

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of

VIRGINIA ELECTRIC AND POWER
COMPANY d/b/a DOMINION VIRGINIA
POWER and OLD DOMINION ELECTRIC
COOPERATIVE

(North Anna Nuclear Power Station, Unit 3)

Docket No. 52-017-COL

CLI-12-17

MEMORANDUM AND ORDER

On June 22, 2012, the Blue Ridge Environmental Defense League (BREDL) filed a "Petition for Review of CLI-12-14."¹ For the reasons given below, we deny BREDL's petition.

I. BACKGROUND

In April, 2011, the Licensing Board in this combined license (COL) matter issued LBP-11-10, in which it denied the admission of two proposed contentions relating to the applicant's decision to change the reactor design referenced in its COL application.² At that point, no contentions remained pending in the proceeding. Noting this fact, the Board

¹ See *Petition for Review of CLI-12-14* (June 22, 2012) (BREDL Petition); CLI-12-14, 75 NRC ____ (June 7, 2012) (slip op.).

² LBP-11-10, 73 NRC 424 (2011).

suspended the parties' disclosure obligations, but did not close the record.³ The applicant, Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion) then filed a "motion for clarification" asking the Board to "clarify" that the proceeding had terminated. In a lengthy opinion, the Board declined to do so.⁴

In CLI-12-14, we reversed the Board's decision, finding that, in accordance with our longstanding practice, the contested proceeding must end once all pending contentions have been resolved. At that time, we remanded the case to the Board to exercise jurisdiction solely for the limited purpose of considering whether to reopen the record and to assess the admissibility of a pending seismic contention.⁵ We also held expressly that the Board's earlier interlocutory orders now were ripe for appellate review, and directed that any such petition be filed within fifteen days of our decision. BREDL's "petition for review" followed. The NRC Staff opposes the petition.⁶

II. DISCUSSION

BREDL seeks review of CLI-12-14, and, particularly, requests that we reverse that decision and reinstate the Board's ruling under which it would retain jurisdiction and hold open the record. BREDL does not appeal earlier interlocutory rulings in the *North Anna* case. Rather, at bottom, it seeks reconsideration of our decision in CLI-12-14 to close the record of this proceeding, and to require BREDL to move to reopen the record to raise new contentions. In substance, BREDL's "petition for review" is a petition for reconsideration, and we therefore

³ *Id.* at 453.

⁴ See generally LBP-11-22, 74 NRC __ (Sept. 1, 2011) (slip op.).

⁵ CLI-12-14, 75 NRC at __ (slip op. at 13-14). That contention currently is being held in abeyance. See generally Order (Granting Consent Motion to Hold BREDL's New Contention in Abeyance) (Oct. 20, 2011) (unpublished) (Order on Consent Motion).

⁶ *NRC Staff Answer in Opposition to the Blue Ridge Environmental Defense League Petition for Review of CLI-12-14* (July 2, 2012) (Staff Answer). Dominion did not file an answer.

treat it as such. Our rules of practice governing requests for reconsideration are found at 10 C.F.R. §§ 2.323(e), 2.345 and 2.341(d), and we consider BREDL's request under those rules.

However it is styled, BREDL's motion is deficient. A petition for reconsideration may not be filed except upon leave of the adjudicatory body that rendered the decision.⁷ If leave is granted, the motion must demonstrate "a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, which renders the decision invalid."⁸ Such a motion should be based on an "elaboration of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification."⁹ It should not simply re-argue matters which we have already considered but rejected.¹⁰ Upon examination, BREDL's motion does not make a compelling case for reconsideration, because it has not pointed to any fact or legal principle that we overlooked in our original decision.

⁷ BREDL has not sought leave to file its request for reconsideration. See 10 C.F.R. § 2.323(e). As we recently held, this procedural deficiency is reason enough to deny the request. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 252 (2010). We do not suggest that leave must be granted prior to filing the petition; leave may be sought simultaneously with the petition itself. We also observe that BREDL's request is out of time. Our rules of practice provide that reconsideration motions must be filed within ten days of the action for which reconsideration is requested. See 10 C.F.R. §§ 2.323(e); 2.345(a)(1). Compare 10 C.F.R. § 2.341(b)(1) (providing fifteen days for filing a petition for review). Our decision in CLI-12-14 was issued on June 7, 2012, and any reconsideration motion should have been filed by Monday, June 18, 2012. BREDL filed its request four days later. Lateness also is a sufficient ground on which to deny the request. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 409 (2005).

