

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

May 28, 2021

In the Matter of

VIRGINIA ELECTRIC AND POWER
COMPANY

(North Anna Power Station, Units 1 and 2)

Docket Nos. 50-338-SLR and
50-339-SLR

**NRC STAFF ANSWER TO APPELLANTS'
MOTION FOR LEAVE TO FILE A REPLY BRIEF**

In accordance with 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission hereby responds to the “Motion for Leave to Reply to Opposition Briefs by Beyond Nuclear, Sierra Club, and Alliance For A Progressive Virginia”, filed on May 25, 2021. For the reasons set forth below, the Staff submits that the filing of a brief in reply to appellee briefs filed under 10 C.F.R. § 2.311 is an extraordinary action not contemplated by the Commission’s rules governing the filing of such briefs, and that the Appellants have shown neither good cause nor special circumstances establishing that the filing of a reply brief should be permitted here. Accordingly, the Staff opposes the Motion and recommends that it be denied.

In support of this Answer, the Staff states as follows:

1. On March 29, 2021, the Atomic Safety and Licensing Board issued its decision in LBP-21-4, denying the petition to intervene and related waiver petition filed by Beyond Nuclear,

Inc., Sierra Club, Inc., and Alliance for Progressive Virginia, Inc. (Appellants).¹ In its decision, the Board found that the Appellants had failed to demonstrate that their proposed contention and waiver petition met applicable NRC requirements; it therefore denied the Appellants' petition to intervene and waiver petition, and terminated the proceeding. On April 23, 2021, the Appellants filed their appeal from that decision, under 10 C.F.R. § 2.311.² The Staff and Applicant Virginia Electric and Power Company (VEPCO) then filed briefs in opposition to the appeal brief.³

2. The Commission's rules governing the filing of appeals are set forth in 10 C.F.R. §§ 2.311 and 2.341. While most appeals are governed by 10 C.F.R. § 2.341, appeals from three specific types of rulings "*must* be made as specified by the provisions of [§ 2.311]."⁴ Specifically, appeals are to be made to the Commission pursuant to § 2.311 with respect to a presiding officer's or Board's rulings on (1) a request for hearing; (2) a petition to intervene; or (3) a request for access to certain protected information.⁵ Accordingly, the instant appeal is governed by 10 C.F.R. § 2.311.

3. The rules governing the filing of briefs under 10 C.F.R. § 2.311 are unambiguous: The rules permit only the filing of an appeal brief by appellants and responsive briefs by appellees. As the Appellants recognize, "10 C.F.R. § 2.311[] does not contemplate the filing of replies to oppositions to

¹ *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), LBP-21-4, 93 NRC __ (Mar. 29, 2021) (slip op.).

² Brief on Appeal of LBP-21-04 by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (Apr. 23, 2021) (Appeal).

³ Applicant's Brief in Opposition to Appeal of LBP-21-4 by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (May 18, 2021) (Applicant's Brief); 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 Brief).

⁴ 10 C.F.R. § 2.311(b) (emphasis added).

⁵ 10 C.F.R. § 2.311(a). In addition, appeals from an order selecting a hearing procedure may be filed under § 2.311(e).

appeals of Commission decisions.”⁶ Long-standing Commission case law confirms that the filing of reply briefs is prohibited for appeals filed under 10 C.F.R. § 2.311.⁷

4. The filing of a reply brief concerning an appeal filed under 10 C.F.R. § 2.311 would thus constitute “an extraordinary opportunity” not provided for in the Commission’s rules.⁸ No showing has been made by the Appellants as to why such an extraordinary opportunity should be provided here.

5. In attempting to justify the filing of a reply, the Appellants claim that they only seek to file a “limited” reply, for the “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.”⁹ Appellants argue that these “corrections are necessary in order to ensure a correct, meaningful, and fair record in this proceeding.”¹⁰

6. Even assuming, *arguendo*, that Appellants are correct in asserting that VEPCO and the Staff mischaracterized their arguments or governing case law—an assertion with which the Staff certainly does not agree, at least with respect to its own brief—Appellants do not explain why the Commission could not detect any alleged “misinterpret[at]ions of governing case law” or other “mistake[s]” without Appellants’ assistance. Indeed, the rules in 10 C.F.R. § 2.311 appear to contemplate that there is no

⁶ Motion at 2.

⁷ *Tenn. Valley Auth.* (Browns Ferry Nuclear Plant Units 1, 2, and 3), CLI-17-5, 85 NRC 87, 92 n.26 (2017) (“[t]he NRC’s rules of procedure do not provide an appellant the right to reply to answers” (citing 10 C.F.R. § 2.311(b)), although the Commission “reviewed the reply as a matter of discretion.”); *Entergy Nuclear Gen. Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 360 n.36 (2012) (the appellant “filed its appeal pursuant to 10 C.F.R. § 2.311, which does not permit the filing of a reply. See 10 C.F.R. § 2.311(b),” but the reply was considered since the “appeal is properly considered a petition for review subject to . . . 10 C.F.R. § 2.341, which affords the petitioner a right to reply.”).

⁸ See *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549-50 (2009) (referring to the opportunity that the Board in that proceeding afforded to petitioners to file new or amended contentions based on newly submitted exhibits, after the petitioners retained counsel).

⁹ Motion at 2.

¹⁰ *Id.*

need for the filing of reply briefs in connection with the three specific types of appeals governed by the rule.¹¹ This is certainly the case here, where the issues were fully briefed before the Board, and the record consists of only a few documents: (a) Appellants' intervention/waiver petition, (b) the Staff's and VEPCO's answers to that petition, (c) Appellants' reply to those answers, (d) the Board's decision in LBP-21-4, and (e) the appeal briefs recently filed by Appellants, VEPCO and the Staff. Appellants have shown no reason to believe the Commission could not review these materials and reach a correct decision on their appeal without affording Appellants the "extraordinary opportunity" to file an otherwise prohibited reply. Nor have they shown that "necessity or fairness" dictates that they be permitted to file a reply,¹² thereby potentially opening the door for other parties to file responsive briefs as dictated by "necessity or fairness."¹³

Accordingly, for the reasons set forth above, Appellants' Motion should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 28th day of May, 2021

¹¹ Similarly, the filing of a reply is not permitted under 10 C.F.R. § 2.323(c) (replies to answers to motions, except in "compelling circumstances"), 10 C.F.R. § 2.342(d) (replies to answers to stay requests "will not be entertained"), and § 2.1213 (replies to answers to stay applications).

¹² Motion at 2.

¹³ See Appellants' "Certificate of Counsel Pursuant to 10 C.F.R. § 2.323(b)" (May 25, 2021) (noting that "Dominion opposes Appellants' request to file a reply, and Dominion will request the opportunity to respond should your request be granted.").

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Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO APPELLANTS' MOTION FOR LEAVE TO FILE A REPLY BRIEF," dated May 28, 2021, have been served upon the Electronic Information Exchange(the NRC's E--Filing System), in the captioned proceeding, this 28th day of May 2021.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 28th day of May, 2021