

June 25, 2012

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of	)	
	)	Docket No. 52-017-COL
Dominion Virginia Power	)	
	)	ASLBP No. 08-863-01-COL
North Anna Power Station, Unit 3	)	

**DOMINION’S ANSWER OPPOSING  
PETITION TO SUSPEND FINAL LICENSING DECISIONS**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.323, and the Order of the Secretary issued June 19, 2012,<sup>1</sup> Virginia Electric and Power Company, dba Dominion Virginia Power (“Dominion”) hereby answers and opposes the Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (“Petition”), which the Blue Ridge Environmental Defense League (“BREDL”) filed in the North Anna Unit 3 COL proceeding on June 18, 2012. The Petition, which was filed in nineteen separate proceedings by some twenty-three individuals and organizations (“Petitioners”) that have intervened, or attempted to intervene, in opposition to those proceedings, requests the (1) suspension of all final licensing decisions until completion of the proceedings on the Commission’s Waste Confidence Decision Update (“WCD Update”) and Temporary Storage Rule (“TSR”) remanded by the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”)<sup>2</sup>; and (2) establishment of special procedures and timetable for

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<sup>1</sup> Calvert Cliffs Nuclear Project, L.L.C., et al. (Calvert Cliffs Nuclear Power Plant, Unit 3, *et al.*), Order (June 19, 2012) (directing that any response to the Petition be filed no later than 12:00 p.m. EDT Monday, June 25, 2012, and not exceed ten pages).

<sup>2</sup> New York, et al. v. NRC, No. 11-1045, 2012 WL 2053581, at \*1 (D.C. Cir. June 8, 2012).

Petitioners to comment on any generic determinations that result from the remanded proceedings, and to submit contentions on site-specific issues where Petitioners believe a generic determination is insufficient. Petition at 3, 10-11.

Petitions to the Commission to suspend proceedings or to hold them in abeyance are treated as motions under 10 C.F.R. § 2.323. Ameren Missouri, et al. (Callaway Plant, Unit 2, *et al.*), CLI-11-05, 74 N.R.C. \_\_\_, slip op. at 18-19 & n.65 (Sept. 9, 2011); AmerGen Energy Co., LLC, et al. (Oyster Creek Nuclear Generating Station *et al.*), CLI-08-23, 68 N.R.C. 461, 476 (2008); Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 N.R.C. 230, 237 (2002). While the NRC rules require that motions be addressed to the Presiding Officer when a proceeding is pending, the Commission has previously indicated that suspension motions such as this are best addressed to it. Callaway, CLI-11-05, 74 N.R.C. \_\_\_, slip op. at 19 n.65; Oyster Creek, CLI-08-23, 68 N.R.C. at 476; Diablo Canyon, CLI-02-23, 56 N.R.C. at 237.

As discussed below, the Petition is without merit and should be denied for multiple reasons. With respect to this COL proceeding, a final licensing decision is not expected for several years. Thus, any request now to delay the final licensing decision is premature, to say the least. Further, the Commission considers a request to suspend licensing proceedings, including a request to suspend final licensing decisions, a “drastic” action that is not warranted absent “immediate threats to public health and safety.” Callaway, CLI-11-05, 74 N.R.C. \_\_\_, slip op. at 19, quoting Oyster Creek, CLI-08-23, 68 N.R.C. at 484. See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 N.R.C. 151, 173-74 (2000). The Petition neither addresses nor satisfies this standard, and otherwise provides no information even remotely suggesting any threat to public health and safety.

Nor should Petitioners (or any other person) be accorded any special procedural rights with respect to commenting on the WCD Update and TSR remand proceedings, or for requesting late-intervention or hearings on late-contentions in any proceeding. Although the Commission has not yet indicated how it will handle the generic remand proceedings,<sup>3</sup> public participation should be consistent with the established processes for any actions the Commission directs in response to the D.C. Circuit remand. Callaway, CLI-11-05, 74 N.R.C. \_\_\_, slip op. at 37. And with respect to individual licensing proceedings, the Commission has previously rejected similar requests for special procedures and timetables, making it abundantly clear that its existing procedures are more than adequate. Id. at 35.

