UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of Virginia Electric Power Co. North Anna Power Station, Units 1 and 2	)	Docket Nos. 50-338/339 SLR

REPLY TO OPPOSITION BRIEFS BY BEYOND NUCLEAR, SIERRA CLUB, AND ALLIANCE FOR A PROGRESSIVE VIRGINIA

I. INTRODUCTION

Beyond Nuclear, the Sierra Club, and Alliance for a Progressive Virginia ("Appellants") hereby reply 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] 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 Appellants' request for a waiver of NRC regulations that would preclude consideration of their Contention absent a waiver. *Id.*

[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").

Recognizing that 10 C.F.R. § 2.311 does not contemplate the filing of replies to oppositions to appeals of Commission decisions, this Reply has the limited purpose of correcting certain 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. Each of these corrections is submitted in a numbered paragraph below. Appellants submit these corrections in order to ensure a correct, meaningful, and fair record in this proceeding.[3]

This 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.

II. DISCUSSION

A. Corrections to Erroneous Interpretations of Governing Case Law

1. At page 9, VEPCO cites *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)) for the proposition that Appellants' waiver petition is defective because it is supported by a declaration by Appellants' counsel.[4] But these cases merely stand for the proposition that to be admissible, contentions must be supported by documented evidence and/or expert opinion. They do not address the validity of a declaration by counsel in support of a waiver petition, attesting that the waiver petition is based on undisputed facts and a legally sound interpretation of applicable statutes and regulations. In this case, the facts relied on by Appellants came from documents generated

[3] *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-12, 67 N.R.C. 386, 393 (2008) (allowing replies "where necessity or fairness dictate.").

[4] Declaration of Diane Curran in Support of 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 Contentions (Dec. 14, 2020) (Attachment 2 to Hearing Request).

by VEPCO or the NRC. Thus, there was no need for a factual declaration. Because the regulations require that a waiver petition must be accompanied by a declaration, Appellants were entitled to support their waiver petition with a declaration by Appellants' counsel.[5]

2. At page 12, VEPCO challenges the legal adequacy of Appellants' appeal of the Board's reliance on *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) to support its ruling that VEPCO may rely on 10 C.F.R. § 51.53(c)(3) to excuse it from addressing the environmental impacts of the Mineral Earthquake. According to VEPCO, Appellants have no legal grounds to ask the Commission to reconsider those decisions now, because NRC regulations required that motions for reconsideration must be filed at the time of the decisions.[6] But Appellants were not party to the *Turkey Point* and *Peach Bottom* proceedings, and therefore could not have sought reconsideration then. In any event, because the ASLB relies on those precedents in this proceeding, Appellants are lawfully entitled to ask the Commission to reconsider the validity of those decisions, in light of the reasoning set forth in the dissenting opinions.[7]

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[5] *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) (finding that a declaration by petitioner's counsel was sufficient to support a finding that the petitioner had made a *prima facie* case for referral of a waiver petition to the Commission). While in that case the Commission ultimately found that issuance of a waiver was not justified, its decision was based on the Commission's view of the substantive sufficiency of the evidence presented in the declaration, not on the fact that the declaration had been prepared by petitioner's counsel. *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 N.R.C. 427, 447-453 (2011)

[6] VEPCO Opp. at 13 (citing 10 C.F.R. § 2.345(a)(1)).

[7] Appellants also relied on the concurring and dissenting opinion of ASLB Judge Abreu in *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant Units 3 and 4), LBP-19-03, 89 N.R.C. 245, 303 (2019). Appeal Brief at 16 n.34.

3. VEPCO also faults Appellants for failing to show any error in the application of the *Turkey Point* and *Peach Bottom* decisions to the particular circumstances of this case.[8] But Appellants contend that those decisions are legally erroneous, not factually erroneous. A change in factual circumstances would not have any effect on the fundamental legal errors underlying the Commission's decisions in the *Turkey Point* and *Peach Bottom* proceedings.

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] This is incorrect. The 1875 earthquake is the design-basis earthquake explicitly referred to in Appellants' Contention:

> By exceeding the reactors' design basis, the earthquake disproved the assumption underlying the NRC's issuance of operating licenses in 1978 (for Unit 1) and 1980 (for Unit 2) and renewal of those licenses [in] 2003, that the reactors could be operated safely and without significant adverse environmental impacts because their SSCs were built to a design basis of sufficient rigor to protect against likely earthquakes.[10]

As further stated in Appellants' Hearing Request:

> North Anna's actual experience of a beyond design basis earthquake fundamentally disproved the assumption underlying the issuance of operating licenses for North Anna Unit 1 (1978) and Unit 2 (1980) and the initial renewal of those licenses in 2003, that the reactors could be operated safely and without significant adverse environmental impacts because their safety systems and components ("SSCs") were designed and built with sufficient rigor to protect against likely earthquakes.

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[8] VEPCO Opp. at 12.

[9] VEPCO Opp. at 20 (citing Appeal Brief at 22). *See also* Staff Opp. at 20.

[10] Hearing Request at 13.

Id. at 33-34. It is not a novel concept that in determining the severity of likely earthquakes in 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. And it is self-evident that the design-basis earthquake on which North Anna's design is based occurred sometime before 1978. By stating that the year of the design-basis earthquake was 1875, Appellants do not add any "new arguments or new evidence" not previously considered by the Board.[11]

2. The NRC Staff claims 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."[12] This characterization of Appellants' case is simply incorrect. 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"). However, Appellants do assert that 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.[13] An earthquake that has already occurred may not be treated as a possible future event, but rather the significance of its previous occurrence must be addressed.
3. The Staff also argues 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

[11] *USEC Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 458 (2006).

[12] Staff Opp. at 14.

[13] Appeal Brief at 28.

1 and 2 were based on the assumption than 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.[14] Appellants relied for this information on the North Anna Updated Final Safety Analysis Report at 3.7-35 (Sept. 27, 2018) (ML18285A049) ("UFSAR"). 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."[15] 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, Appellants do not need an expert to quote a relevant section of a UFSAR whose terms are clear.

4. VEPCO asserts that Appellants raised the role of cost-benefit analysis for the first time on appeal.[16] But 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-

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

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

[16] VEPCO Opp. at 20.

design-basis accident if one were to occur."[17] During the oral argument, Appellants' counsel addressed this distinction at length.[18]

5. VEPCO also argues 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.[19] 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.[20]

III. CONCLUSION

For the foregoing reasons, the arguments made by VEPCO and the NRC Staff in opposition to Appellants' Brief are without merit. Therefore, the Commission should grant Appellants' appeal.

Respectfully submitted,

___/signed electronically by/__
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May 25, 2021

[17] Appeal Brief at 21.

[18] Tr. 14-19, 50-51.

[19] VEPCO Opp. at 22, 25. The Staff makes a similar argument at page 19 n.91.

[20] *See* Hearing Request at 5, 37; Tr. 52-53.

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CERTIFICATE OF SERVICE

I certify that on May 25, 2021, I posted the following documents on the NRC's Electronic Information Exchange:

- REPLY TO OPPOSITION BRIEFS BY BEYOND NUCLEAR, SIERRA CLUB, AND ALLIANCE FOR A PROGRESSIVE VIRGINIA
- MOTION FOR LEAVE TO REPLY TO OPPOSITION BRIEFS BY BEYOND NUCLEAR, SIERRA CLUB, AND ALLIANCE FOR A PROGRESSIVE VIRGINIA

___/signed electronically by/__
Diane Curran