihood of the occurrence of each consequence for issuing a license to construct and operate North Anna Unit 3.”<sup>13</sup>

This is not the first time BREDL has sought admission of a contention relating to the seismicity of the North Anna site. In declining to admit Contention 2, the Board ruled that the seismic suitability of the North Anna site had been evaluated at the early site permit stage and that “further litigation of the geologic fault issue is foreclosed by section 52.39(a)(2)” of the regulations.<sup>14</sup> The Board later declined to admit Contention 13, which challenged Dominion’s request for a site-specific exemption to certain seismic requirements claiming “that Dominion

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<sup>9</sup> See Motion to Reopen the Record for North Anna Unit 3 and Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at North Anna Unit 3 (July 9, 2012).

<sup>10</sup> New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012).

<sup>11</sup> See Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67–69 & n.10 (2012).

<sup>12</sup> CLI-12-17, 76 NRC 207, 212 (2012).

<sup>13</sup> Id. The wording of this contention is nearly identical to the contention filed by BREDL immediately after the earthquake in 2011. See 2011 Motion at 4.

<sup>14</sup> LBP-08-15, 68 NRC 294, 326–27 (2008).

has acknowledged ‘that the proposed Unit 3 cannot . . . meet the standards for safe shutdown during an earthquake.’”<sup>15</sup> The Board acknowledged that whether Dominion’s exemption request satisfied NRC’s regulations was material to the licensing decision, but declined to admit the contention because BREDL had not provided any reason to believe that the exemption request was “improper” as it had claimed.<sup>16</sup>

### III. Legal Standard

In the July 26, 2012 order, the Board indicated that, due to the Commission’s ruling in CLI-12-14, any new contention:

will need to meet each of the following requirements: Under subsection 2.326(a), the motion must be timely, must concern a significant environmental or safety issue, and must demonstrate the likelihood of a materially different result. Under subsection 2.326(b), the motion must be supported by an affidavit that separately addresses each of the 2.326(a) criteria. Because the contention relates to a matter not previously in controversy among the parties, under subsection 2.326(d) the motion must also satisfy the requirements of 10 C.F.R. § 2.309(c). Additionally, the underlying contention must meet the admissibility requirements of 10 C.F.R. § 2.309(f).<sup>17</sup>

The § 2.326 reopening standard requires that a motion be supported by affidavit and (1) be timely, (2) address a significant safety or environmental issue, and (3) demonstrate that a materially different result would have been likely if the evidence had been available.<sup>18</sup> The reopening standard sets a high bar.<sup>19</sup>

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<sup>15</sup> LBP-11-10, 73 NRC 424, 449 (2011).

<sup>16</sup> Id. at 452.

<sup>17</sup> Scheduling Order at 2–3.

<sup>18</sup> 10 C.F.R. §§ 2.326(a) and (b).

<sup>19</sup> LBP-11-22, 74 NRC 259, 269–70 (2011) (citing multiple Commission decisions detailing the heightened burden required of petitioners to satisfy the reopening standard).

Even if a petitioner is able to satisfy the reopening standard, the petitioner must also show that its proposed new contention meets the standard for new or amended contentions in § 2.309(c)<sup>20</sup> and the underlying admissibility standards of § 2.309(f)(1).<sup>21</sup>

Section 2.309(c) requires that the filing be based upon information that (1) was not previously available, and (2) is materially different from information previously available, and (3) is timely filed.<sup>22</sup>

Section 2.309(f)(1) requires, in relevant part, that a contention

(i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.<sup>23</sup>

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<sup>20</sup> 10 C.F.R. § 2.326(d).

<sup>21</sup> See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009); Southern Nuclear Operating Company (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-21, 72 NRC 616, 643 (2010).

<sup>22</sup> 10 C.F.R. § 2.309(c).

<sup>23</sup> 10 C.F.R. § 2.309(f).

Failure to comply with any of the § 2.309(f)(1) requirements renders a contention inadmissible.<sup>24</sup>

IV. Analysis

Although Contention 14 was timely filed under § 2.309(c), it fails to satisfy the contention admissibility requirements of § 2.309(f)(1). Because that failure is sufficient to warrant denial of the Motion, the Board deems it unnecessary to consider whether the Motion would satisfy the reopening standard of § 2.326.

