

March 18, 2002

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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

2002 MAR 27 PM 3: 07

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of: )  
)  
TENNESSEE VALLEY AUTHORITY )  
)  
)  
(Sequoyah Nuclear Plant, Units 1 & 2; )  
Watts Bar Nuclear Plant, Unit 1) )

Docket Nos. 50-327  
50-328  
50-390

RESPONSE OF TENNESSEE VALLEY AUTHORITY TO  
WE THE PEOPLE MOTION TO DISMISS

I. INTRODUCTION

Tennessee Valley Authority ("TVA") herein responds to the "motion for the dismissal of the Tennessee Valley Authority's (TVA) License Amendment Request (LAR) and these proceedings" ("Motion"), included by We the People ("WTP" or "Petitioner") in the introduction to its proposed contentions.<sup>1</sup> In its Motion, WTP makes the general claim that TVA's license amendment requests<sup>2</sup> are "not within the scope of the authority of the Nuclear Regulatory Commission (NRC)." Motion at 1 (footnote omitted). Specifically, WTP claims that

<sup>1</sup> See "Contentions of We the People" (Mar. 7, 2002) at 1 ("WTP Contentions"). Although the printed date on the front page of WTP's contentions is March 6, 2002, TVA did not receive a faxed copy of these contentions until shortly before midnight on March 7, 2002.

<sup>2</sup> See "Tennessee Valley Authority; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing," 66 Fed. Reg. 65,000 and 65,005 (Dec. 17, 2001). The requested license amendments would allow TVA to produce tritium at its Sequoyah and Watts Bar reactors for the Department of Energy ("DOE"), to support DOE in maintaining its tritium inventory for national defense purposes. *Id.* at 65,000, 65,005-06.

42 U.S.C. § 7272<sup>3</sup> bars the NRC from issuing the proposed license amendments. For the reasons discussed below, the Atomic Safety and Licensing Board (“Licensing Board”) should deny the Motion.

## II. ARGUMENT

### A. The Motion is Premature and Must Be Dismissed

WTP’s Motion is essentially nothing more than a condensed and thinly supported version of its proposed Contention 6, which (like WTP’s other contentions) seeks rejection of TVA’s requested license amendments. In sum, WTP is attempting to short-circuit the adjudicatory process and obtain its ultimate relief — denial of the license amendments — as requested in its proposed contentions.<sup>4</sup>

The Commission has recently, and unequivocally, held under similar circumstances that it disfavors motions to dismiss at the early stage in a licensing proceeding. In rejecting a motion to dismiss where the licensing board had not ruled on petitions to intervene or requests for hearing, the Commission found “it premature to address contention-like arguments.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC \_\_\_, slip op. at 6 (Dec. 28, 2001).<sup>5</sup> While that case involved a

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<sup>3</sup> This provision was enacted in 1981 as part of “The Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1981,” Pub. L. No. 96-540, § 210 (1980) (“DOE-NSMA”).

<sup>4</sup> See WTP Contentions at Contention 6 (Mar. 7, 2002) (no page number is available). TVA notes that while it must respond to this Motion, pursuant to 10 C.F.R. § 2.730, by March 18, 2002, it and the NRC Staff need not file responses to WTP’s Contentions until April 4, 2002. By making its Motion coextensive with portions of its Contention 6, Petitioner has unilaterally revised the Licensing Board’s Scheduling Order.

<sup>5</sup> See also *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC \_\_\_ (slip op., Dec. 28, 2001)(denial of petition for immediate relief suspending licensing proceeding); *Duke Cogema Stone & Webster* (Savannah River

motion to the Commission in parallel to proceedings before the licensing board, the same logic applies here. A petition to dismiss based upon a theory articulated as a proposed contention is premature.

At best, WTP's Motion might be equated to a motion for summary disposition as authorized by 10 C.F.R. § 2.749(d). Clearly, the proceeding has not advanced to a stage where WTP is entitled to file such a dispositive motion. This proceeding is in its earliest stages. No responsive filings to contentions have been submitted by TVA or the NRC Staff. WTP has not been admitted as a party and the request for hearing has not been granted. The failure to submit an admissible contention has alone been held sufficient to deny a motion for summary disposition.<sup>6</sup>

Furthermore, Section 2.749(d) would authorize a licensing board to grant a motion for summary disposition only "if the filings in the proceeding, depositions, answers to interrogatories [and other information]" demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." Petitioner's Motion does not come close to clearing that legal threshold. WTP's Motion consists entirely of brief conclusory statements drawn from its proposed Contention 6, and points only to two bases for its claim that the NRC would be issuing the proposed amendments *ultra vires* (i.e., 42 U.S.C. § 7272, and a General Accounting Office ("GAO") report discussed below). Aside from the

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Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC \_\_\_\_ (slip op., Dec. 28, 2001)(denial of petition to suspend proceeding).