In addition, BREDL is no longer a party to the North Anna 3 COL proceeding because the Atomic Safety and Licensing Board has previously dismissed all of its admitted contentions, none of these rulings has been appealed, and the contested proceeding has been terminated. Virginia Electric & Power Co. (Combined License Application for North Anna Unit 3), CLI-12-14, 75 N.R.C. \_\_\_, slip op. at 15 (June 7, 2012). Therefore, BREDL is not entitled to seek suspension of the proceeding.

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<sup>3</sup> The Commission's historical approach has been to treat temporary spent fuel storage and waste confidence generically by rule. The Court in New York (*slip opinion at 20*) also recognized that the temporary spent fuel storage and waste confidence issues may be appropriate for generic resolution, consistent with longstanding precedent. Dominion endorses the procedural steps outlined in the comments to the Commission by the Nuclear Energy Institute (letter dated June 25, 2012). (1) The Commission should announce its intent to expeditiously conduct a rulemaking to supply the analyses required to support the WCD Update and TSR. (2) The Commission should make clear that the issues involved in the rulemaking will not be accepted for hearing in individual adjudications. (3) The Commission should direct the Atomic Safety and Licensing Boards in ongoing contested proceedings to hold in abeyance any contentions seeking to raise waste confidence or temporary spent fuel storage issues until the Commission formally initiates a rulemaking; at that point, contentions held in abeyance should be dismissed.

## II. DISCUSSION

### A. BREDL is Not a Party Entitled to Seek Suspension of this Proceeding

BREDL is no longer a party to the North Anna 3 COL proceeding and, therefore, cannot seek to suspend decisions in the proceeding. In CLI-12-14, the Commission held that the adjudicatory proceeding in this case is closed by virtue of the Atomic Safety and Licensing Board's dismissal of BREDL's prior contentions, and allowed BREDL fifteen days (i.e., until June 22) to petition for review of the Board's prior interlocutory orders. See id. BREDL has not petitioned for review of the Board's rulings, so the dismissal of BREDL's contentions (and hence BREDL's termination as a party) are final.<sup>4</sup> While BREDL may move to reopen the proceeding, it is not currently a party.

The Commission's rules are clear that, aside from being permitted to make oral or written limited appearance statements in a proceeding, non-parties "may not otherwise participate in the proceeding." 10 C.F.R. § 2.315(a). This limitation means that, unless otherwise authorized by the Commission or presiding officer, a non-party motion will not be entertained. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No.1), CLI-83-25, 18 N.R.C. 327, 330, 333-34 (1983) (holding that, in light of petitioner's failure to intervene into a proceeding, the Commission would not entertain petitioner's disqualification motion). See also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), 1986 WL 328110 at \*1 (July 11, 1986) (unpublished Appeal Board decision) (holding that a petitioner whose intervention petition is

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<sup>4</sup> BREDL filed a petition for review on June 22, 2012, but instead of appealing any of the Licensing Board's rulings, as CLI-12-14 and 10 C.F.R. § 2.341 allowed, BREDL's petition asks the Commission to reverse the Commission's own decision in CLI-12-14. See Petition for Review of CLI-12-14. This petition is improper because 10 C.F.R. § 2.341 does not provide for the Commission's review of its own decisions. Nor can this petition be treated as a motion for reconsideration, because any such motion was due within ten days after CLI-12-14 (i.e., by June 17, 2012), is permissible only upon leave of the Commission (which BREDL did not seek) after consultation with the parties (which BREDL did not attempt), and requires a showing of "compelling circumstances, such as the existence of a clear and material error, which could not reasonably have been anticipated, that renders the decision invalid" (a standard which BREDL's petition entirely ignores). See 10 C.F.R. § 2.323(b), (e).

denied “is not a proper party to seek a stay of any Licensing Board action in this operating license proceeding”).<sup>5</sup> Similarly, the Commission has held that only a party to a proceeding (or an Interested State with similar rights) may seek stay of final decisions under 10 C.F.R. § 2.802 (pending a petition for rulemaking). Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-13, 65 N.R.C. 211, 214-15 (2007). While the current Petition is not submitted under 10 C.F.R. § 2.802, the authorization in 10 C.F.R. § 2.802(d) would be meaningless if non-parties had a general right to seek stay or suspension of final decisions in proceedings. Under normal standards of statutory construction,<sup>6</sup> 10 C.F.R. § 2.802(d), which allows a party to seek suspension of a proceeding, implies that a non-party has no such right.