Contention 14 is based upon the August 23, 2011 earthquake in Mineral, Virginia. BREDL quotes a U.S. Geological Survey report on the 2011 earthquake stating that “Dominion has confirmed that the August 23, 2011 earthquake exceeded the spectral and peak ground accelerations for the Operating Basis and Design Basis earthquakes . . . for North Anna Units 1 and 2.”<sup>25</sup> This information was not available before the earthquake occurred, and it is materially different from information previously available concerning earthquakes in the vicinity of the North Anna Plant. On September 22, 2011, BREDL submitted an earlier version of Contention 14<sup>26</sup> that was consistent with the Board’s scheduling order.<sup>27</sup> Subsequently, after the parties agreed to hold the proposed new contention in abeyance until Dominion completed its post-earthquake seismic assessment, BREDL re-filed proposed Contention 14 and its motion to reopen within 60 days of Dominion’s completion of its seismic assessment, as permitted by the Board’s July 26, 2012 Order.<sup>28</sup> The Board therefore concludes that Contention 14 is timely under § 2.309(c).

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<sup>24</sup> See Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

<sup>25</sup> 2014 Motion at 10–11.

<sup>26</sup> 2011 Motion at 1.

<sup>27</sup> See Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) at 2 (unpublished).

<sup>28</sup> Scheduling Order at 2.

The Board nevertheless concludes that Contention 14 fails to satisfy the requirements of § 2.309(f)(1). The current motion largely reasserts the case made in BREDL's September 2011 motion, which the Board held in abeyance pending Dominion's completion of a post-earthquake seismic assessment. In seeking to meet the § 2.309(f)(1)(i) requirement to specifically state the issue raised, BREDL asserts, as it did in its initial motion, that 10 C.F.R. § 100.23 requires investigation of geological, seismological, and engineering characteristics of a site and that "[t]he August 23, 2011 earthquake is now, according to this rule, part of the 'nature' of the site which must be investigated."<sup>29</sup> BREDL further states that, pursuant to 10 C.F.R. § 52.47(a), "the North Anna Unit 3 [combined license application (COLA)] 'must contain a final safety analysis report (FSAR) that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole.'"<sup>30</sup>

The Motion, however, makes no attempt to address whether Dominion's seismic assessment sufficiently investigated the earthquake and incorporated necessary changes into its COLA. Therefore, the Motion fails to state specifically the issue of law or fact that it seeks to litigate before the Board. While such an investigation may be necessary for regulatory compliance, Dominion notified the Board and the Parties on January 6, 2014 that it had completed a seismic assessment and revised its COLA.<sup>31</sup> BREDL does not challenge any part of the seismic analysis Dominion included in its COLA and FSAR. In fact, BREDL's only mention of Applicant's revised COLA states that "Applicant seeks departures, exceptions and variances" from the NRC's design certification.<sup>32</sup> Assuming that BREDL intended to suggest

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<sup>29</sup> 2014 Motion at 4; see also 2011 Motion at 5.

<sup>30</sup> 2014 Motion at 5; see also 2011 Motion at 6.

<sup>31</sup> See Letter from David R. Lewis, Counsel for Dominion, to ASLBP (Jan. 6, 2014) at 1.

<sup>32</sup> 2014 Motion at 4; see also 2011 Motion at 11.

that these exemption requests are “improper,” as it did with Contention 13, the present motion again provides no reason to believe the requests are improper.<sup>33</sup> Merely requesting an exemption, as we have explained, is not sufficient to raise a litigable issue.<sup>34</sup> As such, BREDL fails to meet § 2.309(f)(1)(i)’s requirement to raise a specific issue of law or fact.

To meet the § 2.309(f)(1)(ii) requirement for a brief explanation of the basis for its contention, BREDL states only that new post-earthquake information “must be assessed and integrated into the FSAR, ER, FEIS and other required documents.”<sup>35</sup> Again, BREDL’s current motion does not address any of the additional analysis that Dominion has now included in its FSAR. Even if BREDL had raised a specific issue of fact or law under § 2.309(f)(1)(i), it has not provided any basis to support the contention under § 2.309(f)(1)(ii), having failed to challenge any part of Dominion’s updated COLA.