⁸ 10 C.F.R. § 2.345(b).

⁹ *Private Fuel Storage*, 62 NRC at 410 (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 NRC 1, 2 (2002)).

¹⁰ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

BREDL first argues that our regulation at 10 C.F.R. § 2.318(a) describes the only circumstances where a Board's jurisdiction terminates, and that the resolution of the last pending contention in a proceeding is not one of the listed circumstances.¹¹ Therefore, BREDL argues, the Board's "jurisdiction" did not terminate and, by extension, the contested proceeding did not terminate. But the Board first raised this argument in LBP-11-22, and we rejected it for reasons given in CLI-12-14.¹² In short, we did not—and do not—view section 2.318(a) as providing "an exhaustive list of every situation where Board jurisdiction lapses."¹³ BREDL reiterates this argument, but offers no new reasoning or support for it.

BREDL next argues that it is unfair to close the record of the proceeding at this point, when neither the application nor the Staff review is final. BREDL argues that the COL application has undergone significant revisions (including a change in the referenced reactor design) in the time since its initial filing. Dominion is now in the process of determining the effect that an August 23, 2011, earthquake in Mineral, Virginia, will have on its application. In addition, the Staff's review schedule has also undergone significant delays, and the estimated release dates for the Staff's review reports are being revised.¹⁴ Therefore, BREDL claims, a ruling closing the record of the adjudicatory proceeding at this point is "erroneous, premature,

¹¹ The rule provides that the presiding officer's jurisdiction terminates when the time period for the Commission to direct certification expires, when the Commission renders a final decision, and when the presiding officer withdraws from the case upon disqualifying himself. 10 C.F.R. § 2.318(a).

¹² See LBP-11-22, 74 NRC at ___ (slip op. at 22-23); CLI-12-14, 75 NRC at ___ (slip op. at 12-13).

¹³ CLI-12-14, 75 NRC at ___ (slip op. at 12).

¹⁴ See *Application for Review Schedule for the Combined License Application for North Anna, Unit 3*, available at <http://www.nrc.gov/reactors/new-reactors/col/north-anna/review-schedule.html> (updated Mar. 29, 2012).

and unfair.”¹⁵ This argument—that the evolving application and the Staff’s ongoing review compel holding the proceeding open until the review is complete—is not new.

In CLI-12-14, we addressed and rejected the argument that fairness requires holding the proceeding open in case a new issue—one not initially recognized by the intervenor itself—should arise in the course of the Staff’s review. We stated that the intervening party is not entitled to the Staff’s review documents as a “discovery tool.”¹⁶ On the contrary, the intervenor has the burden to identify any claimed shortcoming in the application, and cannot wait for the Staff’s review to raise issues. We continue to reject the argument that the proceeding ought to be kept open for no other reason than that the Staff’s ongoing review could possibly turn up a new, litigable issue. As we pointed out in CLI-12-14, the reopening rule is intended to allow interested parties the opportunity to raise significant new safety and environmental issues, even when the information upon which they are based comes late in the review process.¹⁷ In sum, we addressed BREDL’s argument when we ruled on CLI-12-14, and BREDL provides no reason to revisit this determination.

BREDL next cites a particular issue that it claims is currently open for resolution before the Board. In particular, BREDL argues that the Board found an exemption request related to seismic issues, which BREDL challenged in its proposed Contention 13, to be a matter “open to further adjudication.”¹⁸ But BREDL misrepresents the Board’s ruling in LBP-11-10. While the Board did find that Dominion’s exemption request was within the scope of the proceeding, the

¹⁵ BREDL Petition at 5.

¹⁶ CLI-12-14, 75 NRC at ___ (slip op. at 12) (citing *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm’n*, 920 F.2d 50, 55 (D.C. Cir. 1990)).

¹⁷ *Id.* at 11-12.

¹⁸ See BREDL Petition at 5 (citing LBP-11-10, 73 NRC at 452). Proposed Contention 13 was one of two contentions rejected in LBP-11-10. BREDL claimed that a requested exemption from the U.S. Advanced Pressurized Water Reactor Design Control Document, that would allow an exceedance of the peak ground acceleration for the certified design, was improper.

