

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
TENNESSEE VALLEY AUTHORITY)	Docket Nos. 50-327 and 50-328
)	Docket No. 50-390
(Sequoyah Nuclear Plant, Units 1 and 2))	(Consolidated)
)	
(Watts Bar Nuclear Plant, Unit 1))	

NRC STAFF'S ANSWER TO WE THE PEOPLE, INC. TENNESSEE'S
MOTION TO DISMISS LICENSE AMENDMENT APPLICATIONS AND PROCEEDING

INTRODUCTION

The staff of the Nuclear Regulatory Commission (Staff) hereby submits its answer to the motion filed by We The People, Inc. Tennessee (WTP), requesting that the Atomic Safety and Licensing Board (Board) dismiss the license amendment applications that are the subject of this proceeding, and dismiss the proceeding.¹ For the reasons set forth below, the Staff submits that WTP has failed to demonstrate that its motion should be granted.

BACKGROUND

Tennessee Valley Authority (TVA) is the licensee for the Sequoyah Nuclear Plant, Units 1 and 2 (Sequoyah), and the Watts Bar Nuclear Plant, Unit 1 (WB). By applications dated August 20, 2001 (for WB), and September 21, 2001 (for Sequoyah), TVA requested license amendments that would allow TVA to insert up to a certain number of tritium producing burnable absorber rods (TPBARs) into the reactor cores. The proposed amendments are related to an agreement between

¹WTP's motion was filed as part of WTP's submission of its contentions. See Contentions Of We The People[, Inc. Tennessee] (Mar. 6, 2002) (served on March 7, 2002) at 1.

TVA and the U.S. Department of Energy (DOE) under which TVA will provide certain irradiation services to DOE. DOE plans to transport the irradiated TPBARs to its Savannah River site in Georgia for defense purposes, but the transportation activities by DOE are not the responsibility of TVA and are not the subject of the pending amendment requests. On December 17, 2001, the Staff published in the *Federal Register* two separate notices of the amendment requests and of an opportunity for a hearing. 66 Fed. Reg. 65,000 (2001) and 66 Fed. Reg. 65,005 (2001). Pursuant to the notices, WTP filed hearing requests and petitions for leave to intervene with respect to both facilities. By an order dated January 28, 2002, issued by the Chief Administrative Judge, the two proceedings were consolidated. On March 7, 2002, WTP filed its contentions, which filing also included its motion to dismiss.

DISCUSSION

I. The Motion To Dismiss

In its motion to dismiss,² WTP asserts that the subject license amendment requests, which WTP characterize as “for the purpose of a defense activity,” are “not within the scope of the authority of the” NRC. According to WTP, the NRC “is not mandated by Congress to regulate or ‘license[] a defense activity, which is prohibited by 42 USC 7272’.” This section provides:

Restriction on licensing requirement for certain defense activities and facilities None of the funds authorized to be appropriated by this or any other Act may be used for any purpose related to licensing of any defense activity or facility of the Department of Energy by the Nuclear Regulatory Commission.

42 U.S.C. § 7272.³ WTP cites in a footnote a General Accounting Office (GAO) Report, GAO/RCED-00-24 at 19-20, which, *inter alia*, discusses that while previously there may have been

²The motion to dismiss is essentially a brief summary of WTP’s Contention No. 6 and bases, to which the Staff will be responding when it files its answer to contentions on or before April 4, 2002.

³This provision was originally enacted as section 210 of the DOE Authorization Act of 1981.

different possible interpretations of 42 U.S.C. § 7272, the NRC and DOE have expressed their views to the GAO that current law permits the NRC to perform the review of the TVA license amendment requests.⁴

II. Analysis

In normal power reactor operations, tritium is produced in small quantities as a byproduct material. The NRC, when issuing operating licenses, thus routinely authorizes licensees to produce tritium by expressly authorizing licensees to possess byproduct materials produced by operation of the facility. The issue here is whether the NRC's review of the TVA license amendment requests, which relate to the production of tritium that will be used for defense purposes, comes within the scope of the prohibition contained in 42 U.S.C. § 7272. In other words, would the NRC be licensing "any defense activity or facility of the Department of Energy," contrary to the provisions of 42 U.S.C. § 7272? The Staff submits the answer is no.

Subsequent to the enactment of 42 U.S.C. § 7272, Congress passed the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999) (Authorization Act). It provides, in relevant part, that the DOE "shall produce new tritium to meet . . . requirements . . . at the Tennessee Valley Authority Watts Bar or Sequoyah nuclear power plants" Authorization Act, section 3134, 113 Stat. 927. In the Staff's view, this provision, together with its legislative history, remove any doubt concerning the NRC's authority to act upon TVA's pending license amendment requests, notwithstanding 42 U.S.C. § 7272.

In House Report No. 106-162 (May 24, 1999) concerning the Authorization Act, it is noted in the discussion relating to "Procedures for Meeting Tritium Production Requirements" that the NRC "will have to issue amended licenses" for the WB and Sequoyah facilities," that the NRC licensing process is "often very lengthy," and that, therefore, the DOE should "initiate the licensing

⁴While WTP's Contention No. 6 and bases relate to WTP's motion to dismiss, WTP did not incorporate any of the former in support of the latter by cross-reference.

process promptly.” H.R. Rep. No. 106-162 at 492-93. Certainly, if 42 U.S.C. § 7272 precluded the NRC from even considering the TVA license amendment requests, Congress would not have wasted its time passing the Authorization Act, or would have taken steps to amend 42 U.S.C. § 7272, which it did not. Therefore, the only reasonable conclusion that can be reached is that 42 U.S.C. § 7272 does not bar the NRC from reviewing the subject TVA license amendment requests.

CONCLUSION

In consideration of the foregoing, WTP has failed to demonstrate that its motion should be granted.⁵ Accordingly, WTP’s motion should be denied.

Respectfully submitted,

/RA/
Steven R. Hom
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of March 2002

⁵As the proponent of an order dismissing the license amendment applications and this proceeding, WTP carries the burden of proof. 10 C.F.R. § 2.732.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO WE THE PEOPLE, INC. TENNESSEE'S MOTION TO DISMISS LICENSE AMENDMENT APPLICATIONS AND PROCEEDING" in the above-captioned consolidated proceedings have been served on the following with listed E-mail addresses or facsimile numbers by E-mail or facsimile transmission, respectively, and on all of the following by deposit in the United States mail, first class, or as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk, by overnight mail, this 21st day of March 2002.

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