BREDL asserts generally that Contention 14 demonstrates that the issue raised is within the scope of the proceeding and material to the findings the NRC must make, as required by §§ 2.309(f)(1)(iii) and (iv).<sup>36</sup> BREDL claims that the NRC must establish conformity with the Atomic Energy Act and the National Environmental Policy Act, which require the NRC and applicants to show that proposed seismic specifications are satisfactory. We have already determined that BREDL failed to provide a specific statement of the issue to be raised. Here, again, BREDL’s lack of specificity cannot support the admissibility of its contention.

To meet the § 2.309(f)(1)(v) requirement for a concise statement of facts and opinions that support its contention, BREDL refers to multiple studies that predate the 2011 earthquake along with one post-earthquake analysis of the impacts on Central Virginia, including on the

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<sup>33</sup> See supra text accompanying note 12.

<sup>34</sup> See LBP-11-10, 73 NRC at 450–53.

<sup>35</sup> 2014 Motion at 5; see also 2011 Motion at 6.

<sup>36</sup> See 2014 Motion at 6–7; see also 2011 Motion at 6–8.



North Anna site.<sup>37</sup> None of these studies point to any deficiency in the seismic analysis conducted by Dominion and incorporated into its FSAR. For instance, BREDL cites a 2011 article by M.V. Ramana that critiques the use of probabilistic risk assessments.<sup>38</sup> Whether or not Mr. Ramana has a valid point, his article predates the earthquake and does not address the actual assessment conducted by Dominion -- the focus of this license proceeding.<sup>39</sup>

At another point, BREDL points to a U.S. Geological Survey study of the 2011 earthquake.<sup>40</sup> The findings are significant: (1) little is known about the cause of earthquakes in Central Virginia; (2) future earthquakes greater than 5.8 magnitude are possible; (3) geologic mapping in the area is incomplete; and (4) "Dominion has confirmed that the August 23, 2011 earthquake exceeded the spectral and peak ground accelerations for the Operating Basis and Design Basis earthquakes . . . for North Anna Units 1 and 2."<sup>41</sup> These are important findings worthy of further study and analysis, but BREDL makes no claim about the degree to which Dominion has failed to adequately address each of these uncertainties in its revised COLA and FSAR.

Finally, BREDL has not shown that a genuine dispute exists as to a material issue of fact or law as required by § 2.309(f)(1)(vi). In attempting to do so, BREDL refers to its previous attempt to raise a contention related to Dominion's request for a site-specific exemption related

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<sup>37</sup> See 2014 Motion at 8–9. The pre-earthquake studies cited by BREDL were included in its September 2011 motion. See 2011 Motion at 8–9.

<sup>38</sup> See 2014 Motion at 8–9.

<sup>39</sup> Additionally, BREDL asserts that it will rely on an expert's analysis without providing the specificity required for contention admissibility. See 2014 Motion at 9. This statement appears to be an attempt to satisfy the affidavit requirement in 10 C.F.R. § 2.326(b). While we do not fully analyze the reopening standard here, mere mention of the future filing of an affidavit does not satisfy this requirement.

<sup>40</sup> See 2014 Motion at 10–11.

<sup>41</sup> See id.

to seismicity.<sup>42</sup> In that case, the Board declined to admit the contention because, though BREDL claimed the request was “improper,” it did not state what was improper or inappropriate about it.<sup>43</sup> Here also, BREDL claims that Dominion must fully incorporate new information related to the 2011 earthquake into the COLA’s seismic analysis but provides the Board no reason to believe that what Dominion has done is in any way improper or inappropriate. As the Board said then, “[t]his vague accusation does not rise to the level of an admissible genuine dispute of material fact or law under section 2.309(f)(1)(vi).”<sup>44</sup>

#### V. Conclusion

As a result of the deficiencies detailed above, we find Contention 14 inadmissible pursuant to 10 C.F.R. §§ 2.309(f)(1). Petitioner has not provided a specific statement of the issue of law or fact to be raised, has not pointed to any alleged facts or expert opinions that can lend support to its contention, and has not provided sufficient information to show that a genuine dispute exists to warrant admission of the proposed contention. Given our ruling that Contention 14 is inadmissible, BREDL’s accompanying request to reopen the proceeding to admit the new contention is moot. Thus, we need not consider whether the Motion satisfies the reopening standard of 10 C.F.R. § 2.326.