<sup>6</sup> See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 741 (1989), *aff'd on other grounds*, ALAB-949, 33 NRC 484, 490 n.19 (1991).

information taken from the proposed contention, Petitioner does not in its Motion demonstrate why it is entitled to its requested relief as a matter of law.<sup>7</sup>

In conclusion, in its February 7, 2002, Memorandum and Order setting forth the schedule and requirements for filings in this proceeding, this Licensing Board stated that it “does not intend to hold any prehearing conference before it has ruled upon the question of whether each of the Petitioners has standing to intervene.”<sup>8</sup> A ruling on Petitioner’s standing should likewise be a prerequisite to resolution of Petitioner’s motion to dismiss. Given the preliminary status of this proceeding — and in particular the skeletal nature of the Motion — it would be contrary to NRC Rules of Practice and adjudicatory precedent to grant WTP’s Motion.<sup>9</sup>

B. WTP’s Motion, In Any Event, Lacks Legal Merit

If the Licensing Board, for some reason, was inclined to consider the Motion, it must find that it lacks merit. In principal part, WTP claims that the NRC Staff is without legal authority to dispose of the requested license amendments because such action would be contrary to 42 U.S.C. § 7272. This assertion is without basis.

The statutory provision relied upon by Petitioner only states that no funds “may be used for any purpose related to licensing of any defense activity or facility of [DOE] by the

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<sup>7</sup> Although TVA is responding to WTP’s Motion, it considers the Motion to be supported only by the material therein cited, and is not addressing other related assertions contained in proposed Contention 6. TVA will fully respond to Contention 6 in its forthcoming Response to Contentions to be filed on or about April 4, 2002.

<sup>8</sup> *Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), \_\_ NRC \_\_, slip op. at 2 (Feb. 7, 2002) (“Scheduling Order”).

<sup>9</sup> Similarly, the Commission has directed that “Boards should forego the use of motions of summary disposition, except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998). This Board cannot now make any such finding.

[NRC].”<sup>10</sup> Nearly twenty years after enacting 42 U.S.C. § 7272, however, Congress clarified the issue by expressly directing DOE to obtain new supplies of tritium produced in the Sequoyah and Watts Bar reactors.<sup>11</sup> By enacting this subsequent legislation, specifically on point, Congress expressed its clear intent. Therefore, Section 7272 cannot be considered to bar NRC licensing of tritium production at TVA reactors.

In addition, the GAO report<sup>12</sup> cited by WTP is strictly informational. It has no binding legal effect on TVA’s production of tritium for DOE. In essence, the report notes that the NRC Staff’s review of the requested license amendments is limited to consideration of technical and environmental issues. The report correctly goes on to note the NRC’s view that “TVA’s reasons for [the LARs] are not NRC’s concern in the license review process, nor is DOE’s subsequent use of the irradiated rods for tritium production.” *Id.* at 18.<sup>13</sup>

Finally, it is well-established that an agency’s statutory interpretation must be upheld against challenge unless deemed unreasonable.<sup>14</sup> There can be no question that the

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<sup>10</sup> DOE-NSMA at § 210.

<sup>11</sup> See “National Defense Authorization Act for Fiscal Year 2000,” Pub. L. No. 106-65, § 3134(a) (1999) (“NDAA 2000”).

<sup>12</sup> GAO/RCED-00-42, “NUCLEAR WEAPONS — Challenges Remain for Successful Implementation of DOE’s Tritium Supply Decision” (Jan. 2000).

<sup>13</sup> In commenting on a draft version of the GAO report, the NRC Executive Director for Operations also noted that “the report understates the significance of [NDAA 2000]. In our view, the act and the accompanying report language remove any substantial doubt about the NRC’s authority, in the face of 42 U.S.C. § 7272, to exercise its normal licensing responsibilities over commercial . . . reactors participating in the [tritium] project.” GAO/RCED-00-42, Appendix IV, “Comments From the Nuclear Regulatory Commission,” at 43-44.

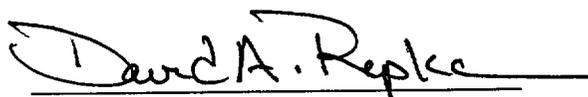
<sup>14</sup> See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984) (holding that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail”).

NRC's exercise of its authority to review TVA's requested license amendments is and has been reasonable — particularly given Congress's express mandate in NDAA 2000 that new supplies of tritium be produced for DOE at Watts Bar and Sequoyah. Petitioner's Motion should therefore not be granted on the basis of what is — at best — a policy disagreement.

### III. CONCLUSION

For the foregoing reasons, WTP's Motion to dismiss TVA's license amendment requests and this proceeding should be denied.

Respectfully submitted,



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Dated in Washington, D.C.  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF TENNESSEE VALLEY AUTHORITY TO WE THE PEOPLE MOTION TO DISMISS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 18th day of March, 2002. Additional e-mail service has been made this same day as shown below. Additional e-mail service has been made this same day as shown below. For the party marked by an asterisk (\*) additional service has been made by overnight delivery due to lack of either e-mail or facsimile.

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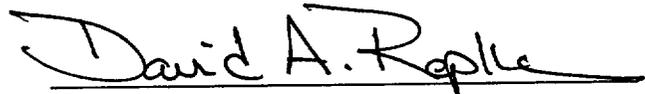
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