**B. Suspension of Final Licensing Decisions is Premature and Inappropriate in the Absence of Any Immediate Threat to Public Health and Safety**

The Commission should also reject the Petition because it is premature. As an initial matter, Petitioners acknowledge that the mandate has not issued from the D.C. Circuit. Petition at 3-4 n.1. Indeed, the mandate could be further delayed should, for example, reconsideration of the Court’s decision be requested. Thus, there is no basis for the Commission to grant the relief requested by the Petition now. And even beyond the status of the Court’s mandate, any suspension request is premature because the NRC Staff has not yet completed its environmental and safety reviews, and the mandatory hearing and issuance of the COL are not expected for several years.<sup>7</sup> There simply is no need for the Commission to suspend this proceeding now, or

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<sup>5</sup> The Commission does allow motions by persons who have submitted petitions to intervene and are awaiting rulings – see Duke Energy Corp. (McGuire Nuclear Stations, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 N.R.C. 385, 398 n.8 (2001) – but that is not the situation here.

<sup>6</sup> *Expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).

<sup>7</sup> The last schedule issued in this proceeding called for the mandatory hearing process to be completed in November 2013. See Letter from D. Matthews to E. Grecheck, North Anna Power Station, Unit 3, Combined License Application – Revised Review Schedule (Mar. 2, 2011) (ADAMS Accession No. ML110310169). The

even when the Court's mandate issues. See Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 22 n.37 (2007) (holding that a request to withhold final decisions pending action on a rulemaking petition was premature when final decisions are not expected "for another year or more.").

Further, the Petition falls far short of the Commission's high standard for suspending a final licensing decision. The Petition does not even address the standard. The Commission has rejected analogous petitions that requested, among other things, suspension of final licensing decisions in numerous matters in light of the Commission's ongoing review of the Fukushima accident. Callaway, CLI-11-05, 74 N.R.C. \_\_\_, slip op. at 3, 20. The Commission applied its longstanding precedent holding that such suspension would be a "drastic" action that is not warranted absent "immediate threats to public health and safety." Id. at 19, quoting Oyster Creek, CLI-08-23, 68 N.R.C. at 484. See also Vermont Yankee, CLI-00-20, 52 N.R.C. at 173-74. The same analysis applies here. The Petition specifically requests "suspen[sion of] final licensing decisions in all pending NRC licensing proceedings." Petition at 3. The Commission should reject the Petition because it does not even claim, let alone show, any threat to the public health and safety.

Moreover, with respect to this proceeding, there is no such threat. As the Commission has previously held in similar circumstances, "[a] site that currently contains no radiological materials and will not for [a number of years] cannot present an immediate threat to public safety." Private Fuel Storage, LLC, (Independent Spent Fuel Storage Installation), CLI-01-26, 54 N.R.C. 376, 381 (2001) (denying petition to suspend licensing proceeding for proposed

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NRC Staff is currently revising this schedule because the schedule for completion of the US-APWR Design Certification has been extended to 2015.

independent spent fuel storage installation pending review of terrorism related rules and policies following the 9/11 events).