As mentioned earlier, BREDL’s Waste Confidence Contention remains in abeyance pending further order from the Commission.<sup>45</sup> Absent that contention, an appeal of this Board ruling would likely be permitted under 10 C.F.R. § 2.341.<sup>46</sup> The Waste Confidence Contention’s pendency, however, creates some uncertainty as to whether BREDL may now appeal the

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<sup>42</sup> See id. at 9–10.

<sup>43</sup> See LBP-11-10, 73 NRC at 452–53.

<sup>44</sup> See id. at 452.

<sup>45</sup> See Calvert Cliffs, CLI-12-16, 76 NRC at 67–69 & n.10.

<sup>46</sup> See Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 385 (2012).

Board's ruling on proposed Contention 14, or whether it must await resolution of the waste confidence issue (either by a ruling declining to reopen the proceeding or to admit the contention, or by a decision resolving the contention on the merits).

The Commission recently held, in Sequoyah, that an appeal under 10 C.F.R. § 2.311 of a licensing board order holding various contentions inadmissible was premature because a waste confidence contention had been held in abeyance, and the Board had therefore not yet granted or denied the hearing request. The Commission stated that the "limited interlocutory appeal right [under § 2.311] attaches only when the Board has fully ruled on the initial intervention petition -- that is, when it has admitted or rejected all proposed contentions."<sup>47</sup>

The present order, however, does not concern an initial intervention petition. The Commission instructed the Board "to exercise jurisdiction for the limited purpose of considering whether to reopen the record and admit BREDL's seismic contention."<sup>48</sup> In Calvert Cliffs, the Commission did not state that this Board would have jurisdiction to rule on BREDL's Waste Confidence Contention, when and if it becomes appropriate for decision.<sup>49</sup> Rather, the Commission retained authority to provide "ultimate direction"<sup>50</sup> on the contentions and recently confirmed that "the direction we provided in Calvert Cliffs remains in place."<sup>51</sup> In light of this Board's limited jurisdiction, we therefore conclude that the situation here is distinguishable from that in Sequoyah, and that BREDL may appeal our decision immediately under 10 C.F.R.

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<sup>47</sup> Tenn. Valley Auth. (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-03, 79 NRC \_\_, \_\_ (slip op. at 7) (Feb. 12, 2014).

<sup>48</sup> CLI-12-14, 75 NRC at 702.

<sup>49</sup> See generally Calvert Cliffs, CLI-12-16, 76 NRC at 67-69 & n.10.

<sup>50</sup> CLI-12-17, 76 NRC at 212.

<sup>51</sup> Sequoyah, CLI-14-03, 79 NRC at \_\_ (slip op. at 9).

§ 2.341.<sup>52</sup> An immediate appeal will also ensure that BREDL does not inadvertently sacrifice any right to appeal it may have.

Pursuant to the Commission's ruling in CLI-12-14, this proceeding remains terminated.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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Ronald M. Spritzer, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Alice C. Mignerey  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
June 13, 2014

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<sup>52</sup> Our views are intended to advise the parties regarding the potentially applicable appeal provisions. Our opinion does not bind the Commission, which will make its own decision whether an appeal may be filed at this juncture in the event such an appeal is filed. *Id.* at \_\_\_ (slip op. at 8 n.33).

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 **MEMORANDUM AND ORDER (Denying BREDL's Motion to Reopen and Admit Contention 14)** have been served upon the following persons by Electronic Information Exchange.

