

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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In the Matter of)	
Virginia Electric Power Co.)	Docket Nos. 50-338/339 SLR
North Anna Power Station, Units 1 and 2)	
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**MOTION FOR LEAVE TO REPLY TO OPPOSITION BRIEFS BY BEYOND
NUCLEAR, SIERRA CLUB, AND ALLIANCE FOR A PROGRESSIVE VIRGINIA**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.311, Beyond Nuclear, the Sierra Club, and Alliance for a Progressive Virginia (“Appellants”) hereby seek leave to file the attached Reply Brief in response to oppositions by Virginia Electric Power Co. (“VEPCO”) and the U.S. Nuclear Regulatory Commission (“NRC”) Staff to Brief on Appeal of LBP-21-04 by Beyond Nuclear, Sierra Club, and Alliance for a Progressive Virginia (Apr. 23, 2021) (“Appeal Brief”).¹

II. FACTUAL BACKGROUND

In the decision on appeal, LBP-21-04, the Atomic Safety and Licensing Board (“ASLB”) denied the admission of Appellants’ single Contention challenging the adequacy of VEPCO’s Environmental Report for its subsequent license renewal (“SLR”) application to address the environmental significance of the 2011 Mineral Earthquake.² The ASLB also rejected

¹ Applicant’s Brief in Opposition to Appeal of LBP-21-4 by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (May 18, 2021) (“VEPCO Opp.”) and NRC Staff’s Brief in Response to Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia’s Appeal of LBP-21-4 (May 18, 2021) (“Staff Opp.”).

² *Virginia Elec. Power Co.* (North Anna Power Station, Units 1 and 2), LBP-21-04, 93 N.R.C. ____ (Mar. 29, 2021) as modified by Memorandum and Order (Correcting Text of Decision) (Mar. 31, 2021) (“LBP-21-04”). In LBP-21-04, the ASLB denied Hearing Request and Petition to Intervene by [named Appellants] and Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to Allow Consideration of Category 1 NEPA Issues at 13-30 (Dec. 14, 2020) (“Hearing Request”).

Appellants' request for a waiver of NRC regulations that would preclude consideration of their Contention absent a waiver. *Id.* Appellants filed a Notice of Appeal and Appeal Brief on April 23, 2021.³ VEPCO and the NRC Staff responded with opposing briefs on May 18, 2021.

Appellants now seek to file a limited reply within seven days of receiving their briefs.

III. APPELLANTS MEET THE NRC'S STANDARD FOR A REPLY.

NRC's regulation for appeal briefs, 10 C.F.R. § 2.311, does not contemplate the filing of replies to oppositions to appeals of Commission decisions. However, the Commission will allow the filing of replies "where necessity or fairness dictate."⁴ Here, Appellants seek leave to reply for the limited purpose of correcting eight specific assertions made by VEPCO and the NRC Staff that misinterpret governing case law or mistakenly assert that Appellants have raised an issue for the first time in their appeal. Appellants respectfully submit that these corrections are necessary in order to ensure a correct, meaningful, and fair record in this proceeding.⁵

A. Corrections to Erroneous Interpretations of Governing Case Law

1. Appellants seek to correct an assertion by VEPCO (VEPCO Opp. at 9) that NRC caselaw precluded Appellants from relying on a declaration by counsel in support of their Waiver Petition, by showing that those decisions merely stand for the proposition that to be admissible, contentions must be supported by documented evidence and/or expert opinion.⁶

³ Brief on Appeal of LBP-21-04 by Beyond Nuclear, Sierra Club, and Alliance for a Progressive Virginia ("Appeal Brief").

⁴ *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-12, 67 N.R.C. 386, 393 (2008).

⁵ Appellants note that their Reply Brief does not address general arguments in which VEPCO and the Staff repeat the ASLB's analyses and conclusions in the decision below. With respect to those claims, Appellants continue to stand on their arguments in their Appeal Brief.

⁶ *Fansteel, Inc.* (Muskogee, OK Site), CLI-00-13, 58 N.R.C. 195, 203 (2003) (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 N.R.C. 193, 208 (2000)).

They do not address the validity of a declaration by counsel in support of a waiver petition, which has been accepted in at least one previous case.⁷

2. Appellants seek an opportunity to respond to VEPCO's argument that Appellants have failed to make a cognizable challenge to the ASLB's reliance on two previous Commission decisions holding that 10 C.F.R. § 51.53(c)(3) excuses SLR applicants from addressing the environmental impacts of the Mineral Earthquake.⁸ This is a key issue that Appellants seek to preserve for potential judicial appeal, and thus fairness requires that Appellants be permitted to address VEPCO's legally incorrect arguments.

B. Appellants' Brief Does Not Introduce New Evidence or Arguments That Were Not Raised Below.

1. According to VEPCO, Appellants' claim that the Board erred by applying probabilistic methods for severe accident analysis to design-basis analysis "raises entirely new arguments never presented to the Board regarding an 1875 earthquake and the absence of cost-benefit analysis in the safety review of North Anna at initial licensing."⁹ Appellants seek an opportunity to correct this erroneous assertion, by demonstrating that the 1875 earthquake is the design-basis earthquake explicitly referred to in Appellants' Contention; and that it is not a novel concept that in determining the severity of likely earthquakes in

⁷ See, e.g., *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 N.R.C. 257, 302-306 (2010), *rev'd on other grounds*, CLI-11-11, 74 N.R.C. 427, 447-453 (2011).