Board rejected BREDL's contention because the contention did "not say what [was] improper about [Dominion's exemption] request."¹⁹ Thus, while the Board acknowledged that the exemption request was still under Staff review, it did not find the matter currently "open" for further adjudication.²⁰ At bottom, BREDL reiterates arguments previously made, without providing any additional justification. BREDL therefore has not demonstrated compelling circumstances that render our decision in CLI-12-14 invalid.

Two other matters merit mention. BREDL argues that the question of spent fuel storage is unresolved in this proceeding.²¹ BREDL points to a petition filed in various proceedings—including this one—following a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit, vacating our recently-amended Waste Confidence Decision and associated Temporary Storage Rule.²² In June, several petitioners, including BREDL in this case, filed a petition asking (among other things) that we suspend issuance of any new or renewed operating licenses until the NRC has resolved the deficiencies in the waste confidence rule identified by

¹⁹ LBP-11-10, 73 NRC at 452.

²⁰ With respect to the August 23, 2011 earthquake—which occurred after the Board's ruling—we recognized in CLI-12-14 that BREDL intends to propose a new contention relating to seismic issues after Dominion completes its ongoing analysis of the earthquake's effect on its pending application. We directed the Board to rule on any motion to reopen to admit a new contention on that subject. CLI-12-14, 75 NRC at __ (slip op. at 13-14). By agreement of the parties, the Board has placed BREDL's proposed contention concerning the August 2011 earthquake in abeyance until Dominion completes its analysis. Order on Consent Motion, at 2. Dominion recently provided an update to the Board and parties on the expected schedule for its seismic assessment. See Lewis, David R., Counsel for Dominion, Letter to the Administrative Judges (June 19, 2012) (informing the Board that revisions to the Final Safety Analysis Report are expected to be complete by May 2013). Thereafter, BREDL will have sixty days to submit a motion to reopen the proceeding, as well as address the requirements of 10 C.F.R. §§ 2.309(c) and (f). Order (Setting Time for Filing Motion to Reopen the Proceeding) (July 26, 2012) (unpublished).

²¹ BREDL Petition at 6.

²² *Id.* (citing *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)). The court rendered its decision on June 8, 2012—the day after we decided CLI-12-14.

the court.²³ We recently granted the relief requested in part, and denied it in part, finding, as relevant here, that “we will not issue licenses dependent upon the Waste Confidence Decision or the Temporary Storage Rule until the court’s remand is appropriately addressed.”²⁴

In a related vein, subsequent to filing the instant request BREDL moved to reopen the record of this proceeding to admit a new contention. BREDL argues that the environmental report associated with the COL application is inadequate, in that it does not discuss the environmental impacts of spent fuel storage after cessation of plant operations, nor does it discuss “[the failure] to establish a spent fuel repository,” in light of the court’s ruling in *State of New York v. NRC*.²⁵ Similar requests were filed on a number of dockets. We have held these requests in abeyance, pending our further direction.²⁶ We observe, however, that whatever our ultimate direction with respect to BREDL’s motion to reopen, a ruling reopening a proceeding with respect to a specific issue would not have the effect of reopening the proceeding for adjudication on unrelated matters—once a record is closed, each new issue is subject to consideration under the reopening standards.²⁷ The pendency of the motion to reopen is not a basis for us to reconsider our ruling in CLI-12-14 today.

²³ See *Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings* (filed by BREDL on this docket June 18, 2012).

²⁴ *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC __, __ (Aug. 7, 2012) (slip op. at 4).

²⁵ See generally *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); Zeller, Louis A, Letter to the Secretary of the Commission (July 10, 2012).

²⁶ *Calvert Cliffs*, CLI-12-16, 76 NRC at __ (slip op. at 6).

²⁷ See, e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 227-28 (2002).

III. CONCLUSION

For the reasons discussed above, we *deny* BREDL's petition.

IT IS SO ORDERED.

For the Commission²⁸

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 25th day of September, 2012

²⁸ Section 201 of the Energy Reorganization Act, 42 U.S.C. § 5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Apostolakis was not present when this item was affirmed. Accordingly the formal vote of the Commission was 4-0 in favor of the decision. Commissioner Apostolakis, however, previously had indicated that he would approve this Order.

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NUCLEAR REGULATORY COMMISSION

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)
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 **COMMISSION MEMORANDUM AND ORDER (CLI-12-17)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
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Dated at Rockville, Maryland
this 25th day of September 2012