Administrative Judge  
Ronald Spritzer, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [ronald.spritzer@nrc.gov](mailto:ronald.spritzer@nrc.gov)

Administrative Judge  
Richard F. Cole  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [richard.cole@nrc.gov](mailto:richard.cole@nrc.gov)

Administrative Judge  
Alice C. Mignerey  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [alice.mignerey@nrc.gov](mailto:alice.mignerey@nrc.gov)

Matthew Zogby, Law Clerk, ASLBP  
E-mail: [matthew.zogby@nrc.gov](mailto:matthew.zogby@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop - O-15 D21  
Washington, DC 20555-0001  
Sara Kirkwood, Esq.  
Marcia Carpentier, Esq.  
Patrick Moulding, Esq.  
Robert Weisman, Esq.  
Megan Wright, Esq.  
Catherine Scott, Esq.  
Lloyd Clark, Esq.  
Nicholas Koontz, Paralegal  
E-mail:  
[sara.kirkwood@nrc.gov](mailto:sara.kirkwood@nrc.gov)  
[marcia.carpentier@nrc.gov](mailto:marcia.carpentier@nrc.gov)  
[patrick.moulding@nrc.gov](mailto:patrick.moulding@nrc.gov)  
[robert.weisman@nrc.gov](mailto:robert.weisman@nrc.gov)  
[megan.wright@nrc.gov](mailto:megan.wright@nrc.gov)  
[catherine.scott@nrc.gov](mailto:catherine.scott@nrc.gov)  
[lloyd.clark@nrc.gov](mailto:lloyd.clark@nrc.gov)  
[nicholas.koontz@nrc.gov](mailto:nicholas.koontz@nrc.gov)

OGC Mail Center: [ogcmailcenter@nrc.gov](mailto:ogcmailcenter@nrc.gov)

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
E-mail: [hearing.docket@nrc.gov](mailto:hearing.docket@nrc.gov)

DOCKET NO. 52-017-COL

**MEMORANDUM AND ORDER (Denying BREDL's Motion to Reopen and Admit Contention 14)**

Dominion Resources Services, Inc.  
120 Tredgar Street, RS-2  
Richmond, VA 23219  
Lillian M. Cuoco, Senior Counsel  
E-mail: [Lillian.Cuoco@dom.com](mailto:Lillian.Cuoco@dom.com)

North Carolina Utilities Commission  
Louis S. Watson, Jr., Senior Staff Attorney  
Kim Jones, Analyst  
4325 Mail Service Center  
Raleigh, NC 27699-4325  
E-mail: [swatson@ncuc.net](mailto:swatson@ncuc.net); [kjones@ncuc.net](mailto:kjones@ncuc.net)

Old Dominion Electric Cooperative (ODEC)  
4201 Dominion Boulevard, Suite 200  
Glen Allen, Virginia 23060  
James Patrick Guy II, Esq.  
E-mail: [james.guy@leclairryan.com](mailto:james.guy@leclairryan.com)

Morgan, Lewis & Bockius, LLP  
1111 Pennsylvania, Ave. N.W.  
Washington, D.C. 20004  
Stephen J. Burdick, Esq.  
E-mail: [sburdick@morganlewis.com](mailto:sburdick@morganlewis.com)

Pillsbury Winthrop Shaw Pittman, LLP  
2300 N. Street, N.W.  
Washington, DC 20037-1128  
David R. Lewis, Esq., Counsel for Dominion  
Maria Webb, Paralegal  
E-mail: [david.lewis@pillsbury.com](mailto:david.lewis@pillsbury.com);  
[maria.webb@pillsburylaw.com](mailto:maria.webb@pillsburylaw.com)

Blue Ridge Environmental Defense League  
P.O. Box 88  
Glendale Springs, NC 28629  
Louis A. Zeller  
E-mail: [BREDL@skybest.com](mailto:BREDL@skybest.com)

John D. Runkle  
P.O. Box 3793  
Chapel Hill, NC 27515  
E-mail: [jrunkle@pricecreek.com](mailto:jrunkle@pricecreek.com)

Erich Pica, President  
Friends of the Earth  
1100 15<sup>th</sup> Street, NW  
11<sup>th</sup> Floor  
Washington, D.C. 20555  
E-mail: [mkeever@foe.org](mailto:mkeever@foe.org)

[Original signed by Brian Newell]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 13<sup>th</sup> day of June 2014