⁸ VEPCO Opp. at 12 (citing *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant Units 3 and 4), CLI-20-03, 91 N.R.C. 33 (2020) and *Exelon Generation Co., L.L.C.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-20-11, 92 N.R.C. _ (slip op.) (Nov. 12, 2020))

⁹ VEPCO Opp. at 20 (citing Appeal Brief at 22 and *USEC Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 458 (2006) ("*USEC*"). See also Staff Opp. at 20.

a deterministic analysis, the NRC would look at the seismic history of the region to determine the most severe earthquake that had occurred in the known history of the site.

2. Appellants seek to correct the NRC's Staff's erroneous claim that Appellants are arguing, for the first time on appeal, that the 2011 Mineral earthquake should be "incorporated into the [North Anna reactors'] design basis."¹⁰ For fairness and completion of the record, Appellants should be allowed to respond to the Staff's mischaracterization of Appellants' case, by making it clear that Appellants are not making any claims under the Atomic Energy Act or NRC implementing regulations. Rather, Appellants' claims are grounded entirely in the National Environmental Policy Act ("NEPA"). Nevertheless, the NRC, having used Atomic Energy Act-based concepts for its NEPA analysis of design-basis accidents, may not simply disregard those concepts at this juncture.¹¹ This is an important legal point of Appellants' case for which the record should be clear.
3. Appellants seek leave to reply to the Staff's argument that Appellants have presented, for the first time on appeal and without expert support, factual assertions that the NRC's findings regarding the adequacy of the design of ASME Code Class 1 piping for the initial licensing of North Anna Units 1 and 2 were based on the assumption that an earthquake more severe than the 1875 earthquake would not occur, and that an earthquake with the severity of the 1875 earthquake would occur only once.¹² Appellants relied for this information on the North Anna Updated Final Safety Analysis Report at 3.7-35 (Sept. 27, 2018) (ML18285A049) ("UFSAR"). Appellants seek leave to

¹⁰ Staff Opp. at 14.

¹¹ Appeal Brief at 28.

¹² Staff Opp. at 13-14 n.67 (citing Appeal Brief at 9, 22, 23-24).

demonstrate that the UFSAR was not cited for the first time in Appellants' brief; rather, it was cited in LBP-21-04 for the proposition that "the safety impact of the 2011 Mineral earthquake has been fully assessed by VEPCO and the Staff."¹³ Given the ASLB's reliance on the UFSAR to show the lack of one kind of environmental impact (*i.e.*, that the Mineral Earthquake did not cause "any damage or deformation" (*id.* n. 47)), fairness requires that Appellants be permitted to cite a different part of the UFSAR to show an aspect in which the environmental impacts of the Mineral Earthquake were significant and *not* adequately accounted for. Moreover, fairness requires that Appellants be permitted to point out that contrary to the Staff's argument, Appellants do not need an expert to quote a relevant section of a UFSAR whose terms are clear.

4. Appellants seek leave to correct VEPCO's assertion that Appellants raised the role of cost-benefit analysis for the first time on appeal.¹⁴ Contrary to their argument, Appellants did not add new evidence or arguments by pointing out the differences in the purposes of NEPA design-basis accident analysis and severe accident analysis, *i.e.*, that "while NEPA design-basis accident analysis confirms that the environment is protected from significant impact by a design-basis imposed by NRC under rigorous safety standards, the purpose of severe accident analysis is to evaluate whether there are cost-effective measures that would minimize the impact of a beyond-design-basis accident if one were to occur."¹⁵ In addition, Appellants seek leave to point out that during the February 4, 2021 oral

¹³ LBP-21-04, slip op. at 26-27 and note 47 (citing UFSAR, Chapter 3 at 3.7-55 – 3.7-66).

¹⁴ VEPCO Opp. at 20.

¹⁵ Appeal Brief at 21.

argument, Appellants' counsel addressed this distinction at length, thus giving the ASLB an opportunity to consider it.¹⁶

5. Appellants seek leave to correct assertions by both VEPCO and the Staff that Appellants' brief is the first place they raise "the existence of a relationship between safety and environmental issues in NRC licensing reviews [that] somehow nullifies the license renewal scope limitation" codified in 10 C.F.R. Part 54.¹⁷ Appellants seek to demonstrate that to the contrary, the relationship between safety and environmental issues is at the heart of Appellants' Contention, and Appellants have repeatedly stated that limitations on the scope of a license renewal review under 10 C.F.R. Part 54 do not restrict the scope of a NEPA review.¹⁸

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Appellants' request to file the attached Reply Brief.

Respectfully submitted,

 /signed electronically by/
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May 25, 2021

¹⁶ Tr. 14-19, 50-51.

¹⁷ VEPCO Opp. at 22, 25. *See also* Staff opp. at 19 n.91.

¹⁸ *See* Hearing Request at 5, 37; Tr. 52-53.

CERTIFICATE OF COUNSEL PURSUANT TO 10 C.F.R. § 2.323(b)

I certify that on May 24, 2021, I contacted counsel for VEPCO and the NRC Staff in an attempt to resolve the issue raised by this motion. Counsel for VEPCO stated that “Dominion opposes Appellants’ request to file a reply, and Dominion will request the opportunity to respond should your request be granted.” Counsel for the NRC Staff stated that the Staff opposes Appellants’ filing of a reply brief, and will file an answer setting out the Staff’s position in response to any motion Appellants may file seeking leave to reply.

 /signed electronically by/
Diane Curran