The Petition incorrectly argues that the Commission's decision in Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-10-19, 72 N.R.C. 98 (2010) is "precedent" applicable here. Petition at 5, 10. Petitioners mischaracterize Indian Point. Contrary to Petitioners' assertions, the Commission did not order suspension of the Indian Point license renewal decision pending resolution of the Commission's initial waste confidence ruling. See Petition at 10. In that case, the Commission ruled that a proffered contention seeking to challenge onsite waste storage issues was inadmissible under "longstanding NRC policy" that licensing boards should not accept in individual licensing proceedings contentions that are, or are about to become, the subject of a general rulemaking by the Commission. Indian Point, CLI-10-19, 72 N.R.C. at 100. The Commission stated that, at that time, its "deliberations on the waste confidence update" were "continuing," and that "in any event [the Commission] will not conclude action on the Indian Point license renewal application until the rulemaking is resolved." Id. The Commission's statement amounted to a mere observation that, as a practical matter, it would complete action on the waste confidence rulemaking before renewing Indian Point's operating license, which is, in fact, what occurred.<sup>8</sup> Moreover, the Indian Point decision provides no indication that the Commission intended that decision to result in suspension of the license renewal decision pending resolution of the rulemaking because the Commission nowhere addressed its own high threshold for such a suspension – a showing of an immediate threat to public health and safety. Thus, Petitioners' characterization of CLI-10-19 as precedent for

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<sup>8</sup> At the time CLI-10-19 was issued, the Staff had not yet issued the final supplement to the safety evaluation report or the final supplemental environmental impact statement supporting license renewal, and would not do so for a number of months. See Milestone Schedule for Indian Point Units 2 and 3 License Renewal, available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html#schedule>. The WCD Update issued in December 2010, and the Indian Point proceeding remains ongoing.

suspending a final licensing decision pending completion of a rulemaking is far off the mark and provides no support for the present suspension request.

**C. No Special Procedures or Timetable Are Required**

The Commission should reject Petitioners' requests for special procedures and timetables on the same grounds that the Commission rejected similar requests in Callaway. First, Petitioners request that the Commission allow them to comment on any generic determination that the NRC may make with respect to the remanded WCD Update and TSR. Petition at 11. More specifically, the Petitioners request that, if the Commission prepares an environmental assessment to address the remanded issues, the Commission provide Petitioners an opportunity to comment on that assessment. Second, Petitioners request that the Commission allow them to raise contentions in individual licensing proceedings where they believe that the generic rulemaking is insufficient to address its concerns, and be provided with at least 60 days to seek consideration of site-specific safety or environmental concerns raised by the remanded proceeding. Id. The Commission should reject both requests.

With respect to the first request, it should be denied because it is premature and unsupported. It is premature because the Commission has not yet established the processes it will employ to address the generic issues raised by the D.C. Circuit remand. Further, the Petition provides no support for requesting a level of public participation different from that which would typically accompany agency processes. Once the Commission does establish the processes for addressing those generic issues, any public participation should be "consistent with the established processes for any actions that [the Commission] directs the NRC Staff to undertake." Callaway, CLI-11-05, slip op. at 37 (rejecting a petitioner's request for "additional reasonable time following completion of the release of the NRC's own findings on the lessons of Fukushima



to comment on them and propose licensing or regulatory changes as appropriate”). The Petition nowhere justifies any deviation from the normal course.

The second request should also be denied because “[n]either new procedures nor a separate timetable for raising new issues” is warranted. Callaway, CLI-11-05, slip op. at 35. When rejecting similar requests for new procedures and new timetables, including a sixty-day period for raising new issues following the publication of regulatory proposals or environmental decisions, id. at 32, the Commission held that its

procedural rules contain ample provisions through which litigants may seek admission of new or amended contentions, seek stays of licensing board decisions, appeal adverse decisions, and file motions to reopen the record, as appropriate.

Id. at 35. Thus, for example, should BREDL conclude that any generic rulemaking promulgated to address the issues raised by the remand is insufficient to address its site-specific concerns, BREDL could petition for waiver of that rule under 10 C.F.R. § 2.335.<sup>9</sup> In other words, the Commission’s rules already specify the precise means for Petitioners to seek redress of any site-specific concern they may have.

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<sup>9</sup> One of the four criteria used to evaluate a Section 2.335 petition for waiver is that the waiver petition raises “circumstances . . . unique to the facility rather than common to a large class of facilities.” Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 559-60 (2005) (quotations and citations omitted).

### **III. CONCLUSION**

For all of the above stated reasons, the Petition should be denied.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: June 25, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that Dominion's Answer Opposing Petition to Suspend Final Licensing Decisions, dated June 25, 2012, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 25<sup>th</sup> day of June, 2012.

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